3

The law and politics of access to the ECOWAS Court in human rights cases*

Christopher Nyinevi & Apraku Nketiah

1 Introduction ... 62
2 The unique human rights mandate of the ECOWAS Court ... 65
3 Critical evaluation of the policy of unrestricted access ... 69
  3.1 The local remedies rule ... 69
  3.2 The *lis pendens* rule ... 73
  3.3 Insufficient attempts at regulating access in human rights cases ... 76
4 Resistance to the policy of unrestricted access ... 77
5 Evaluation of the proposed Supplementary Rules on the Human Rights Practice of the ECOWAS Court ... 83
  5.1 The local remedies rule ... 84
  5.2 The lis pendens rule ... 85
  5.3 Non-appellate character of the Court ... 86
  5.4 The legal basis of the Supplementary Rules ... 88
6 Concluding remarks ... 90

Abstract:

As part of the Economic Community of West African States (ECOWAS) Revised Treaty commitment to respect, promote and protect human rights within the ECOWAS, the ECOWAS Court of Justice was mandated to determine human rights cases in 2005. Access to the Court's human rights jurisdiction, which is not predicated on the exhaustion of local remedies or deference to national courts to avoid parallel proceedings, has generated resistance from member states and has been criticised in some academic writings. In response to recurrent concerns from member states, the Court has

* This chapter is the culmination of earlier ideas and drafts on the topic, which were presented at the International Conference of the ECOWAS Court in Praia, Cape Verde (May 2022), the RWI Research Writing Workshop in Nairobi, Kenya (June 2022), and the RWI Academic Network Human Rights Conference in Harare, Zimbabwe (October 2022). We express gratitude to the participants of these events, as well as to the editors and reviewers of this book, for their valuable comments and suggestions.

decided to clarify and regulate access to its human rights mandate by adopting Supplementary Rules of Procedure, subject to the approval of the ECOWAS Council of Ministers. This paper discusses the human rights mandate of the ECOWAS Court, evaluates the proposed Supplementary Rules and considers the extent to which the Rules may impact individuals' access to the Court.

1 Introduction

The Economic Community of West African States Treaty (Lagos Treaty) created 'ECOWAS' as a vehicle for economic cooperation and development to raise the standard of living of their peoples, maintain economic stability in the region, and foster closer ties among themselves.[1] The Lagos Treaty made no reference to human rights, whether expressly or impliedly. The closest it came was a carve-out clause permitting member states to implement trade restrictions necessary for the 'protection of human, animal or plant life'[2] modelled on a similar general exception in the General Agreement on Tariffs and Trade (GATT).[3]

Nevertheless, ECOWAS eventually began to lean towards respect and protection of human rights.[4] A major contributing factor was the outbreak of conflicts in the region, beginning with the Liberian Civil War in 1989, followed in 1991 by the conflict in Sierra Leone.[5] The gross human rights violations and dire humanitarian crises that came with the conflicts meant that ECOWAS could no longer remain a mere economic organisation.[6] It began to take on an increasingly political role in the sub-region, including commitments to respect and protect human rights.

It created the ECOWAS Monitoring Group (ECOMOG), a subregional security initiative under which peacekeeping forces were deployed to troubled areas. On the legal front, ECOWAS adopted the Declaration of Political Principles 1991, in which it declared that it would promote peace, stability and democracy in West Africa based on political pluralism and

1 Lagos Treaty art 2.

2 Lagos Treaty art 18(3)(c).

3 GATT art XX(b).

4 E Nwauche 'Regional economic communities and human rights in West Africa and African Arabic countries' in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives in their protection and promotion* (2009) 319 at 321-322.

5 ST Ebobrah 'Court of Justice of the Economic Community of West African States (ECOWAS)' in *Max Planck Encyclopedia of International Law* (2019) para 2; Nwauche (n 4) 321-322.

6 See Nwauche (n 4) 321-322.

respect for human rights.[7] The Economic Community of West African States Revised Treaty 1993 (ECOWAS Revised Treaty) firmly established this new commitment to respect human rights. Article 4 of the Revised Treaty states that 'the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter' is a fundamental principle of ECOWAS.[8]

The legal foundation for the protection of human rights within ECOWAS was consolidated in 2005 when the Protocol Relating to the Community Court of Justice 1991 (Court Protocol) was amended to allow individuals and non-governmental organisations (NGOs) to bring member states before the Court for human rights violations.[9] Cumulatively, these developments have created what is now an active human rights regime within a (sub)-regional economic integration arrangement.

Despite its relatively short period of existence, the ECOWAS human rights system has made significant contributions to the protection of human rights. The ECOWAS Court is arguably the most active (sub)-regional court on the continent.[10] Since the expansion of the Court's mandate in 2005 that granted it jurisdiction in human rights cases, it has received over 500 cases on its docket.[11] It has given about 130 rulings and rendered about 300 judgments, most of which relate to protecting and enforcing the human rights of groups and individuals.[12] Beyond the immediate provision of remedies or reparations to victims of human rights violations, the Court has, through its judgments, contributed to an impressive body of human rights jurisprudence in Africa,[13] especially on socio-economic rights.[14] Not surprisingly, the Court appears to be known

7 ECOWAS Declaration of Political Principles A/DCL.1/7/91, 4-6 July 1991.

8 ECOWAS Revised Treaty art 4(g).

9 Protocol A/P.1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005.

10 Ebobrah (n 5) para 2.

11 MT Ladan *ECOWAS Community Court of Justice as a supranational court and engine of integration in West Africa: Achievements, challenges and prospects* (Paper presented at the International Conference of the ECOWAS Court of Justice) Lomé, Togo, 22-25 November 2021.

12 Ladan (n 11).

13 F Falana *Achievements, challenges and prospects of the ECOWAS Court of Justice* (Paper presented at the International Conference of the Ecowas Court of Justice) Lomé, Togo, 22-25 November 2021 and Ladan (n 11).

14 O Okafor & O Effoduh 'The ECOWAS Court as a (promising) resource for pro-poor activist forces' in J Gathii (ed) *The performance of Africa's international courts: Using litigation for political, legal, and social change* (2021) 106 at 108.

more for its human rights mandate than its traditional role as a regional economic community court.[15]

The reasons for the Court's popularity are not hard to find. First, an applicant may bypass national courts and submit cases to the ECOWAS Court directly without first exhausting local remedies.[16] Second, the *lis pendens* rule under the Court's Protocol does not apply to national courts, meaning that an applicant's case will be admissible despite the pendency of the same or substantially the same matter before a national court.[17] Together, these rules have created a policy of unrestricted access to the Court that has been responsible for its expanding docket. In a few cases, the Court has acknowledged the problematic nature of the policy of unrestricted access by declining admissibility.[18] But overall, it has stuck firmly to its position that exhaustion of local remedies is not a pre-condition to seizing the Court in human rights cases.[19] It has also confirmed that 'the pendency of a case before a domestic court does not oust its jurisdiction to entertain a matter'.[20]

The policy of unrestricted access has won the support of human rights activists and NGOs.[21] But it has been strongly criticised in academic writings[22] and drawn the ire of some ECOWAS member states who have pressed for amendments to the Court's Protocol to formally require the exhaustion of local remedies.[23] Therefore, there was always the likelihood that if the Court persisted in that direction with no deference to national jurisdictions, it risked setting itself up for confrontation with national courts and political authorities whose cooperation it requires to enforce its decisions.[24]

15 Ladan (n 11).

16 ECOWAS Court Protocol art 10.

17 As above.

18 *Aziagbede Kokou v Togo* [2013] CCJELR 167 paras 42 & 70.

19 *Hadijatou Mani Koraou v Niger* ECW/CCJ/JUD/06/08 (2008) paras 36-45.

20 *Nosa Ehanire Osaghae v Nigeria* ECW/CCJ/JUD/03/17 (2017) 22.

21 Amnesty International 'West Africa: Proposed amendment to ECOWAS Court jurisdiction is a step backward' 28 September 2009 https://www.amnesty.org/en/documents/afr05/005/2009/en/ (accessed 20 August 2023).

22 A Enabulele 'Sailing against the tide: Exhaustion of domestic remedies and the ECOWAS Community Court of Justice' (2012) 56 *Journal of African Law* at 268; ST Ebobrah *A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice* (Research Partnership Paper No 1/2008) Danish Institute for Human Rights https://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (2008).

23 Amnesty International (n 21).

24 Ebobrah (n 22) 25-26.

Concerns about the policy of unrestricted access to the Court in human rights cases have persisted.[25] This may have contributed to the low compliance rate with the Court's judgments which currently stands at 30 per cent.[26] Accordingly, the Court has realised it ought to meet dissatisfied member states halfway by being responsive to concerns about the non-exhaustion of local remedies, and the non-application of *the lis pendens* rule to cases before national courts. In a move that goes beyond its approach of judicially regulating access to the Court in some cases, the Court decided, in May 2022, to issue Supplementary Rules of Procedure on the human rights practice of the Court to 'avoid forum shopping and conflict with the national courts of Member States'.[27]

Using a doctrinal approach, this chapter analyses the ECOWAS human rights system with particular attention to the rules around access to the ECOWAS Court in human rights cases. The discussions review the Court's approach to the admissibility of cases, the criticisms that have been levelled against it and the resistance it has generated. The discussions then consider whether the proposed Supplementary Rules of Procedure adequately address the concerns about access to the Court.

The chapter is organised into six parts, with Part 1 being this introduction. Part 2 considers the unique features of the ECOWAS human rights system focusing on the policy of unrestricted access. Part 3 evaluates the policy of unrestricted access, pointing out its legal and practical challenges, while Part 4 recounts the resistance the Court's approach has generated. In Part 5, the extent to which the Supplementary Rules address the concerns around the local remedies and *lis pendens* rules is evaluated, and the impact of the Rules on individuals' access to the Court is considered. Part 6 concludes by presenting some recommendations.

2 The unique human rights mandate of the ECOWAS Court

The idea of an ECOWAS court or tribunal dates back to the inception of the organisation in 1975. Article 11 of the Lagos Treaty provided for the establishment of a Community Tribunal to settle disputes relating to

25 DA Dapatem & EE Hawkson 'President tells ECOWAS Court to reform procedures' *The Daily Graphic*, 22 March 2022 https://www.graphic.com.gh/news/general-news/president-tells-ecowas-court-to-reform-procedures-2.html (accessed 19 June 2023).

26 Justice A Asante, President of the Ecowas Court, *Speech delivered at the International Conference of the Ecowas Court of Justice*, Lomé, Togo, 22-25 November 2021.

27 Memorandum on the supplementary rules of procedure for the human rights practice of the Community Court of Justice, ECOWAS for the approval of the ECOWAS Council of Ministers (5 May 2022) para 10.

the interpretation and application of the Treaty.[28] That Tribunal was not created until July 1991 when the ECOWAS Authority adopted a Protocol to establish what is now the Community Court of Justice.[29] Even so, the Court would not become operational until ten years later. Meanwhile, the 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.[30] However, since the Revised Treaty preserved existing ECOWAS Protocols, including the 1991 Protocol on the Community Court of Justice, the ECOWAS Court is deemed to be established pursuant to articles 6(e) and 15(1) of the Revised Treaty, although its Protocol predates the Treaty.[31]

Under the 1991 Protocol, the Court was designed to comprise seven judges appointed from among nationals of the member states.[32] 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.[33] A 2005 Supplementary Protocol amended the 1991 Protocol of the Court and expanded the Court's jurisdiction to cover matters including human rights.[34] Since then, access to the Court has been open to 'individuals on application for relief for violation of their human rights'.[35] This essentially makes the ECOWAS Court the human rights court of the West African sub-region with the jurisdiction to determine cases of human rights violations occurring in member states.[36] It, arguably, breathed life into what was hitherto a dormant Court.[37]

28 Lagos Treaty arts 11 & 56.

29 Protocol A/P.1/7/91 of 6 July 1991, as amended by 2005 Supplementary Protocol (Amended Protocol of the Court).

30 ECOWAS Revised Treaty art 15(2) provides that 'the status, composition, powers, procedure and other issues concerning the Court shall be set out in a Protocol relating thereto'.

31 ECOWAS Revised Treaty art 92(3).

32 ECOWAS Court Protocol (as amended) art 3(2).

33 *Olajide Afolabi v Nigeria* ECW/CCJ/JUD/01/04 (2004) and *Frank Ukor v Rachad Laleye* ECW/CCJ/APP/01/04 (2005).

34 Protocol A/P.1/7/91 of 6 July 1991, Supplementary Protocol adopted on 19 January 2005 art 3. Protocol A/P.1/7/91 of 6 July 1991, Supplementary Protocol art 3.

35 ECOWAS Court Protocol (as amended) art 10(d).

36 ECOWAS Court Protocol (as amended) art 9(4).

37 Since the addition of the human rights mandate, over 500 cases have been filed with the Court most of which complaints of human rights violations. See Ladan (n 11) and Falana (n 13).

After the 2005 expansion, the Court maintained four broad heads of jurisdiction or mandates. At the same time, it is a Community Court of Justice, a Community Arbitration Tribunal, a Community Public Service Court, and a Community Human Rights Court. While the Court is more known for its human rights work, it is fundamentally a (sub)-regional economic community court that has been re-purposed for international human rights protection.[38] Nevertheless, the re-purposing of the ECOWAS Court for human rights protection is a bit different from how the two other subregional courts with human rights jurisdiction, the East African Court of Justice (EACJ)[39] and the erstwhile Southern African Development Community (SADC) Tribunal,[40] attained their human rights protection mandates. Whereas the ECOWAS Court is expressly vested with the jurisdiction to hear human rights cases (under the 2005 Supplementary Protocol), the EACJ and the SADC Tribunal took on their roles through an expansive interpretation of their jurisdiction.[41]

ECOWAS does not have a human rights protocol. Therefore, the ECOWAS human rights system is not founded on a specific human rights charter. The sources of human rights law that the ECOWAS Court may apply vary, depending on the case and the relevant international human rights obligations that the respondent state has accepted. That said, because all ECOWAS member states are parties to the African Charter on Human and People's Rights (African Charter) and have also bound themselves by article 4(g) of the ECOWAS Revised Treaty to respect, promote and protect human rights in accordance with the African Charter, the African Charter is essentially the primary source of human rights law for the ECOWAS Court.

Article 10 of the Court Protocol governs the admissibility of human rights cases. It provides that an application alleging a violation of human rights must not be anonymous or be the subject of proceedings before another international court. These requirements are supplemented by Rule 33 of the Rules of the Court, which provide that human right applications brought under article 10 of the Court Protocol should indicate:

38 J Gathii & H Mbori 'Reference guide to Africa's international courts: An introduction' in J Gathii (ed) *The performance of Africa's international courts: Using litigation for political, legal, and social change* (2021) 300, 302.

39 MT Taye 'The role of the East African Court of Justice in the advancement of human rights: Reflections on the creation and practice of the court' (2019) 27 *African Journal of International and Comparative Law* at 359.

40 HB Asmelash 'Southern African Development Community Tribunal' in *Max Planck Encyclopedia of International Procedural Law* (last updated February 2016).

41 Gathii & Mbori (n 38) 302.

(a) the name and address of the applicant;
(b) particulars of the respondent;
(c) the summary of facts constituting the alleged violations and points (or 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 10 is that a 'vague and ghost' application (which does not disclose the subject matter of the dispute, the parties involved, the summary of the arguments and the prayers of the applicant) is inadmissible before the Court.[42] On the other hand, if the application discloses the identity of the applicant and states sufficient facts and legal points to demonstrate a *prima facie* violation of human rights, then the requirements of Rule 33 are met.[43]

Apart from the above, the only other admissibility requirement evident from article 10 of the ECOWAS Court Protocol is that the application should not be pending before another international court.[44] Conspicuously missing from its admissibility rules is the general requirement to exhaust local remedies. In due regard to 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 the enforcement of human rights.[45] 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.[46]

Yet, unlike other human rights regimes, access to the ECOWAS Court in human rights cases (whether by individuals or NGOs) is not predicated

42 ECOWAS Court Protocol (as amended) art 10(d); *Ocean King Nigeria Limited v Senegal* [2011] CCJELR 139 (ECOWAS Court); *Aziagbede Kokou* (n 18) 174.

43 *El Hadji Aboubacar v BCEAO and the Republic of Niger* [2011] CCJELR 8 para 25.

44 The Court 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 para 13.

45 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union interafricaine des droits de l'Homme, Les témoins de Jéhovah v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 36; *Rencontre Africaine pour la De´fense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 10; and H Onoria 'The African Commission on Human and People's Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 3 *African Human Rights Law Journal* at 1, 3-5.

46 African Charter art 56(5); Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 1717 art 5(2)(b); and *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 25.

on the 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.[47]

Relatedly, the Court has also held that the pendency of a suit in a national court regarding the same or substantially the same matter between the parties does not render a parallel suit in the ECOWAS Court inadmissible.[48] In some cases, factors such as the applicant's standing or victim status and the application's international character have been considered admissibility requirements to regulate access to the Court. However, the net effect of the two major admissibility rules, as interpreted by the Court, is that individuals and NGOs practically have unrestricted access to the Court in human rights cases.

3 Critical evaluation of the policy of unrestricted access

3.1 The local remedies rule

As noted above, the Court has held that exhaustion of local remedies is not a pre-condition to seizing the Court in human rights cases.[49] It has justified this position on the basis that the Court's Protocol contains no such requirement. The Court reiterated that justification in *Incorporated Trustees of Fiscal and Civic Rights Enlightenment Foundation*, where it held that 'it cannot impose other extraneous conditions on litigants other than the ones provided for in [the Court's] Protocol'.[50] With no local remedies requirement or deference to national courts concerning pending suits, applicants can simply bypass national courts and proceed directly to the ECOWAS Court with their human rights claims. The link between this approach to admissibility and the high volume of human rights cases on the Court's docket could not be clearer. However, as the existing literature bears out, this approach to the exercise of the Court's human rights mandate does not seem to be sufficiently supported in law or practically

47 See *Hadijatou Mani Koraou* (n 19) paras 36-45. See also *The Incorporated Trustees of Fiscal and Civic Rights Enlightenment Foundation v Nigeria* ECW/CCJ/JUD/18/16 (2016) at 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'.

48 See *Valentine Ayika* (n 44) para 13 and *Nosa Ehanire Osaghae* (n 20) 22.

49 See *Hadijatou Mani Koraou* (n 19) paras 36-45.

50 *Incorporated Trustees* (n 47) 19.

sustainable in the long term.[51] International human rights jurisdiction rests on the principle of subsidiarity.[52] This means that the jurisdiction of an international human rights body is designed and intended to complement the role of domestic courts in enforcing human rights rather than supplanting them. This is the *raison d'être* of the local remedies rule. The state against whom a charge of human rights violation is laid must be afforded the opportunity to redress it.[53] Recourse may be made to the international forum if local remedies are unavailable in the state or if they exist, they are insufficient, ineffective, or unduly prolonged.[54]

The local remedies rule is a principle of customary international law.[55] In *ELSI*, the International Court of Justice (ICJ) observed that the parties to a treaty are free to 'either agree that the local remedies rule shall *not apply* to claims based on alleged breaches of that treaty; or confirm that it shall apply [emphasis added]'[56] However, given that it is a fundamental rule of customary international law, the Court held that the requirement to exhaust local remedies cannot be dispensed with 'in the absence of any words [in the treaty] making clear an intention to do so'.[57] In other words, the mere silence of a treaty on the local remedies rule cannot be taken to mean that the parties have excluded its application to claims brought by individuals under the treaty.

Regardless, the ECOWAS Court has taken the view that the absence of the local remedies requirement in its Protocol implies that ECOWAS members have waived it.[58] Yet, the evidence would seem to suggest otherwise. As Enabulele notes, ECOWAS members such as The Gambia and Niger have invoked the application of the rule in cases before the Court, a development that undercuts the waiver argument.[59] Moreover,

51 See Enabulele (n 22); Ebobrah (n 22).

52 See generally S Besson 'Subsidiarity in international human rights law – What is subsidiary about human rights?' (2016) 61 *American Journal of Jurisprudence* 69.

53 L Chenwi 'Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 *Human Rights Quarterly* 374 at 376-378; D Shelton *Remedies in international human rights law* (2015) 91-94.

54 Shelton (n 55) 91-94.

55 See International Law Commission, Draft Articles on Diplomatic Protection with Commentaries art 15.

56 Case concerning *Electtronica Sicula S.p.A. (ELSI) (United States v Italy)* 1989 ICJ Rep 15 para 50.

57 *ELSI* (n 56).

58 *Hadjiatou Mani Koraou* (n 19) paras 39-40.

59 Enabulele (n 22) 291. Ordinarily, the text of the treaty would be the best evidence of waiver of a relevant principle of international law. Yet where, as with the ECOWAS Court Protocol, the treaty is silent on the principle, subsequent practice under the treaty

article 4(g) of the ECOWAS Revised Treaty, which is the fountainhead of the ECOWAS human rights system, states that the state parties 'solemnly affirm and declare their adherence to [the] recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter'. Those provisions of the African Charter include a codification of the local remedies rule. None of the state parties to the African Charter (including ECOWAS members) has made a reservation or deposited a declaration excluding the applicability of the rule.[60]

Therefore, absent a clear intention to the contrary, it seems incongruous to presume that the same states agree to the exhaustion of local remedies within the African Charter's human rights system but reject it within the ECOWAS human rights regime that draws its lifeblood from the African Charter via article 4(g) of the ECOWAS Revised Treaty.[61] Some may argue that article 4(g) of the ECOWAS Revised Treaty only incorporates the catalogue of rights in the first part of the African Charter, but not the institutional and procedural mechanisms of the Charter, including the local remedies rule. That argument may be true, but only to the extent that we are dealing with those procedural provisions of the Charter that are *lex specialis* within the meaning of the Charter and intended to apply exclusively to the Charter institutions.

may (in accordance with the Vienna Convention on the Law of Treaties (VCLT) art 32) be a relevant supplementary means of determining whether the principle was in fact waived under the treaty. According to the International Law Commission, subsequent practice of the parties includes 'statements in the course of a legal dispute'; Report of the work of the 70th session of the International Law Commission, 30 April-1 June and 2 July-10 August 2018 UN Doc A/73/10 (8 Aug 2018) (ILC Report) conclusion 4, commentary, paras 16-18, 23-24.

60 Enabulele (n 22) 291.

61 Admittedly, apart from the 2005 amendment of the Court's Protocol, which created the Court's human rights jurisdiction, there has been at least one other amendment in 2006. This latter amendment addressed issues relating to the number of judges of the Court, their qualifications, tenure, and discipline (see Supplementary Protocol A/SP.2/06/06 of 14 June 2006). The argument could, therefore, be made that if the member states really wanted the local remedies rule, they would have included it the 2006 amendment, if not the 2005 amendment, which created the Court's human rights mandate. Such an argument would, however, miss a point. That point is that at the time of the last amendment to the Court's Protocol in June 2006, the cases of the Court beginning with *Hadijatou Mani Koraou* (n 19), in which the Court would reject the application of the local remedies rule, had not been decided. Thus, the non-applicability of the local remedies rule, which has since become a source of debate, was not a live issue at the time. Also, given that article 20 of the Protocol of the Court requires that the Court should apply relevant rules of customary international law, member states would have been entitled to assume (as evidenced by later arguments in cases before the Court) that the Court would interpret access to its human rights jurisdiction consistent with the local remedies rule, even if such a requirement was not legislated.

While the requirement to exhaust local remedies is procedural, it is not a mere procedural rule that can be offhandedly dispensed with. Nor can it be seriously argued that it is a Charter-created rule whose application is limited to only the institutions of the African Charter system. As a rule of customary law, it exists and applies despite the African Charter.[62] Accordingly, its inclusion in the Charter would seem to put beyond doubt the parties' intention that it is a general requirement that should govern the enforcement of the rights in the Charter. Based on this, it is legitimate for the state parties to expect that apart from those provisions of the Charter which are intended to apply exclusively to Charter institutions, a court or body that applies the African Charter must do so consistently with the generally applicable principles that the parties intended to govern it. Any other approach would mean that institutions outside the African Charter system are free to interpret and apply the Charter in a manner inconsistent with the parties' intention.

Besides, upholding the local remedies rule does not mean that access to the Court would be unduly restricted. It is not an inexorable command that admits no exceptions. Indeed, under the African Charter and its jurisprudence, for instance, there are at least eight exceptions to the local remedies rule.[63] In effect, the rule is quite flexible. It allows an international court to give due respect or deference to courts of the respondent state while ensuring, at the same time, that the state does not escape international accountability in appropriate cases. By upholding the rule, international courts send a message that they are there to complement the role of national courts in protecting human rights rather than to supplant or compete with them. If an international human rights body disregards the rule where it should have upheld it, it sets itself up for confrontation with national courts and political authorities in the respondent state whose cooperation it requires to enforce its decisions.[64] These would seem to explain why the ECOWAS Court decisions ruling

62 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States*) (merits) [1986] ICJ Rep 14 at para 77.

63 Centre for Human Rights, University of Pretoria, *A guide to the African human rights system: celebrating 30 years since the entry into force of the African Charter on Human and Peoples' Rights 1986-2016* (2016) 19-20. (The local remedies requirement need not be satisfied if (i) the victim-applicants are indigent; (ii) the complaint alleges serious or massive violations of human rights; (iii) the jurisdiction of national courts in the matter has been ousted by law; (iv) the rights asserted in the application are not provided for in national law; (v) exhausting local remedies in the state poses a threat to the life of the applicant; (vi) the victim-applicants are too numerous making exhaustion of local remedies impractical; (viii) the domestic processes or procedures make local remedies unduly prolonged; or (viii) exhaustion of local remedies will be illogical or an exercise in futility.)

64 Enabulele (n 22) 293-294; Ebobrah (n 22) 26.

out the applicability of the local remedies rule merely by its absence in the Court's Protocol have been met with resistance by ECOWAS members and viewed in the literature as troubling.[65]

3.2 The *lis pendens* rule

The other limb of the policy of unrestricted access is the Court's position that it has jurisdiction to hear a claim even if substantially the same matter is pending in a national court.[66] In *Osaghae* the Court reaffirmed this position stating that 'the pendency of a case before a domestic court does not oust its jurisdiction to entertain a matter … [a]s long as the matter is not before another international court, this Court has the competence to entertain same'.[67] In doing so, the Court recalled its decision in *Valentine Ayika*,[68] where it assumed jurisdiction despite the subject matter's pendency before the Supreme Court of Liberia.[69] The Court has justified this line of cases on the basis that article 10 of the Court's Protocol only renders inadmissible cases pending before other international courts.

Admittedly, the admissibility requirement of article 10(d)(ii) of the Court Protocol only covers matters before other international courts. This reflects the doctrine of *lis pendens,* which requires a Court to decline or at least suspend the exercise of its jurisdiction if there is a parallel proceeding before another court involving the same parties on the same matter and there is, therefore, a likelihood of conflicting decisions.[70] In the *MOX Plant case*, the Arbitral Tribunal for the law of the sea cautioned that 'a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the parties'.[71] However, there is doubt about whether the *lis pendens* rule requires an international court to decline or suspend its jurisdiction if the parties are litigating the same matter before a national court.[72] On that point, the ECOWAS Court

65 Ebobrah (n 22) 26; Enabulele (n 22) 293-294.

66 *Valentine Ayika* (n 44) para 13.

67 *Nosa Ehanire Osaghae* (n 20) 22

68 *Valentine Ayika* (n 44) para 13

69 *Nosa Ehanire Osaghae* (n 20) 22.

70 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (provisional measures) (2019) ICJ Reports 361 at 402-409 (Dissenting Opinion of judge ad hoc Cot).

71 *MOX Plant* case *(Ireland v United Kingdom)* (order on suspension of proceedings on jurisdiction and merits and request for provision measures) PCA Case No. 2002-01 (24 June 2003) para 28.

72 K Yannaca-Small 'Chapter 25: Parallel proceedings' in P Muchlinski et al (eds) *The Oxford Handbook of International Investment Law* (2008) 1008 at 1021-1025.

is arguably right in its view that article 10(d)(ii) of the Court Protocol is inapplicable to proceedings before a national court.

Nevertheless, the Court's rationalisation that it is *ipso facto* allowed to determine claims pending before national courts may not be entirely correct. Treaty law, that is, the Court Protocol and other ECOWAS instruments, are not the only sources of law the Court should apply. As an international court, the Court is expected to also apply relevant rules of customary international law and general principles of law.[73] In addition, and where appropriate, it should also apply international judicial best practices.[74] Thus, even if there is no rule of international law that requires it to abstain from exercising jurisdiction in a matter pending before a national court, it seems that at least best practice would require deference to national courts in such matters.[75] In any event, the underlying value of the *lis pendens* doctrine is the idea that courts should avoid situations of parallel proceedings and conflicting outcomes. That value reflects in the principle of subsidiarity that governs the jurisdiction and role of international human rights bodies.[76] Within the context of international human rights law, the principle of subsidiarity defines the structural relationship between states and the international institutions they establish for the protection of human rights. Subsidiarity emphasises

73 ECOWAS Court Protocol (as amended) art 20; *Jerry Ugokwe v Nigeria* [2004-2009] CCJELR 37, paras 30-31; and Enabulele (n 22) 292-293.

74 C Brown *A common law of international adjudication* (2007) 3-5 and particularly at 240 where he states: '[I]f a party applies for the exercise of a power which is not expressly conferred by the relevant international court's constitutive instrument, that party can argue that just because this procedure or power is not expressly provided for, does not mean that it is excluded. Rather, the party can argue that the international court might be able to apply the procedure, or exercise the power, either because the procedure is applicable as a general principle of judicial procedure, or because the power is an inherent power. Further, in determining whether the exercise of a particular power is necessary in order to carry out their functions, international courts might turn to the practice of other international tribunals for guidance.'

75 *Southern Pacific Properties Ltd (SPP) v Egypt* (Decision on Preliminary Objections of Jurisdiction) ICSID Case No ARB/84/3 (27 November 1985). In that case a question whether the parties had consented to arbitration before the International Chamber of Commerce, which was before the Tribunal, was simultaneous also being considered by the Cour de Cassation of France. Acknowledging need to avoid parallel proceedings and potential conflicting outcomes, the Tribunal stated at para 84: 'When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interests of judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.' Guided by these considerations, the Tribunal decided to stay its proceedings until the conclusion of the 'the proceedings in the French courts' (para 88).

76 See generally Besson (n 52).

the primary role of the state to protect human rights while granting international institutions the auxiliary role of 'providing guidance, assistance, monitoring, and back-up, but without replacing states as the primary guarantors'.[77] It, therefore, explains the commitment states make to take all necessary measures to guarantee the enjoyment of the rights in treaties they ratify, at least in the first instance.[78] It further explains the imposition of admissibility rules, such as the requirement to exhaust local remedies before recourse to international human rights mechanisms.[79] In other words, it creates a presumption in favour of national jurisdiction regarding human rights protection.[80] Under article 1 of the African Charter, ECOWAS members, all of whom double as parties to the African Charter, have committed themselves to implementing and enforcing the rights guaranteed in the Charter. They have reinforced that undertaking by their additional human rights commitments in the ECOWAS Revised Treaty.[81] It follows that the principle of subsidiarity broadly defines the relationship between ECOWAS states and the regional or subregional human rights institutions (including the ECOWAS Court) they have created to protect human rights consistent with the African Charter.[82] A proper appreciation of this structural relationship as defined by the principle of subsidiarity would require that the ECOWAS Court exercise its jurisdiction in a way that is complementary to national jurisdictions rather than in a manner that attempts to supplant or compete with them.[83] Thus, despite the non-applicability of the *lis pendens* rule to national courts within the express terms of article 10 of the Court Protocol, in fidelity to

77 G Neuman 'Subsidiarity' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (2013) at 363-364.

78 Besson (n 52) 78

79 B Duhaime 'Subsidiarity in the Americas: What is there for deference in the Inter-American system?' in L Gruszczynski & W Werner (eds) *Deference in international courts and tribunals: Standard of review and margin of appreciation* (2014) 289, 290; Besson (n 52) 79-80.

80 Ebobrah (n 22) 27.

81 ECOWAS Revised Treaty arts 4(g) & 5.

82 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) para 50.

83 Besson (n 52) 78. The principle of subsidiarity may be descriptive in that it describes the relationship between regional or international human rights mechanisms and national jurisdictions in the protection of human rights. However, it does not merely describe the layered structure of human rights protection, in which national jurisdictions have a primary role and international mechanisms provide surveillance and assistance. Instead, it provides a justification for why this layered structure exists and establishes a presumption in favour of national jurisdiction when it comes to human rights protection. Additionally, it serves as the foundation for principles such as the requirement to exhaust local remedies, which determine the conditions and appropriateness of interventions by regional or international human rights mechanisms. Therefore, at its core, the principle of subsidiarity is normative and should inform how an international or regional human rights body defines its relationship with national jurisdictions.

the principle of subsidiarity, the Court would still have a basis to defer to national jurisdiction.

3.3 Insufficient attempts at regulating access in human rights cases

The ECOWAS Court has acknowledged the need to regulate access to its human rights mandate in some cases, but it has not done so consistently and coherently to assuage the concerns about access to its jurisdiction. For example, in *Aziagbede Kokou*, the Court held that the admissibility requirements of article 10(d) of the Court Protocol are not exhaustive and that in appropriate cases, the Court may consider 'other criteria of admissibility'.[84] It noted, for instance, that a case may be deemed inadmissible if it does not 'exhibit any international nature and proves to be premature or precocious'.[85] Applying these judicially distilled (and obviously pragmatic) admissibility requirements, the Court declared as inadmissible applicants' claims alleging violations of the right to life, security of the person and freedom from torture.[86] The Court reasoned that those claims of human rights violations which arose from alleged violence visited on applicants by Togolese security forces during an election were matters pending before the domestic courts in Togo. The court noted that ordinarily, it would be entitled to make its own assessment of facts in exercising its mandate. However, in this case, it could not do so without interfering with criminal proceedings that had been initiated regarding the same events upon which the application was based. Therefore, the court concluded that the claims were premature and inadmissible since determining them would interfere with the proceedings before the Togolese courts.[87]

While the approach of the Court in *Aziagbede* is prudent and pragmatic, it has not always been followed in other cases with similar facts, resulting in inconsistencies.[88] For these reasons, the concerns about access to the Court's human rights jurisdiction remain alive for ECOWAS members.

84 *Aziagbede* (n 18) para 19.

85 *Aziagbede* (n 18) para 20.

86 *Aziagbede* (n 18) para 70.

87 *Aziagbede* (n 18) para 42.

88 Research Directorate, ECOWAS Court 'Study on the regulation of access to the Court in matters of human rights violations with regard to the need for the harmonious development of the Community Legal Order' (April 2022) at para 9. (Study on Regulation of Access to ECOWAS Court). See also Nosa *Ehanire Osaghae* (n 20) 22 and *Valentine Ayika* (n 44) para 13.

4 Resistance to the policy of unrestricted access

Resistance to unrestricted access to the Court in human rights cases began almost immediately after the Court obtained its human rights mandate in 2005.[89] This was, however, not an isolated development as far as subregional courts in Africa were concerned. Similar negative political reactions against subregional courts in East Africa and Southern Africa precipitated by unfavourable rulings against states had been recorded.[90] In the East African Community, Kenya launched a bid to abolish the EACJ or have the judges removed after the Court upheld a challenge to the process by which the government selected Kenya's delegates to the East African Legislative Assembly.[91] Kenya could not garner the support to abolish the Court. However, it succeeded in getting reforms, including creating an appellate division of the Court to allow for appeals, the imposition of strict timelines for filing complaints, and a change in disciplinary rules enabling judges to be removed for accusations of corruption in their home states.[92] Within the SADC, Zimbabwe (under President Mugabe) was similarly infuriated when the SADC Tribunal decided in favour of a white Zimbabwean landowner who challenged the seizure of his land as part of Mugabe's signature land reform programme.[93] Through a campaign of vilification and refusal to agree to the filling of judge and staff vacancies

89 MR Madsen, P Cebulak & M Wiebusch 'Backlash against international courts: explaining the forms and patterns of resistance to international courts' (2018) 14 *International Journal of Law in Context* at 197. Madsen and others observe that 'backlash' is the term predominantly used in the literature to refer to negative or adverse reactions to international courts. However, they note that it is not necessarily an analytical concept, but rather a common language that typically denotes a negative reaction in the realm of politics. Therefore, they use the descriptor 'resistance' as the umbrella term for the spectrum of negative or adverse reactions to international courts. In their view, this encompasses different forms of negative reactions that can be broadly classified as pushback or backlash. They define pushback as 'ordinary resistance occurring within the confines of the system but with the goal of reversing developments in law,' and backlash as 'extraordinary resistance challenging the authority of an [international court] with the goal of not only reverting to an earlier situation of the law but also transforming or closing the [international court.]' at 203. In agreement with Madsen and others, 'resistance' is used in this section and other parts of the paper as the generic term for negative or adverse reactions to the ECOWAS Court, while 'pushback' or 'backlash' is used where the facts and context warrant such nuance.

90 L Helfer 'Backlash against International Courts in West, East and Southern Africa (2015) 109 *Proceedings of the Annual Meeting (America Society of International Law)* 27-30.

91 *Anyang Nyong'o v Attorney General of Kenya* Ref No 1/2006 (29 March 2007).

92 KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East, and Southern Africa: Causes and consequences' in J Gathii (ed) *The performance of Africa's international courts* (2020) 254.

93 *Mike Campbell (Pvt) Ltd v Zimbabwe* 2008 AHRLR (SADC 2008).

on the Court, Zimbabwe practically achieved its mission of getting the SADC Tribunal suspended.[94] With the leverage gained from suspending the Tribunal's operations, Zimbabwe then negotiated the abolition of the individual complaint procedure when the Tribunal was later reconstituted under a new protocol.[95]

Within ECOWAS, the resistance to the Court's approach was launched by The Gambia, whose government under Yahyah Jammeh was notorious for intimidating and harassing the media, opposition parties and the judiciary.[96] It was within this context that two cases came to the ECOWAS Court against The Gambia. The first was *Manneh*, where the applicant, a journalist, alleged unlawful arrest, detention and torture by Gambia's Intelligence Agency.[97] Despite several notifications about the suit and the hearing, the government refused to defend the claims.[98] The Court found The Gambia liable, ordered the applicant's release, and awarded him compensation of $100,000.[99] The ruling embarrassed the Gambian government as condemnation and demands for compliance poured in from foreign governments, international organisations, human rights NGOs and other civil society organisations.[100]

In a second suit by exiled journalist Musa Saidykhan also alleging unlawful detention and torture,[101] the government decided to respond after apparently regretting its strategy in the *Manneh case*.[102] Among others, it objected to the jurisdiction of the Court and admissibility of the claim for non-exhaustion of local remedies.[103] Following the Court's rejection of the objections in a preliminary ruling in June 2009, The Gambia switched strategies to defeat the claim to avoid another embarrassment.[104] It mounted a public attack on the Court and submitted a proposal to the ECOWAS Commission in September 2009 for a revision of the Court's Protocol to, *inter alia*, require: (i) the exhaustion of local remedies; (ii) the

94 Alter, Gathii & Helfer (n 92) 274-282.

95 Alter, Gathii & Helfer (n 92) 254, 282.

96 Alter, Gathii & Helfer (n 92) 258.

97 *Chief Ebrimah Manneh v The Gambia* ECW/CCJ/JUD/03/08 (2008).

98 *Manneh* (n 97).

99 As above.

100 Alter, Gathii & Helfer (n 92) 258; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, on his mission to the Gambia (3-7 November 2014) UN Doc A/HRC/29/37/Add.2

101 *Musa Saidykhan v The Gambia* ECW/CCJ/JUD/08/10 (2010).

102 Alter, Gathii & Helfer (n 92) 258.

103 *Musa Saidykhan* (n 101).

104 Alter, Gathii & Helfer (n 92) 259.

filing of cases within 12 months of exhausting local remedies; and (iii) the rejection of claims filed by anonymous parties.[105] The Gambia also demanded an amendment to the ECOWAS Revised Treaty to establish an appellate procedure for all decisions of the Court.[106]

While The Gambia's proposal was seemingly modest and uncontroversial, the antecedents to the proposal betrayed a disguised attempt to 'clip the wings' of the Court.[107] For this reason, the proposal was fiercely denounced and resisted by civil society organisations.[108] In the face of stiff opposition, the ECOWAS Committee of Legal Experts, who considered the proposal, recommended against its adoption.[109] The ECOWAS Council of Ministers endorsed the Committee's recommendation and thereby defeated The Gambia's attempt at a backlash against the Court.[110]

The Council of Ministers' decision to reject The Gambia's proposal has been described as 'striking'.[111] Whatever the reasons were, three factors appear to have been decisive. First, there was a motivation to distance ECOWAS from The Gambia, which was widely perceived as a bad actor under the Jammeh regime.[112] Second, civil society mobilisation in support of the Court and its mandate, including legal challenges to The Gambia's proposals played a key role.[113] And thirdly, the Court enjoyed international goodwill and the support of the bureaucrats at the ECOWAS Commission.[114] Although it was still in its early years, the Court had rendered decisions that attracted international attention and goodwill. Apart from the cases against The Gambia, it also upheld a challenge to modern slavery in Niger that was internationally praised.[115] For these and other reasons, officials at the ECOWAS Commission did not favour the

105 Alter, Gathii & Helfer (n 92) 259.

106 As above.

107 Alter, Gathii & Helfer (n 92) 259-260.

108 Alter, Gathii & Helfer (n 92) 259-261.

109 Alter, Gathii & Helfer (n 92) 261.

110 Alter, Gathii & Helfer (n 92) 261; see also Madsen, Cebulak & Wiebusch (n 89) 215-216.

111 Alter, Gathii & Helfer (n 92) 261.

112 See Alter, Gathii & Helfer (n 92) 261, 285 and Report of the Special Rapporteur, Christof Heyns (n 100).

113 See Alter, Gathii & Helfer (n 92) 261-262.

114 Alter, Gathii & Helfer (n 92) 262.

115 *Hadijatou Mani Koraou* (n 19); Alter, Gathii & Helfer (n 92) 262.

imposition of restraints that would undercut the progress the Court was making as a fledgling judicial body.[116]

Nevertheless, the rejection of The Gambia's proposal was, to a large extent, an act of 'shooting the messenger', even if it had a veiled agenda. It was a victory for the Court and its supporters, no doubt. But equally true is the fact that it merely postponed the resolution of the question of unrestricted access to a later date. Thus, because the real issue was never dealt with, it keeps coming up whenever member states have unfavourable rulings issued against them. Most recently, an ECOWAS Court judgment against Côte d'Ivoire that resulted in the execution of a legal process against an Air Côte d'Ivoire plane in Mali appeared to have incensed the Ivorian government.[117] Apparently, other member states that have investigating magistrate procedures for criminal investigations have also been worried about potential interference in such proceedings arising from the Court's practice of hearing human rights applications of accused persons who are under investigation by national courts.[118]

At the opening of an External Session of the ECOWAS Court in Accra in March 2022, then Chairman of the ECOWAS Authority, President Akufo-Addo of Ghana, echoed the concerns of member states about the above issues when he stressed the need for access to the Court to be regulated.[119] He observed that the prevailing unrestricted access to the Court in human rights cases sometimes 'results in judgments that Member States find difficult to enforce, or [that] are inconsistent with the concerned Member State's municipal laws'.[120] He added that '[s]ome judgments have even led to efforts to attach state assets in satisfaction of the judgments … [h]owever, this is not the practice in other international courts'.[121] Citing these concerns, he suggested that without amending Court Protocol, the Court itself could 'impose a rule of judicial self-restraint that would insist that an applicant for the exercise of the Court's expanded jurisdiction

116 Alter, Gathii & Helfer (n 92) 262.

117 J Afrique 'Why an Air Côte d'Ivoire Plane was seized by businessman Diawara' *The Africa Report*, 24 November https://www.theafricareport.com/149582/why-an-air-cote-divoire-plane-was-seized-by-businessman-diawara/ (accessed 19 June 2023).

118 See Study on regulation of access to ECOWAS Court (n 88) paras 21-22, and, below, Draft Supplementary Rules (n 139) art 7 which identify and seek address these concerns.

119 See Address by the President of the Republic of Ghana and Chairman of the Authority of Heads of State and Government of ECOWAS, Nana Addo Dankwa Akufo-Addo, at the External Court Session of the ECOWAS Court of Justice in Accra, Ghana (21 March 2022).

120 Address by President of Ghana and Chairman of ECOWAS Authority (n 119).

121 As above.

satisfy the requirement of the exhaustion of domestic remedies'.[122] He considered that such a rule which the Court could possibly introduce under a practice direction, 'would obviate any potential conflict between the Court and national government[s]'.[123] Ghana's Attorney-General and Minister of Justice echoed similar sentiments noting that 'there is no justification for member states with strong human rights record and formidable judicial institutions, like the Republic of Ghana, to be denied the opportunity to redress an alleged wrong within the framework of its own domestic legal system before international responsibility may be called into question'.[124] He suggested that 'the time has come' for the relevant legal texts to be amended to incorporate the local remedies rule to align 'the practice of the Court with prevailing customary international law'.[125] As an alternative, he re-suggested the old proposal for an appellate division of the Court to be established to provide 'an assurance against any serious or grave errors in rulings'. [126]

Evidently, from a political standpoint, the adverse reactions of member states to decisions of the Court do not necessarily indicate a divorce between dissatisfaction with the outcome and the process by which the case was initiated. The thinking, at least from these recent negative reactions, appears to be that without unrestricted access to the Court, a member state would likely not be saddled with an eventual unfavourable ruling.[127]

In light of these recurrent concerns, the Presidency of the ECOWAS Court convened a meeting in Abidjan, Côte d'Ivoire, from 10 to 15 April 2022 to conduct a self-evaluation of the Court's approach and find an appropriate solution. Accordingly, the objective of the meeting, in relevant part, was to 'consider the concerns of the Member States that are advocating for the amendment of the Texts of the Court to include

122 Address by President of Ghana and Chairman of ECOWAS Authority (n 119).

123 As above.

124 'Remarks by Godfred Yeboah Dame Hon. Attorney-General & Minister for Justice of the Republic of Ghana at Opening of the External Sitting of the ECOWAS Community Court of Justice, Monday, 21 March 2022, Accra.'

125 Remarks by Attorney General of Ghana (n 124).

126 As above.

127 See Remarks by Attorney General of Ghana (n 124): 'The omission of a requirement to exhaust local remedies is undoubtedly, also responsible for the ever-recurring difficulties in securing enforcement of decisions emanating from the ECOWAS Community Court of Justice. Legitimate questions about the sovereignty of nations and the supremacy of a Republic's Constitution are raised when a citizen of one country sidesteps all the avenues for resolution of a dispute available under the Constitution of his own country and directly accesses the ECOWAS Community Court.'

the exhaustion of local remedies' and to specifically 'examine the need to regulate access to the Court in human rights violations'.[128]

The Research Directorate of the Court prepared a background paper which informed the deliberations at the meeting.[129] The paper acknowledged the concerns that have been raised about unrestricted access to the Court. It noted that, generally, the current model of unrestricted access presents the real risk that the mandate of the ECOWAS Court will conflict with national jurisdictions and that such a risk is 'highly plausible if not almost certain'.[130] Regarding the non-exhaustion of local remedies, the paper acknowledged that since an applicant is free to bypass national courts, it puts the ECOWAS Court in a situation where it essentially competes with domestic institutions of member states 'in the field of remedies for human rights violations'.[131] Together with the non-applicability of the *lis pendens* rule to national courts,[132] the risks of conflict between the ECOWAS Court and national jurisdictions are 'not purely speculative'.[133]

Against the backdrop of this critical, internal review, the Court concluded the Abidjan meeting with a decision to regulate access to its jurisdiction in human rights cases by adopting Draft Practice Directions for the purpose.[134] However, later developments after the Abidjan meeting, including a proposed meeting by ECOWAS Ministers of Justice to consider proposals to regulate access to the Court, prompted a different strategy. In an apparent move to own the process and beat the competition, the Draft Practice Directions adopted at the Abidjan meeting was repackaged as draft Supplementary Rules of the Court (Draft Supplementary Rules) and submitted for the approval of the ECOWAS Council of Ministers who

128 'Report of the meeting on the regulation of access to the Community Court of Justice, ECOWAS, in matters of human rights violations with regard to the need for the harmonious development of the community legal order', 10-15 April 2022, Abidjan, Côte d'Ivoire ('Report of ECOWAS Court meeting on regulation of access in human rights cases') para 3.

129 Report of ECOWAS Court meeting on regulation of access in human rights cases (n 88). See Study on regulation of access to ECOWAS Court (n 88).

130 Study on regulation of access to ECOWAS Court (n 88) para 4.

131 Study on regulation of access to ECOWAS Court (n 88) para 5.

132 See Study on regulation of access to ECOWAS Court (n 88) para 7: 'The Community Court of Justice, in the exercise of its mission to protect human rights, has been seized with numerous actions even though proceedings were underway at the national level.'

133 Study on Regulation of Access to ECOWAS Court (n 88) para 7.

134 Report of ECOWAS Court meeting on regulation of access in human rights cases (n 128) para 5.

were scheduled to meet from 30 June to 1 July 2022 in Accra, Ghana.[135] The Council, however, deferred consideration of the draft Supplementary Rules.

The developments leading up to this decision by the ECOWAS Court somehow reflect what Alter and others describe as the 'wily politics' approach of African states to influencing their subregional courts. They observe that more democratic states in subregional economic communities are often uneasy about radically changing the mandates of courts and therefore act as a buffer against such moves by their more authoritarian counterparts.[136] But at the same time, they do not relish the idea of having policies of governments, including their own, questioned or reversed at a subregional court.[137] The result of this internal conflict is that they avoid full-blown attacks on regional courts and instead focus on areas they can more easily control, such as limiting access to the court and imposing stricter time limits for filing claims.[138] This crafty political approach to influencing subregional courts appears to be what is playing out in ECOWAS, seemingly aided by the instinct of the Court to self-preserve by leading the process to reform itself.

5 Evaluation of the proposed Supplementary Rules on the Human Rights Practice of the ECOWAS Court

The draft Supplementary Rules begin with an introduction setting out their necessity and purpose, followed by an operative part comprising eleven articles. The introduction outlines three main objectives for the issuance of the draft Supplementary Rules:

(i) to clarify the scope of access and admissibility requirements for human rights cases for the guidance of agents or legal counsel who represent parties before the court;
(ii) to explain and supplement the settled jurisprudence of the Court regarding access to its human rights jurisdiction; and

135 See Memorandum on the supplementary rules (n 27).
136 Alter, Gathii & Helfer (n 92) 298.
137 As above.
138 As above.

(iii) to highlight 'the need to respect the national sovereignties of Member States' by enacting measures to prevent forum shopping and/or conflict with national courts.[139]

The relevant provisions of the operative part that bear on the discussions in this chapter are article 3, which deals with the admissibility of cases generally; article 4, which addresses the non-appellate character of the Court; and article 6, which addresses the issue of forum shopping. A close examination of these provisions reveals that the Court's attempt to regulate access to its human rights jurisdiction revolves around three thematic issues: (a) the local remedies rule; (b) the *lis pendens* rule; and (c) the non-appellate character of the court.

5.1 The local remedies rule

Article 3 of the draft Supplementary Rules reiterates the two basic requirements of admissibility of cases under article 10(d) of the Court's Protocol which are 'non-anonymity and non-pendency before another international court'. But despite the Court's consistent position that article 10(d) does not require exhaustion of local remedies or bar the court from concurrently considering a matter that may be pending in a national court, the Supplementary Rules are signalling a different approach. Accordingly, article 3 further provides that while the Court is not bound by the local remedies rule, it 'shall only entertain applications that have international character'.[140] The concept of 'international character' is not necessarily new at the Court. There have been references to it in some decisions of the Court, although without sufficient elucidation of its content or practical application.[141]

Thus, it is not exactly clear what is meant by 'applications that have international character' in the context of the 'exception' the draft Supplementary Rules seek to create to the Court's non-exhaustion of local remedies position. However, it could be understood to mean that where an applicant alleges breaches of an international human rights instrument ratified by the state, the case is international and, therefore, properly (and perhaps exclusively) within the Court's jurisdiction as an international human rights body, making the possibility of conflicts with national

139 Draft supplementary rules of procedure on the human rights practice of the Community Court of Justice, ECOWAS (May 2022).

140 Draft Supplementary Rules 2022 (n 139) art 3(2).

141 *Registered Trustees of Jama'a Foundation v Nigeria* ECW/CCJ/JUD/04/20 (2020) paras 57-58.

jurisdiction unlikely.[142] Such a position would, however, be erroneous since the requirement to exhaust local remedies is not limited to cases that implicate only domestic law. In other words, national courts may equally have jurisdiction to determine 'applications that have international character', especially if the state has domesticated the relevant international human rights instrument. Therefore, limiting the human rights mandate of the ECOWAS Court to applications with international character does not necessarily resolve issues concerning the local remedies rule.

5.2 The *lis pendens* rule

To prevent forum shopping, the draft Supplementary Rules now seek to extend the *lis pendens* rule to national courts. Article 6 of the Supplementary Rules provides that '[a]ny application for human rights violation lodged before the Court while pending before a national court, shall be ruled inadmissible.'

However, the clarity of the lis pendens provisions in article 6 is muddied by article 3(3) of the draft Supplementary Rules. Article 3(3) also affirms the Court's new approach that '[a]n application pending before a national court shall not be admissible before the Community Court of Justice'. Yet, it adds a caveat: 'unless it relates to procedural violations that have human rights connotations, by the trial municipal court in the course of proceedings'.[143]

The caveat can be understood in at least two ways. First, it could mean that despite the application of the *lis pendens* rule to national courts, if an applicant's international human rights are breached by or during a judicial proceeding of a national court (for example, a breach of the right to a fair trial), the ECOWAS Court can entertain the violation caused by or during the domestic proceedings. But secondly, it could also mean that despite extending the *lis pendens* rule to a national court, the ECOWAS Court may *concurrently entertain* an application if 'it relates to procedural violations that have human rights connotations, by the trial municipal court in the course of proceedings'.[144] The susceptibility of article 3(3) to two contradictory meanings does not help with the clarity the Court wishes to bring to issues around access to its jurisdiction through the

142 This view is supported by art 1(1) of the Supplementary Rules which provides that the mandate of the Court 'is in respect of International Human Rights Law and the obligations of Member States to respect, protect and fulfil human rights in accordance with the African Charter on Human and Peoples Rights (ACHPR) and any other International human rights Instruments that a Member State is party to'.

143 Supplementary Rules 2022 (n 142) art 3(3).

144 As above.

Supplementary Rules. A redraft of the provisions relating to the *lis pendens* rule would be necessary.

5.3 Non-appellate character of the Court

Article 4(1) of the draft Supplementary Rules restates the Court's jurisprudence to the effect that it has no jurisdiction to act as an appellate court over decisions of national courts. It then provides in more specific terms under article 4(2) that:

> Any party that is not satisfied by the decision of a national Court or that is aggrieved by the decision of a national court, cannot challenge such decision before the ECOWAS Court of Justice, but should follow the appeal channels within the national court system of the Member State concerned.

The non-appellate nature of the Court's jurisdiction is further addressed by article 3(4). It states that the Court 'shall uphold the principle of *res judicata* concerning any application already decided by a national court and will therefore not entertain an application, if the same application has already been decided by a national court of a Member State'.

These provisions generate some concerns that require a couple of observations. First, it is generally accepted that international courts, such as the ECOWAS Court, do not exercise appellate jurisdiction over national courts; they can, therefore, not grant orders reversing national court decisions as such.[145] However, this does not rule out the fact that as organs of a state, the national courts may incur international responsibility for their states by rendering judgments that breach the state's international obligations, including those on human rights. Where that is the case, an international court, while it cannot directly reverse the national court decision, will nevertheless have jurisdiction to determine whether that national court decision breaches the international obligations of the state.

Similar to article 4(1) of the draft Supplementary Rules, the African Court held in *Mtingwi* that it was not an appellate court relative to decisions of national courts.[146] However, realising it would be erroneous to maintain such an unqualified position, the Court clarified in *Thomas* that the non-appellate nature of its jurisdiction did not preclude it from

145 See cases such as *Jerry Ugokwe v Nigeria and Dr Christian Okeke* (intervener) ECW/CCJ/Jud/03/05 (2005) and *Moussa Leo Keita v Mali* ECW/CCJ/Jud/03/07 (2007) where the Court has stressed that its mandate is not one of appellate jurisdiction over national court decisions. See also *Kennedy Ivan v Tanzania* (merits and reparations) (2019) 3 AfCLR 48 para 26 where the African Court took a similar position.

146 *Mtingwi v Malawi* (jurisdiction) 15 March 2013 (2016) 1 AfCLR 190 para 14.

examining national court proceedings to 'determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State'.[147] Thus, properly understood, the idea that an international court does not have appellate jurisdiction mainly relates to the fact that the Court cannot issue orders directly invalidating or reversing national court decisions. The correct approach, as evidenced in the practice of the ICJ in particular, is for the international court to order the state to adopt means of its own choosing to reverse decisions of its courts that violate its international obligations.[148] But that should not be confused with the propriety or mandate of an international court to review a national court decision to determine whether it implicates the responsibility of the state for internationally wrongful acts.

In light of this, the unqualified rule barring aggrieved persons from 'challenging' national court decisions at the ECOWAS Court seems inadvisable given its unintended consequences. It would effectively foreclose all applications to the ECOWAS Court hinged on a national court decision without any consideration for those decisions that implicate the responsibility of the state for human rights violations.

Second, article 4(2) of the draft Supplementary Rules creates an absurdity. This is because, for a Court that has consistently held on to the position that applicants need not exhaust local remedies before accessing its human rights jurisdiction, it now appears to be consigning a class of cases and applicants permanently to local remedies (that is, 'the appeal channels within the national court system of the Member State concerned') without the possibility of recourse to an international remedy. This outcome is reinforced by the overly broad *res judicata* rule in article 3(4) of the draft Supplementary Rules. Without any indication as to when the rule becomes effective after a national court decision is delivered and no exception for cases where a national court decision may be the cause of a human rights violation, article 3(4) effectively excludes applications grounded on national court decisions from the Court's mandate.

147 *Alex Thomas v Tanzania* Judgment (merits) 20 November 2015 (2015) 1 AfCLR 465 para 130.

148 *Jurisdictional Immunities of the State; Germany v Italy: Greece intervening* (23 February 2012) (2012) ICJ Rep 99 at para 137 where the Court held: '[T]he fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution. On the other hand, the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect'.

In fact, the combined effect of these two provisions put applicants in a worse position than if there were a requirement to exhaust local remedies. This is because the local remedies rule allows an applicant to pursue their case in an international forum if the domestic remedy is ineffective or did not sufficiently redress the violation. Under the draft Supplementary Rules, the *res judicata* and *non-appellate* provisions would foreclose recourse to the ECOWAS Court if the matter has been heard in a domestic court, but without any regard for whether the domestic remedy was effective or sufficient. An applicant may therefore be better off under a requirement to exhaust local remedies than these rules.

5.4 The legal basis of the Supplementary Rules

A more fundamental concern that may be raised is the method that has been chosen to regulate access to the Court's human rights mandate, that is, the adoption of Supplementary Rules. The Court's power to adopt Supplementary Rules is derived from article 99 of its Rules of Procedure.[149] Article 99 provides that the Court 'shall adopt supplementary rules concerning its practice in relation to (a) letters rogatory; [or] (b) reports of perjury by witnesses or experts'. The Court does not act unilaterally in these matters. All rules adopted by the Court are ultimately subject to the approval of the ECOWAS Council of Ministers.[150]

Nevertheless, an ordinary and fair reading of article 99 would suggest that Supplementary Rules, even if approved by the Council, may not address substantive issues of law. Instead, their purpose is to address only matters of form (formalities) relating to how requests for cooperation and judicial assistance (that is, letters rogatory) and expert reports or other reports on witness perjury may be prepared and filed with the Court. If this reading of article 99 is correct, then it raises questions about whether Supplementary Rules could be deployed to regulate the admissibility of cases and access to its human rights mandate. These are important and substantive legal issues covered by the Court's Protocol. To be sure, the Rules of the Court (whether main or supplementary) are subsidiary to the Court's Protocol. Thus, besides the question of whether article 99 of the Court's Rules can be the basis of these particular Supplementary Rules, there is a much deeper question of whether the procedural rules of the court can regulate and, in some cases, exclude access to the Court. Given that access to the Court's mandate is covered under the Court's Protocol, the unimpeachable legal approach to regulate access to the Court would be to amend the Protocol.

149 Rules of the ECOWAS Court of Justice 2002.

150 Court Protocol (as amended) art 34.

An alternative and legitimate approach that may not require amendment of the Protocol would be for the Court to interpret its mandate under the Protocol and the ECOWAS Revised Treaty in line with the principle of subsidiarity. As argued earlier, the human rights commitments of ECOWAS states under the African Charter and the ECOWAS Revised Treaty create a structural relationship between the states and the Court based on the principle of subsidiarity. Interpreting its mandate in line with the subsidiarity principle will give the Court a legitimate basis to judicially define access to its jurisdiction along the lines of its approach in *Aziagbede.* By that approach, it would be able to apply the *lis pendens* rule to national courts without calling into question the basis of its authority to do so.

Arguably, the Court could use the same approach to apply the local remedies rule since an important offshoot of subsidiarity is the requirement to exhaust local remedies. As has been argued in this chapter and by others, that should be possible if the Court is willing to re-evaluate its position and accept that the absence of the local remedies requirement in the Court's Protocol does not imply a waiver by the states.[151] Indeed, as has been demonstrated above, a victim of a human rights violation may be better off under a requirement to exhaust local remedies than under some of the draft Supplementary Rules due to their effect of consigning certain cases permanently to the domestic forum. While such a turnabout will be legally defensible on the grounds that there is strictly speaking no rule of *stare decisis* in international law, there is admittedly the risk of appearing as inconsistent.[152]

That leaves us with the only non-amendment option that will not damage the Court's reputation: an interpretative note or guidance by the ECOWAS Authority or Council of Ministers. Under the Vienna Convention on the Law of Treaties (VCLT), one of the aids to interpreting a treaty is 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.[153] This provision, which arguably reflects customary law,[154] provides a basis for the ECOWAS members, as represented in the ECOWAS Authority or Council of Ministers, to adopt an agreed interpretative note on how the Court should interpret its existing human rights mandate.[155] Given

151 See generally Enabulele (n 22).

152 It could be argued that a turn-about is a lower risk to the reputation of the Court compared to the risks of adopting Supplementary Rules that constrict access, appear internally inconsistent and are arguably outside the Court's legislative mandate.

153 Art 31(3)(a).

154 ILC Report (n 59) conclusion 2, commentary, para 2.

155 ILC Report (n 59) conclusion 4, commentaries, paras 4-15.

the position of the Court that ECOWAS members have waived the local remedies rule, which some member states have disputed, the interpretative note or guidance could be used to clarify the position of member states on the issue by stating that access to the Court's human rights mandate should conform to the local remedies rule, and other relevant rules of admissibility applicable under the African Charter system. An interpretative note or guidance, couched in such general terms, would allow the Court enough discretion to legitimately apply and develop, on a case-by-case basis, admissibility rules to regulate access to its human rights mandate.

6 Concluding remarks

This chapter discussed the human rights mandate of the ECOWAS Court with a particular focus on access to the Court in human rights cases. It examined the Court's approach to the admissibility of cases and concerns that have been raised about it by ECOWAS members and scholars. It also assessed how the Court responded to these concerns judicially, in some cases, and how it now seeks to regulate access to its human rights mandate with a draft Supplementary Rules in view of recurrent concerns.

The attempt of the Court to address the concerns of member states is a welcome development, considering the flaws with the current model of unrestricted access, as argued throughout this chapter. That said, the draft Supplementary Rules have some challenges, as the discussions have demonstrated. Some of its provisions have contradictions and internal inconsistencies, particularly those on the local remedies and *lis pendens* rules. The provisions addressing the non-appellate character of the Court also seem to have the unintended consequence of excluding from the Court's mandate applications that allege human rights violations caused by national court decisions.

More fundamentally, it is doubtful that there is a legal basis to adopt Supplementary Rules of this kind under article 99 of the Rules of Procedure of the Court or to generally regulate access to the Court's human rights mandate by procedural rules, whether main or supplementary. The argument advanced in this chapter is that the unimpeachable means to regulate access to the Court's human rights mandate would be for the Court's Protocol to be amended. Alternative and legitimate means, not involving legislative intervention, would be for the Court to interpret its mandate in line with the principle of subsidiarity. That approach could then serve as a basis to apply the local remedies requirement or defer to national courts, consistent with the *lis pendens* rule. However, such a turnabout in the Court's jurisprudence risks reputational damage. Therefore, it appears that the best alternative to amending the Protocol of

the Court would be for the ECOWAS Authority or Council of Ministers to adopt an interpretative note or guidance. The note or guidance would clarify that access to the Court in human rights cases should conform to the local remedies rule and other relevant admissibility requirements in the African Charter. The Court can then apply this new approach without risking damage to its legitimacy and reputation, which could result from a reversal of its jurisprudence on unrestricted access to the Court.

Table of abbreviations

ACHPR	African Charter on Human and Peoples Rights
EACJ	East African Court of Justice
ECOMOG	ECOWAS Monitoring Group
ECOWAS	Economic Community of West African States
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
NGO	Non-governmental organisations
NGO	Non-governmental organisations
SADC	Southern African Development Community
VCLT	Vienna Convention on the Law of Treaties

Literature

African Union 'Address by the President of the Republic of Ghana and Chairman of the ECOWAS Authority of Heads of State and Government, Nana Addo Dankwa Akufo-Addo' 15 March au.int/en/speeches/20220315/address-president-republic-ghana-and-chairman-ecowas-authority-heads-state-and accessed 21 August 2023

Afrique J 'Why an Air Côte d'Ivoire Plane was seized by businessman Diawara' *The Africa Report*, 24 November https://www.theafricareport.com/149582/why-an-air-cote-divoire-plane-was-seized-by-businessman-diawara/

Alter KJ, Gathii JT & Helfer LR 'Backlash against international courts in West, East, and Southern Africa: Causes and consequences' in J Gathii (ed) *The performance of Africa's international courts* (OUP 2020)

Amnesty International 'West Africa: Proposed amendment to ECOWAS Court jurisdiction is a step backward' 28 September 2009 https://www.amnesty.org/en/documents/afr05/005/2009/en/

Asmelash HB 'Southern African Development Community Tribunal' in *Max Planck Encyclopedia of International Procedural Law* (last updated February 2016)

Besson S 'Subsidiarity in international human rights law – What is subsidiary about human rights?' (2016) 61 *American Journal of Jurisprudence* 69-84.

Brown C *A common law of international adjudication* (OUP 2007).

Centre for Human Rights *University of Pretoria, A guide to the African human rights system: celebrating 30 years since the entry into force of the African Charter on Human and Peoples' Rights 1986-2016* (PULP 2016)

Chenwi L 'Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 *Human Rights Quarterly* 374-398

Dapatem DA & Hawkson EE 'President tells ECOWAS Court to reform procedures' *The Daily Graphic*, 22 March 2022 https://www.graphic.com.gh/news/general-news/president-tells-ecowas-court-to-reform-procedures-2.html

Draft supplementary rules of procedure on the human rights practice of the Community Court of Justice, ECOWAS (May 2022)

Duhaime D 'Subsidiarity in the Americas: What is there for deference in the Inter-American system?' in Gruszczynski L & Werner W (eds) *Deference in international courts and tribunals: Standard of review and margin of appreciation* (OUP 2014)

Ebobrah ST 'Court of Justice of the Economic Community of West African States (ECOWAS)' in *Max Planck Encyclopedia of International Law* (OUP 2019)

Ebobrah ST *A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice* (Research Partnership Paper No 1/2008) Danish Institute for Human Rights https://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (2008)

Enabulele A 'Sailing against the tide: Exhaustion of domestic remedies and the ECOWAS Community Court of Justice' (2012) 56 *Journal of African Law* 268-295

Falana F *Achievements, challenges and prospects of the ECOWAS Court of Justice* (Paper presented at the International Conference of the ECOWAS Court of Justice) Lomé, Togo, 22–25 November 2021

Gathii J & Mbori H 'Reference guide to Africa's international courts: An introduction' in J Gathii (ed) *The performance of Africa's international courts: Using litigation for political, legal, and social change* (OUP 2021)

Helfer L 'Backlash against International Courts in West, East and Southern Africa (2015) 109 *Proceedings of the Annual Meeting (America Society of International Law)* 27-30

Justice A Asante President of the ECOWAS Court, *Speech delivered at the International Conference of the ECOWAS Court of Justice*, Lomé, Togo, 22-25 November 2021

Ladan MT *ECOWAS Community Court of Justice as a supranational court and engine of integration in West Africa: Achievements, challenges and prospects* (Paper presented at the International Conference of the ECOWAS Court of Justice) Lomé, Togo, 22–25 November 2021

Madsen MR, Cebulak P & Wiebusch M 'Backlash against international courts: explaining the forms and patterns of resistance to international courts' (2018) 14 *International Journal of Law in Context* 197-220

Memorandum on the supplementary rules of procedure for the human rights practice of the Community Court of Justice, ECOWAS for the approval of the ECOWAS Council of Ministers (5 May 2022)

Neuman G 'Subsidiarity' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2013)

Nwauche E 'Regional economic communities and human rights in West Africa and African Arabic countries' in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives in their protection and promotion* (Macmillan Education 2009)

Okafor O & Effoduh O 'The ECOWAS Court as a (promising) resource for pro-poor activist forces in J Gathii (ed) *The performance of Africa's international courts: Using litigation for political, legal, and social change* (OUP 2021)

Onoria H 'The African Commission on Human and People's Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 3 *African Human Rights Law Journal* 1-24

Remarks by Godfred Yeboah Dame Hon. Attorney-General & Minister for Justice of the Republic of Ghana at Opening of the External Sitting of the ECOWAS Community Court of Justice, Monday, 21 March 2022, Accra

Research Directorate, ECOWAS Court 'Study on the regulation of access to the Court in matters of human rights violations with regard to the need for the harmonious development of the Community Legal Order' (April 2022)

Shelton D *Remedies in international human rights law* (OUP 2015)

Taye MT 'The role of the East African Court of Justice in the advancement of human rights: Reflections on the creation and practice of the court' (2019) 27 *African Journal of International and Comparative Law* 359-377

Yannaca-Small K 'Chapter 25: Parallel proceedings' in P Muchlinski et al (eds) *The Oxford Handbook of International Investment Law* (OUP 2008)

International, Regional and Other Rights Instruments, Resolutions and Reports

African Charter on Human and People's Rights (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217

ECOWAS Declaration of Political Principles A/DCL.1/7/91, 4-6 July 1991

Economic Community of West African States Treaty (adopted 28 May 1975) 14 ILM 1200

Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171

Protocol A/P.1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005

Report of the meeting on the regulation of access to the Community Court of Justice, ECOWAS, in matters of human rights violations with regard to the need for the harmonious development of the community legal order', 10-15 April 2022, Abidjan, Côte d'Ivoire

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, on his mission to the Gambia (3-7 November 2014) UN Doc A/HRC/29/37/Add.2

Report of the work of the 70th session of the International Law Commission, 30 April-1 June and 2 July-10 August 2018 UN Doc A/73/10 (8 Aug 2018)

Rules of the ECOWAS Court of Justice 2002

Supplementary Protocol A/SP.2/06/06 of 14 June 2006

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Cases

Application of the International Convention on the Elimination of All Forms of Racial Discrimination; Qatar v United Arab Emirates (provisional measures) (2019) ICJ Reports 361

Aziagbede Kokou v Togo [2013] CCJELR 167

Case concerning *Electtronica Sicula S.p.A. (ELSI) (United States v Italy)* 1989 ICJ Rep 15

El Hadji Aboubacar v BCEAO and the Republic of Niger [2011] CCJELR 8

Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union interafricaine des droits de l'Homme, Les témoins de Jéhovah v Zaire (2000) AHRLR 74 (ACHPR 1995)

Jerry Ugokwe v Nigeria [2004-2009] CCJELR 37

Jerry Ugokwe v Nigeria and Dr Christian Okeke (intervener) ECW/CCJ/Jud/03/05 (2005)

Jurisdictional Immunities of the State; Germany v Italy: Greece intervening (23 February 2012) (2012) ICJ Rep 99

Mike Campbell (Pvt) Ltd v Zimbabwe 2008 AHRLR (SADC 2008)

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Merits) [1986] ICJ Rep 14

MOX Plant Case (Ireland v United Kingdom) (order on suspension of proceedings on jurisdiction and merits and request for provision measures) PCA Case No. 2002-01 (24 June 2003)

Mtingwi v Malawi (jurisdiction) (2016)1 AfCLR 190

Ocean King Nigeria Limited v Senegal [2011] CCJELR 139 (ECOWAS Court)

Prince v South Africa (2004) AHRLR 105 (ACHPR 2004)

Purohit and Moore v The Gambia (2003) AHRLR 96 (ACHPR 2003)

Registered Trustees of Jama'a Foundation v Nigeria ECW/CCJ/JUD/04/20 (2020)

Rencontre Africaine pour la De´fense des Droits de l'Homme v Zambia (2000) AHRLR 321

Southern Pacific Properties Ltd (SPP) v Egypt (Decision on Preliminary Objections of Jurisdiction) ICSID Case No ARB/84/3 (27 November 1985)

The Incorporated Trustees of Fiscal and Civic Rights Enlightenment Foundation v Nigeria ECW/CCJ/JUD/18/16 (2016)

Valentine Ayika v Liberia [2011] CCJELR 237

Ernest Francis Mtingwi v Republic of Malawi Decision (jurisdiction) 15 March 2013 (2016) 1 AfCLR 190

Kennedy Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48

Anyang Nyong'o v Attorney General of Kenya Ref No 1/2006 (29 March 2007)

Alex Thomas v Tanzania Judgment (merits) 20 November 2015 (2015) 1 AfCLR 465

Nosa Ehanire Osaghae v Nigeria ECW/CCJ/JUD/03/17 (2017)

Frank Ukor v Rachad Laleye ECW/CCJ/APP/01/04 (2005)

Olajide Afolabi v Nigeria ECW/CCJ/JUD/01/04 (2004)

Moussa Leo Keita v Mali ECW/CCJ/Jud/03/07 (2007)

Chief Ebrimah Manneh v The Gambia ECW/CCJ/JUD/03/08 (2008)

Hadijatou Mani Koraou v Niger ECW/CCJ/JUD/06/08 (2008)

Musa Saidykhan v The Gambia ECW/CCJ/JUD/08/10 (2010)