

CHAPTER 18

TO HAVE AND TO HOLD? ASSESSING NIGERIA'S HUMAN RIGHTS PRAXIS THROUGH ITS RELATIONSHIP WITH THE ECOWAS COMMUNITY COURT OF JUSTICE

Udoka Ndidiama Owie and Izevbuwa Kehinde Ikhimiukor***

1 Introduction

The Economic Community of West African States (ECOWAS) was established on 28 May 1975 by the Treaty of Lagos, as a vehicle of economic integration within the West African sub-region.¹ By the early 1970s, post-colonial West Africa had undergone dramatic changes with the emergence of independent sovereign states and economies that had to grapple with fitting into the global community of states and the global economy. With economic challenges as a denominating factor between the West African states, economic stability and development was an ideal to be, and was, pursued. The ECOWAS consists of 15 states, namely, Benin, Burkina Faso, Cape Verde, The Gambia, Ghana, Guinea, Guinea-Bissau, Côte d'Ivoire, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo, with an aim to promote regional cooperation and integration to raise the living standards of its people, increasing and maintaining economic stability, fostering closer relations among its members and contributing to the progress and development of the African continent.²

As in the case of other regional and sub-regional economic development organisations, a judicial body was established as an institution of ECOWAS – now the ECOWAS Community Court of Justice.³ At inception it was envisaged, that the functioning of the Court would be limited to the interpretation of the constitutive treaty establishing the Community and the settlement of disputes between member states of the Community.

* LLB (Nsukka) LLM PhD (LSE); Associate Professor, Faculty of Law, Baze University Abuja, Nigeria; Postdoctoral Fellow, Osgoode Hall Law School, York University, Canada; uowie@yorku.ca; udoka.owie@bazeuniversity.edu.ng

** LLB (Ekpoma) LLM (Sheffield) PhD (Middlesex); Barrister and Solicitor, Law Society of Ontario; izevbuwaikhimiukor@yahoo.co.uk

1 See Treaty of Lagos 1975, 1010 UNTS 17, reprinted in 14 ILM 1200 (1975). See generally O Ojo 'Nigeria and the formation of ECOWAS' (1980) 34 *International Organisation* 590-600.

2 Treaty of Lagos (n 1) art 2(i).

3 Treaty of Lagos art 4(d).

The Court has undergone fundamental re-purposing with its jurisdiction expansively revised to include the determination of cases of violations of human rights occurring in any member state with access to the jurisdiction of the Court granted to private litigants including individuals and corporations. The ECOWAS Court has cornered a niche jurisdiction over the interpretation and application of an unspecified catalogue of human rights instruments, including the African Charter on Human and Peoples' Rights (African Charter) and with its design features, it has become a reckonable force in the West African sub-region; a role which Nigeria has played a significant part. Despite its return to democracy, Nigeria's political and foreign policy spaces have been characterised by a consistent inconsistency which has contributed to challenges in the construction of a narrative surrounding its human rights praxis.

It is to this extent that the impetus for this chapter is derived and the chapter seeks to critically assess the relationship between Nigeria and the ECOWAS Court with a view to showing how the relationship, albeit with its shortcomings, has impacted on human rights governance in Nigeria. In doing so, the chapter will consider the role of Nigeria in the establishment of the ECOWAS as an organisation on the one hand and the ECOWAS Court as an institution within ECOWAS itself. It will also analyse the role of Nigeria in the jurisprudence of the Court, and this analysis will comprise not only cases where Nigeria has been a party to a case before the Court but also will include cases where Nigerian citizens and non-governmental organisations (NGOs) have been litigants before the Court. In addition, the chapter will consider the role of Nigeria in the effectiveness of the Court by addressing issues of enforcement of decisions of the Court in Nigeria. In the main, the chapter seeks to highlight the actions of Nigeria in its engagement with the Court, as well as any incongruity, in the expectation that by the presentation in the chapter, the relationship will be seen as an organic whole that should not be reduced to just its particularities; but should also inform praxis with a view to strengthening the relationship between the ECOWAS Court and Nigeria as well as the effectiveness of the Court.

2 Nigeria, ECOWAS and the ECOWAS Court: An institutional assessment

Nigeria's commitment to regional integration within the West African region pre-dates the establishment of ECOWAS in 1975 and its efforts at the institutionalisation of the concept. Following its independence from British colonialism on 1 October 1960, Nigeria has vigorously sought and pursued a Pan-Africanist ideal.⁴ In the pursuit of this ideal, Nigeria envisaged itself as being the driving force and strategically positioned itself in the actualisation of this ideal. And so, Nigeria not only opposed

4 UN Owie 'Nigeria's contributions to international human rights praxis' (2016) 22 *African Yearbook of International Law* 17-25.

Kwame Nkrumah's Continental Union Government or United States of Africa but rallied other African states in support of its opposition, arguing that political unification could only be achieved when there is economic integration which must be pursued at sub-regional levels.⁵ Nkrumah, like Sékou Touré of Guinea and Modibo Keita of Mali, had proposed continental integration of the African continent under a framework which sought the achievement if the development of the continent primarily through political strategies and means and were of the view that political unification was paramount and a prerequisite for economic unification or development. Nigeria's opposition could be seen through the simple, but not untrue, optic of its own hegemonic aspirations (as opposed to Ghana and Nkrumah's hegemonic and personal ambitions).⁶ It could also be seen from a complexity of issues which a politically unified continental government would raise for the concepts of sovereignty, political independence and territorial integrity for newly independent states in Africa. Imbued with savviness, fuelled by ambition and blinded by naivety, as Nkrumah's dream did not see the light of day Nigeria (fuelled by its vision of economic integration at the sub-regional level as well as a healthy dose of rivalry with Ghana) sought to achieve economic integration within West Africa.

The establishment of economic integration in West Africa was dominated by political discord between the Francophone and Anglophone countries. On the one hand, the rivalry between Nigeria and Ghana brewed and continued – a rivalry that is not unrelated to Ghana's independence from Britain before Nigeria as well as its withdrawal from the West African Currency Board and West African Airways, comparable economic strengths between the two countries and quest for political dominance regionally. On the other hand, there was a unification of other states against Nigeria for fears of dominance due to the political and economic strength which it wielded within the region.⁷ In a bid to counter-balance Nigeria's political and economic strength, other regional arrangements were pursued by the Francophone states under the *Communauté Economique de l'Afrique de l'Ouest* (CEAO) between Benin, Niger, Senegal, Côte d'Ivoire, Mali, Upper Volta (now Burkina Faso) and Mauritania. However, problems including concerns by some of the CEAO states about the viability of an arrangement excluding Nigeria mired these efforts. The subsequent oil boom experienced by Nigeria resulting in its economic eclipse of its West African neighbours bear out the concerns.⁸ The discord was such that even when a framework for the adoption of political unity on the African continent was established under the Organisation of African Union (OAU), economic integration within West Africa was still at least a decade away. In addition to the sub-regional

5 Ojo (n 1) 571-572.

6 R Moss 'To move a continent: Kwame Nkrumah's role in African affairs 1957-1966' *Master's degree dissertation*, Australian National University, 1970-73.

7 Ojo (n 1) 572-573.

8 Ojo (n 1) 579-581.

impediments to regional integration, Nigeria was also facing a serious internal threat by the secession of Biafra. The break out of hostilities and civil war between the Nigerian government and the Biafrans were such that the exigencies of war put regional integration on the back burners for the Nigerian government. The recognition of Biafra by Gabon and Côte d'Ivoire who pressurised France's informal recognition contributed in spurring the Yakubu Gowon-led Nigerian government towards regional integration. In the wake of the war, the Nigerian government embarked upon a diplomatic offensive which culminated in the Lomé Ministerial Meeting of 1973 which further resulted in a draft ECOWAS treaty considered and adopted at a summit in Lagos, Nigeria by 16 West African Heads of State and Government on 25 May 1975.

At inception, among the institutions of ECOWAS was included the Tribunal of the Community which was established to ensure the observance of law and justice in the interpretation of the Treaty establishing the Community as well as the settlement of disputes referred to it.⁹ The Treaty of Lagos 1975 explicitly set out the aims and purposes of the Community which focused exclusively on economic integration, stability and development within the sub-region. Despite provision in the Treaty of Lagos 1975 for a tribunal as an institution of the Community, no such tribunal was created due to the reticence on the part of Nigeria, which contributes the lion share of ECOWAS funds, 'to embrace an organ that could circumscribe its role as a regional hegemon'.¹⁰ In addition, the fact of members states' non-implementation of ECOWAS Protocols, which otherwise had no direct effect in their domestic systems, ensured that the existence of the Tribunal did not go beyond paper.¹¹

The Court in its present form was constituted in 1991 by the Authority of Heads of State and Heads of Government.¹² By a 1991 Community Protocol, the ECOWAS Court of Justice was created with the mandate to resolve disputes between Community members and interpret Community Rules.¹³

In addition to the power to interpret the constitutive treaty of ECOWAS, adjudicate disputes between member states *inter partes* or between member states and the institutions of the Community with regard to the interpretation or application of its constitutive treaty, the Court also has jurisdiction to give advisory opinion to the member states

9 Treaty of Lagos (n 1) arts 4(i)(d) & 11(i).

10 KJ Alter, LR Helfer & JR McAllister 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal of International Law* 737 746, citing KO Kufuor *The institutional transformation of the Economic Community of West African States* (2006) 2-8.

11 Alter et al (n 10) 746.

12 Protocol A/P.I/7/91 on the Community Court of Justice, 6 July 1991. It entered into force on 5 November 1996.

13 Protocol (n 12) arts 9(2) & (3). According to art 10(1) of the Protocol, the Court was granted jurisdiction to issue advisory opinions at the request of the Authority, Council, member state(s) or the Executive Secretary or any other institution of the Community.

and institutions of the Community with regard to the Treaty.¹⁴ As in the case of the Statute of the International Court of Justice, the 1991 Protocol did not provide for individual access to the Court. This was a relic of classical international law whereby states were seen as the only subjects of international law and capable of possessing rights and duties under international law. States were to espouse the claims of their citizens in international law as individuals and corporate bodies did not have access to courts.¹⁵

However, in 1993 ECOWAS was reconstituted. The constitutive instrument of the Community was substantially revised to include provisions which were not contained nor contemplated under the 1975 Treaty but which were necessitated by changes occurring internationally and the concomitant need to adapt the Community to derive greater benefits therefrom, as well as the need to modify the strategies of the Community with a view to accelerating economic integration in the sub-region.¹⁶ The Revised Treaty introduced certain fundamental principles which were to be adhered to by member states including the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.¹⁷ The Revised Treaty also provided for a Community Court of Justice, whose modalities for functioning were to be set out in a related protocol.¹⁸

The introduction of human rights into the optic of ECOWAS must be contextualised against the backdrop of developments occurring globally as well as within the sub-region. First, the end of the Cold War in 1990 resulted in a mass transition to democratic forms of government in Europe and Africa that were eager to tap into the economic policies of the Bretton Woods institutions, such as the International Monetary Fund and the World Bank which were more favourably disposed towards democratic states and insisted upon respect for human rights.¹⁹ Second, there was growing insecurity and a need to address armed conflict within West Africa, necessitating the establishment by ECOWAS of a Cease-Fire Monitoring Group (ECOMOG) in 1990 and the subsequent utilisation of military intervention through ECOMOG in two ECOWAS member states – Liberia and Sierra Leone – where gross violations of human rights had

14 Protocol (n 12) art 10.

15 Protocol art 9(3).

16 Revised Treaty 1993, Preamble, http://www.courtecowas.org/site2012/pdf_files/revised_treaty.pdf (accessed 11 October 2018).

17 Revised Treaty (n 16) art 4(g).

18 Revised Treaty arts 6 & 15(2).

19 TM Franck 'The democratic entitlement' (1994-1995) 29 *University of Richmond Law Review* 1 8. See also P Armstrong 'Human rights and multilateral development banks: Governance concerns in decision-making' (1994) 88 *American Society of International Law Proceedings* 271 280, citing World Bank Governance: The World Bank's experience (Operations Policy Department, Final Draft) 23 November 1993; UN Owie 'Towards a right to democratic governance in international law' (2016) 31 *South African Journal of Public Law* 3.

reached epic proportions in threatening international peace and security.²⁰ It is also important at this juncture to mention Nigeria's involvement in regional security under ECOWAS. Following the insurgence of the Charles Taylor-led National Patriotic Front of Liberia against the government of Samuel Doe in 1990, Nigeria under General Ibrahim Babangida, who was also the Chairperson of the Authority of Heads of Government of ECOWAS, proposed and oversaw the establishment of a Standing Mediation Committee made up of Ghana, The Gambia, Mali, Togo and Nigeria (which headed the Committee). The terms of reference of the Committee included settling disputes and conflict situations within the Community.²¹ In fulfilment of its mandate, the Committee was tasked with inquiring into the nature and character of the conflict as well as proffering solutions to end the conflict.²² As part of its solution, the Committee decided on the formation of ECOMOG,²³ as a cease-fire monitoring and peace-keeping force. The deployment of ECOMOG in Liberia was done following the refusal of the United Nations Security Council to intervene in the Liberian conflict as requested by the government of Liberia.²⁴

Nigeria bore the brunt of financing the ECOMOG mission in Liberia and contributed about 80 per cent of upkeep and cost of the mission.²⁵ It also contributed about 70 per cent of troops,²⁶ and gave economic incentives such as concessionary oil to member states of ECOWAS in exchange for joining and remaining in ECOMOG.²⁷ Nigeria's role in ECOMOG is invariably tied to its role in the functioning of ECOWAS because at the time it was seen that '[a] successful ECOMOG intervention would strengthen a largely moribund ECOWAS and create a precedent or regional cooperation that the rest of Africa could follow' as well as 'signal to the rest of the world that African nations were also ready and capable of responding to the critical economic, political and security challenges of the new world order, without prompting from erstwhile colonial powers'.²⁸ For its part, Nigeria expressly justified the establishment of ECOMOG and the deployment of the mission to Liberia from a human

20 C Gray *International law and the use of force* (2008) 294-299. ECOMOG also intervened, albeit to a lesser extent, in Guinea Bissau in 1998 and also in Côte d'Ivoire in 2002. A human rights-oriented approach is evident in the justification proffered before the United Nations Security Council for the ECOWAS intervention in Liberia in the absence of a clear constitutional basis that 'ECOMOG is going to Liberia first and foremost to stop the senseless killing of innocent civilian nationals and foreigners and to help the Liberian people to restore their democratic institutions'. See UN Doc S/21485.

21 M Pitts 'Sub-regional solutions for African conflicts: The ECOMOG experiment' (1999) 19 *Journal of Conflict Studies* 13.

22 GJ Yoroms 'ECOMOG and West African regional security: A Nigerian perspective' (1993) 21 *Journal of Opinion* 84-87.

23 A/DEC 1/8/90 in Banjul, Republic of The Gambia.

24 A Abass *Regional organizations and the development of collective security beyond chapter VII of the UN Charter* (2004) 144.

25 Yoroms (n 23) 89.

26 As above.

27 H Howe 'Lessons of Liberia: ECOMOG and regional peace keeping' (1996-1997) 21 *International Security* 145-152-153.

28 Howe (n 27) 152, citing C Akabogu 'ECOMOG takes the initiative' in MA Vogt (ed) *The Liberian crisis and ECOMOG: A bold attempt at regional peacekeeping* (1992) 86.

rights and democratic perspective to the United Nations Security Council, that 'ECOMOG is going to Liberia first and foremost to stop the senseless killing of innocent civilian nations and foreigners and to help the Liberian people to restore their democratic institutions'.²⁹ Considered against the backdrop that Nigeria was under a military dictatorship at the time which was notorious for human rights violations within Nigeria highlights the discourse concerning the incongruous nature of Nigeria's human rights praxis. While it is not without its fair share of criticisms, the abiding legacy of ECOMOG is evident in its restoration of peace (however fragile) within the West African sub-region and its jump-starting of the ECOWAS through the revision of its constitutive instrument and providing a basis for the end of the inertia of the ECOWAS Community Court and indeed, the beginning of a *sui generis* international court.

With regard to the ECOWAS Community Court of Justice, despite the 1991 Protocol which breathed life into the Court, it struggled with inertia. As it was, access to the Court was exclusive to member states and institutions of the Community. The only hope for citizens was for their states to take action on their behalf and only with respect to the interpretation and application of the Treaty.³⁰ Upon the recommendation of a Committee of Eminent Persons, that access to court should be granted to private litigants,³¹ things began to look up for the Court which seemed to have been relegated to non-existence in the first 16 years after it was envisaged and subsequently as underwhelming since 1991.

In 2001 the ECOWAS states adopted a Protocol on Democracy and Good Governance with provisions that seemed to empower the Community Court as a human rights adjudicative mechanism.³² This development radically changed the court's jurisdictional landscape as evident in *Olajide Afolabi v Federal Republic of Nigeria*.³³ In this case a Nigerian trader alleged that Nigeria, by closing its border with Benin Republic, had violated the right to free movement of persons and goods contrary to its obligations under the ECOWAS Treaty. Nigeria challenged the jurisdiction of the Court and the standing of the complainant arguing that private individuals lacked access to court under the 1991 Protocol. The Court upheld the objections of Nigeria and dismissed the suit on the ground that individuals did not have access to the Court but acknowledged that serious issues had been raised by the complainant.

The decision of the ECOWAS Court in *Afolabi* gave room for, and

29 UN Doc S/21485 (1990). See Gray (n 20) 422.

30 Protocol (n 12) art 9.

31 Committee of Eminent Persons for the Review of the ECOWAS Treaty, Final Report 16 June 1992.

32 Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, 21 December 2001; see art 39. See also F Cowell 'The impact of the ECOWAS Protocol on Good Governance and Democracy' (2011) 19 *African Journal of International and Comparative Law* 331.

33 Unreported case, Suit ECW/CCJ/APP/01/03.

impetus to, a campaign to expand the jurisdiction of the Court.³⁴ In particular, the Court was of the view that while it lacked jurisdiction over the matter that the applicant had raised important questions on free movement within the Community area and that any authorisation to receive applications from litigants had to be through member states. The Court's cautious interpretation of the 1991 Protocol could be explained against the backdrop of its history of non-existence and redundancy and not wanting any backlash from member states. The *Afolabi* case highlighted a major problem of ECOWAS – as it was, there was little or no motivation for member states to challenge regional integration and individuals who were affected by regional integration, or a lack thereof, under the ECOWAS agreements had no means of judicial redress.³⁵ This led to a coordinated campaign by ECOWAS judges, the civil society, National Bar Associations and also ECOWAS officials seeking the expansion of the jurisdiction of the Court which, very importantly, was not opposed by member states including Nigeria.³⁶ By a Supplementary Protocol in 2005, individuals and corporate bodies were granted access to the ECOWAS Court in proceedings with regard to the acts of Community officials which violate their rights as well as individuals for relief for violations of human rights in so far as the latter is not anonymous nor proceedings have been instituted before another international court.³⁷

Following the adoption of this Protocol, the right of individual access to the ECOWAS court was upheld in *Alhaji Hammani Tidjani v Federal Republic of Nigeria*.³⁸ In *Petrostar (Nigeria) Ltd v Blackberry Nigeria Ltd & Another*, the Court upheld the claims brought by the Plaintiff for breach of contract.³⁹ Likewise, an NGO registered in Nigeria successfully asserted the right of NGOs to have access to the ECOWAS Court in *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria*.⁴⁰ Furthermore, the Court has upheld, at the instance of a Nigerian NGO, the right of a people to environment favourable for development.⁴¹

In 2009, the newly-endowed jurisdiction of the Court was threatened

34 See Alter et al (n 10); ST Ebobrah 'Critical issues in the human rights mandate of the ECOWAS Court of Justice' (2010) 54 *Journal of African Law* 1; ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2009' (2010) 10 *African Human Rights Journal* 233 for a detailed and incisive account.

35 n 10, 750.

36 Alter et al argue that the success of the campaign in bringing out reforms to the jurisdiction of the Court did not address the problems of the Afolabi case. See n 10, 750.

37 A/SP.1/01/05, art 4 amending art 10 of the 1991 Protocol.

38 Suit ECW/CCJ/APP/01/06, Judgment, para 22 (28 July 2007); see also *Sikiru Alade v Federal Republic of Nigeria* Suit ECW/CCJ/APP/05/11, Judgment (11 June 2012).

39 Suit ECW/CCJ/APP/08/08, Judgment ECW/CCJ/JUD/05/11. See also *Starcrest Investment Ltd v President ECOWAS Commission & 3 Others* Suit ECW/CCJ/APP/01/08, Judgment ECW/CCJ/JUD/06/11 where the Court rejected the ability of a corporate body to bring claims as a victim of violations of human rights and not that a corporate body could not bring claims before the Community Court of Justice.

40 ECW/CCJ/APP/08/09, Ruling, paras 59-61 (10 December 2010) and ECW/CCJ/APP/08/08, Ruling, paras 33-34 (27 October 2009).

41 *SERAP v Federal Republic of Nigeria* Case ECW/CCJ/APP/09, Judgment, paras 111-112 (14 December 2012).

by The Gambia following some proceedings against The Gambia before the Court involving torture, cruel and inhumane treatment.⁴² The Gambia called for a Meeting of Government Experts and proposed an amendment of the 2005 Protocol to restrict the human rights jurisdiction of the Court to treaties ratified by member states and to require the exhaustion of local remedies. The Committee of Experts recommended against a restriction of the jurisdiction of the Court and the recommendation was unanimously adopted by the Council of Justice Ministers and resulted in the rejection of the proposal by the Council of Foreign Ministers of the member states including Nigeria.⁴³ In addition, Nigerian NGOs and prominent legal personalities campaigned vigorously against The Gambia's proposal and even sought orders from the Court to stop The Gambia's proposal.⁴⁴ As a result, the jurisdiction of the Court over human rights violations was solidified.

3 Nigeria and the ECOWAS Court: A jurisprudential assessment

Despite the establishment of ECOWAS with a view to economic integration, stability and development to improve the lives of citizens of the Community, the newly-acquired human rights competence of the ECOWAS Court has eclipsed other competences of the Court with cases of human rights violations presented to the Court concerning mostly the civil and political rights of citizens. Indeed, it has been argued that the utilisation of the Court to enforce the economic rights of ECOWAS citizens despite gross violations by member states and that 'instead, the ECOWAS Court of Justice is practically a human rights court that is solicited on various alleged violations of any possible human rights instrument'.⁴⁵

We agree with Mossner to the extent that the Court has acquired an expansive human rights jurisdiction which has been solicited by ECOWAS citizens on various allegations of violations of human rights. However, and on the contrary, ECOWAS citizens have also applied to the Court to interpret economic rules of the Community but the Court has strictly interpreted the rules as permitting challenge of the rules by only member states, to the exclusion of citizens whom the Court has held are

42 *Chief Ebrima Manneh v The Gambia*, Suit ECW/CCJ/APP/04/07, Judgment ECW/CCJ/JUD/03/08; and *Musa Saidykhan v The Gambia*, Suit ECW/CCJ/APP/11/07 (16 December 2010).

43 Alter et al (n 10) 761-764.

44 KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293 299. See also <https://www.vanguardngr.com/2009/10/serap-cdhrda-challenge-plans-to-amend-ecowas-court-powers/> (accessed 11 October 2018).

45 LE Mossner 'The multilayered system of regional economic integration in West Africa' in C Herrmann et al (eds) *European yearbook of international economic law* (2013) 329.

required to have their complaints espoused by their states.⁴⁶ Unfortunately, no suits have been filed by member states challenging non-compliance with economic rules before the Court.⁴⁷ Thus, the jurisdictional reforms embarked upon in the aftermath of the *Afolabi case* are limited and the problem which warranted the reform still lingers.⁴⁸

Nevertheless, Nigeria has provided ample opportunity for the Court to navigate the architectural landscape of its jurisdiction and competence, thus contributing to jurisprudence within the region. Very controversially, the Court has had to tread murky waters by its invitation, on the grounds of alleged violations of right to fair hearing and political participation, to decide upon the validity of elections in member states. In *Jerry Ugokwe v Federal Republic of Nigeria and Others*,⁴⁹ owing to the annulment of the election of the applicant by an electoral tribunal which was upheld by the Court of Appeal in Nigeria, an application was brought before the Community Court alleging an infringement of a right to fair hearing by the Tribunal and the Court of Appeal. By the application, it was also sought for the ECOWAS Court to restrain the Independent National Electoral Commission from invalidating the election and the National Assembly from replacing the applicant. The Court granted an interim order restraining the National Assembly from replacing the applicant.⁵⁰ Following strong political condemnation, the Court subsequently held that it had no jurisdiction to adjudicate on electoral matters.⁵¹ Likewise, in *Ameganvi and Others v Republic of Togo* the Court held that it had no competence to order the reinstatement sought by the plaintiffs into the Togolese National Assembly.⁵²

In another suit, indirectly involving an electoral matter, albeit a pre-election issue, between *Hope Democratic Party and Another v Federal Republic of Nigeria and Others*,⁵³ the applicants alleged that acts of the defendants were tantamount to political intimidation and usurpation of apparatus of state power which violated the plaintiff's right to participate in elections, and *a fortiori* right to equality before the law. The plaintiffs also challenged the non-investigation and prosecution of the third and fourth defendants' acceptance and possession of over 21 billion Naira over and above the legally-prescribed N1 billion as a breach of electoral laws and a violation of the plaintiff's right to freely contest and be freely chosen at the presidential election.

46 *Femi Falana & Another v Republic of Benin, Federal Republic of Nigeria and the Republic of Togo* Suit ECW/CCJ/APP/10/07, Judgment ECW/CCJ/JUD/02/12. See Alter et al (n 10) 756-757.

47 The Secretariat has also not filed a complaint before the Court and neither has a national judge made the required referral to the Court in this regard.

48 Alter et al (n 10) 750.

49 ECJ/CCP/APP/02/05 (7 October 2005).

50 Alter et al (n 10) 759.

51 n 46 para 19.

52 Suit ECW/CCJ/APP/12/10 (Review Judgment of 13 March 2012) Judgment ECW/CCJ/JUG/06/12.

53 Suit ECW/CCJ/APP/04/15, Judgment ECW/CCJ/JUD/19/15.

The Court, in exercising reticence, held that the first plaintiff, being a political party, was incompetent to bring suits before the Court, having no access to the Court; and that the second to sixth defendants were incompetent parties before the Court and that although the first defendant was the only proper party, the plaintiff did not allege and prove any violation or wrongdoing by the first defendant.⁵⁴ Interestingly, the Court proceeded to dismiss the case on the ground that the action had lost meaning and was devoid of purpose since the third and fourth defendants had lost the election.⁵⁵

The Court has shown an inclination towards self-restraint in cases of violation of human rights involving electoral matters. The political savviness of the Court is borne out of the history of the Court, both as non-existent as well as redundant at different stages, and the fact of its human rights jurisdiction resulting from legislative endowment as against judicial activism. The Court perhaps is mindful not to allow itself to be befallen by the fate of the Tribunal of the Southern African Development Community (SADC) which was suspended following its foray into murky political waters by its decision that to grant an order preventing Zimbabwe from removing farmland from white landowners under a government land redistribution programme.⁵⁶ Also, the capacious jurisdiction of the Court over human rights violations within the Community and its peculiar design features, including the lack of a requirement to exhaust local remedies, has made it susceptible to forum shoppers bringing purely political applications (best adjudicated by national courts) disguised as human rights violations. Applications involving elections in Nigeria have helped the Court to demarcate its competence at least regarding its authority to sit as an appellate court over national courts.

On fundamental rights, cases such as *Sikiru Alade v The Federal Republic of Nigeria*,⁵⁷ where the Court held that the detention of the applicant for a duration of nine years on a holding charge, awaiting trial violated the rights of the applicant to personal liberty under article 6 of the African Charter and ordered his release and the payment of damages to the applicant by Nigeria, have contributed to growing human rights jurisprudence not just within member states and the Community area but also on the continent. Likewise, in *Gabriel Inyang v Federal Republic of Nigeria*⁵⁸ the Court held that there was insufficient evidence for it to make a finding on whether the actions of Nigeria constituted cruel, inhuman and degrading conditions in violation of its international obligations but found that the constitution of the tribunal established under the Robbery and Firearms (Special Provisions) Act Cap 398, LFN 1990 which convicted and sentenced

54 n 53 paras 10.2, 10.3(a) & 10.3(b).

55 Para 10.4.

56 See *Mike Campbell (Pvt) Ltd & Others v Republic of Zimbabwe* [2008] SADCT 2; F Cowell 'The death of the Southern African Development Community Tribunal's human rights jurisdiction' (2013) 12 *Human Rights Law Review* 153.

57 Suit ECW/CCJ/APP/05/11.

58 Suit ECW/CCJ/APP/03/18, Judgment ECW/CCJ/JUD/20/18.

the applicants to death in 1995 as well as the powers of the governor to confirm and review the decision of the Tribunal and the deprivation of the right to the appeal the decision of the Tribunal or the governor violated the right to fair hearing under the African Charter.

The human rights jurisprudence has not been limited to commission of acts subversive of member states' obligations under human rights instruments but has also extended the responsibility of member states for omissions. Thus, in *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission*,⁵⁹ the Court had to determine whether it could exercise jurisdiction on the basis of the African Charter based on an application relating to alleged violations of the right to education against Nigeria despite the non-justiciable nature of the right to education under Chapter II of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides for directive principles of state policy which are non-enforceable against the state. The directive principles of state policy contained in Chapter II of the Nigerian Constitution have been held by the Nigerian Courts including its apex court as being not justiciable.⁶⁰ The ECOWAS Court held:⁶¹

This Court is empowered to apply the provisions of the African Charter on Human and Peoples' Rights and Article 17 thereof guarantees the right to education. It is also well established that the rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this Court. Therefore, since the plaintiff's application was in pursuance of a right guaranteed by the provisions of the African Charter, the contention of the second defendant that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold.

The Court also held, contrary to the jurisprudence from Nigerian courts requiring a plaintiff to show *locus standi* for public interest litigation, that the establishment of the existence of a public right sufficed to ground the action. However, the abrogation of the Fundamental Rights Enforcement Procedure Rules of 1979 and the adoption of a new Fundamental Rights Enforcement Procedure Rules in 2009 by the Chief Justice of Nigeria changed the procedural landscape of human rights enforcement and, among others, removed the requirement of *locus standi* as well as included the African Charter and 'other instruments (including Protocols) in the African regional human rights system' as part of the instruments that the Nigerian courts have to take cognisance of the rights contained within.⁶²

59 Suit ECW/CCJ/APP/08/08 (27 October 2009).

60 *Archbishop Anthony Okogie v Attorney General of Lagos State* (1981) 2 NCLR 337 350; see also *Shugaba v Minister of Internal Affairs* (1981) 2 NCLR 459; *Nigerian Army v Mowarin* (1992) 4 NWLR (Pt 235) 345; *Badejo v Federal Ministry of Education* (1996) 8 NWLR (Pt 464) 15; *Attorney General of Ondo State v Attorney General of the Federation* (2002) 9 NWLR (Part 772) 22.

61 n 59 para 20.

62 Art 4.

The issue of justiciability of rights that are not guaranteed under the constitutions of member states also arose in another case, *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria*,⁶³ wherein the plaintiffs this time alleged that the rights to health, an adequate standard of living and economic and social development of the people of Niger Delta in Nigeria had been violated by the failure of Nigeria to enforce laws and regulations to protect the environment and prevent pollution. The plaintiffs sought an order directing the defendants to establish adequate regulation for the operations of oil companies and to carry out transparent investigation into the activities of the oil companies.⁶⁴ The defendant asserted that the ECOWAS Court lacked jurisdiction to examine alleged violations of the International Covenant on Civil and Political Rights (ICCPR) as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) because its Constitution only recognises the jurisdiction of its domestic courts as being competent to examine violations of ICCPR and that ICESCR did not provide for the justiciability of the rights contained therein.⁶⁵ It was further argued by the defendant that the jurisdiction of the ECOWAS Court was only with regard to treaties, conventions and protocols of ECOWAS.⁶⁶ The Court rejected a narrowing of its human rights jurisdiction, asserted its legal competence with regard to international human rights instruments including ICCPR and ICESCR and held that by failing to enforce environmental legislations and regulations in force Nigeria violated the right of a people to a general satisfactory environment favourable to their development contrary to article 24 of the African Charter.⁶⁷ Thus, the non-justiciability of certain rights as directives principles of state policy does not preclude action before the Court.

In *Hembadoon Chia & 7 Others v Federal Republic of Nigeria*,⁶⁸ where the applicants had alleged a violation of the right to education, Nigeria did not raise the question of justiciability of the right under the 1999 Constitution but rather contended that the evidence of the applicants did not support their claim that it violated its obligation to provide education to its citizens nor denied any of its citizens the right to education. The Court held that there was no violation of the right to education under the African Charter as the applicants had failed to lead sufficient evidence to substantiate the claim.

As stated earlier, ECOWAS citizens have challenged the legality of actions of member states for non-compliance with Community rules. In *Femi Falana & Another v Republic of Benin, Federal Republic of Nigeria and the Republic of Togo*,⁶⁹ involving allegations of violations of freedom of

63 n 41.

64 n 41 para 19.

65 n 41 paras 20 & 24.

66 n 41 para 24.

67 n 41 above para 120.

68 Suit ECW/CCJ/APP/07/16; Judgment ECW/CCJ/JUD/21/18.

69 n 46.

movement of persons due to refusal of officials of the Republic of Togo to allow the plaintiffs passage to Lomé on grounds of closure of border due to presidential elections, the plaintiffs sought, *inter alia*, a declaration that the defendants have no powers to close the borders and erect check points and toll gates in the member states of ECOWAS by virtue of Protocol A/P1/S/79 relating to Free Movement of Persons, Residence and Establishment as well as article 12 of the African Charter. The Court found that article 12 of the African Charter guaranteed freedom of movement within a state and that there was no restraint of the plaintiffs within Nigeria and Benin; rather that free movement between member states of ECOWAS was regulated by the Protocol on Free Movement which was not absolute but conditional upon matters of national security.⁷⁰ In addition, the Court held that the case was statute barred, the cause of action having arisen more than three years before the application was filed.⁷¹ Relying on a Resolution of the United Nations General Assembly,⁷² the Court stated that while limitation periods apply to human rights cases, that there is an exception in cases of gross violations of rights and serious violations of international humanitarian law but found in the instant case that the right involved could not be characterised as such.⁷³ The decision gives hope to victims that the Court would not be shackled by technicalities where gross violations of human rights are involved.

In *Kemi Pinheiro (SAN) v Republic of Ghana*, an application was filed by a Nigerian applicant against Ghana pursuant to the African Charter and the ECOWAS Protocol on Free Movement of Persons, Right of Residence and Establishment.⁷⁴ The applicant in alleging a violation of his rights by the Ghana Law School's denial of access to qualifying examinations contended that the deprivation of his right to establishment as guaranteed by articles 1 and 2 of the Supplementary Protocol violated articles 20 and 22 of the African Charter and was illegal. It is noteworthy that the said provisions of the African Charter deal with the right of 'people' to existence, self-determination and development. The Court affirmed the right to establishment of ECOWAS citizens in any member state of the Community other than their state of origin, and added that a failure by member states to internally implement a Community Protocol is a violation of a State's treaty obligations.⁷⁵ However, the Court found that the rights relied on by the applicant in articles 20 and 22 of the African Charter are collective rights and not individual rights.⁷⁶

The Court went further to hold that while individuals have access to the Court against member states for violations of its obligations enshrined in Community instruments, only member states or the ECOWAS

70 n 46 para 33.

71 n 46 paras 25-29.

72 Resolution 60/147 (16 December 2005).

73 n 46 paras 30-31.

74 ECW/CCJ/APP/07/10 (6 July 2012).

75 n 74 paras 43-45.

76 n 74 paras 36, 38.

Commission have access to the Court to compel a defaulting member to fulfil its obligation.⁷⁷ Thus, the recourse of a Community citizen who has been a victim of an alleged violation of a right contained in the Community Protocol is to have his state espouse the claim and file an action before the Community Court against the defaulting member state or to file an action against the defaulting state 'addressing the domestic jurisdiction of the state where the alleged violation took place'.⁷⁸

In *Dasuki v Federal Republic of Nigeria*, following challenges, by way of preliminary objection, to the jurisdiction of the ECOWAS Court to hear the plaintiff's application, the Court ruled that it had jurisdiction to entertain the case brought against Nigeria by the National Security adviser to the former Nigerian President alleging a violation of his right to liberty as guaranteed under the African Charter following the refusal by government security operatives to release him from detention despite having been granted bail and court orders to release him.⁷⁹

The Court, as an international court of which human rights forms part of the core of its jurisdiction, is unique in the sense that litigants are not obligated to exhaust local remedies. Thus, there is no requirement that individuals have to pursue national judicial remedies before instituting an action before the Court in contradistinction to the international rule and praxis whereby claimants of human rights violations are obligated to first attempt to remedy such violations under national law because states are the primary enforcers of human rights, even when stipulated in international instruments.⁸⁰ Rather the only limitation on the Court assuming jurisdiction is that the action should not be before any other international court. Indeed, the Court has upheld this in a plethora of decisions where its jurisdiction has been challenged, including the celebrated decision in *Hadjiatou Mani Karou v Niger*,⁸¹ as well as in *Gabriel Inyang v Nigeria*.⁸² This position is markedly different from what obtains under the European Convention on Human Rights 1950.⁸³ By the 1993 Revised Treaty, member states of ECOWAS had affirmed and declared their adherence to the recognition, promotion and protection of human rights in accordance with the African Charter; and the African Charter expressly provides for the exhaustion of local remedies rule in

77 n 74 para 48.

78 n 74 para 49.

79 ECW/CCJ/APP/01/16 (11 April 2016).

80 The rule of exhaustion of local remedies is that '[a] state should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question'. See C Trindade *The application of the rule of exhaustion of local remedies in international law: Its rational in the international protection of individual rights* (1983) 1. See also S d'Ascoli & KM Scherr 'The rule of prior exhaustion of local remedies in the context of human rights protection' (2006) 16 *Italian Yearbook of International Law* 117.

81 ECW/CCJ/JJD/06/08 (27 October 2008).

82 n 58.

83 ETS 5 art 35(1). It entered into force on 3 September 1953.

the enforcement of human rights.⁸⁴ Yet, the ECOWAS Protocol departs from this rule of international law. It is instructive to note that even the European Court has recently decided to relax its approach to the local remedies rule in a bid to ensure access to justice.⁸⁵

The Court has been afforded the opportunity to specify the limits of its jurisdiction. In *SERAP v Nigeria*⁸⁶ and *Chief Damian Onwuham (Alabeke) v Nigeria*,⁸⁷ the EECJ held that only member states and institutions of the Community can be sued for human rights violations and that jurisdiction will be founded upon whether there has been an alleged violation of an international or community obligation by member states and not whether member states are directly involved in the actual commission of the alleged acts.⁸⁸ Also, in *Ocean King Nigeria Ltd v Republic of Senegal*,⁸⁹ where the applicant alleged that the seizure of its vessel amounted to piracy in breach of the ECOWAS Treaty and the African Charter and that the divestiture of its ownership of the vessel without being informed violated its right to own property, its right to move freely within the ECOWAS member states and its right to a fair trial, the Court held that the only individuals have access to the Court for violation of human rights under article 10(d) of the Supplementary Protocol 2005. In *David v Uwechue*⁹⁰ the Court addressed its competence to adjudicate an action between individuals.⁹¹

In setting out its practice and procedure, the ECOWAS Court has resolved issues of evidential and legal burden of proof in its proceedings in *Petrostar (Nig) Ltd v Blackberry Nig Ltd & Another*.⁹² In this case the Court held that the burden of proof of a fact was on the party asserting the existence of the fact and that it is only when an applicant has discharged the onus of proof of a fact that the evidentiary burden shifts to a respondent. In *Femi Falana v Republic of Benin*⁹³ the Court held that the standard of proof in civil cases is on a preponderance of evidence and it also held in *Gabriel Inyang v Nigeria*⁹⁴ that the proof of a fact can be either by production of documents, oral testimony or production of material for examination by the Court. Also, in *Aliyu Tasheku v Federal Republic of Nigeria*⁹⁵ the ECOWAS Court considered whether a fundamental human right, constitutionally recognised before national courts, was analogous

84 CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), art 50. It entered into force 21 October 1986.

85 *Er & Others v Turkey* Application 23016/04 (Judgment of 31 July 2012).

86 n 41.

87 Suit ECW/CCJ/APP/13/14, Judgment ECW/CCJ/JUD/22/18.

88 n 87.

89 ECW/CCJ/APP/05/08 (08 July 2011).

90 Suit ECW/CCJ/APP/04/09, Judgment ECW/CCJ/RUL/03/10.

91 See also *Chief Frank Ukor v Rachad Laleye* unreported case, Suit ECW/CCJ/APP/01/04, brought by an individual against another individual and though the issue of jurisdiction of the Court over two individuals was also before the Court, the Court limited itself to whether individuals had access to the Court and on that ground dismissed the matter.

92 n 39. See also *Onwuham v Nigeria* (n 87).

93 n 46.

94 n 58.

95 Judgment ECW/CCJ/RUL/12/12.

with an international human rights application before the Court such as to ground an argument concerning *res judicata*. The Court consequently held that the rights concerned in the application were essentially the same as had been litigated before the Nigerian courts and declared the application inadmissible.

An assessment of Nigeria's involvement in the ECOWAS Court institution would be incomplete without an assessment of Nigeria's role in the effectiveness, or lack thereof, of the Court. The actions of Nigeria in this regard point to a clear inconsistency. The Supplementary Protocol of 2005⁹⁶ provides that judgments of the Court that have financial implications for member states are binding and that decisions of the Court are to be executed *vide* a writ of execution submitted to member states for execution in line with their domestic civil procedure rules. To facilitate this process, member states are expected to have designated an authority within the state to receive, process and notify the Court of the execution of its writs. The ECOWAS Revised Treaty prescribes penalties and sanctions that may be imposed on member states that fail to honour their obligations and commitments under the legal texts of the Community. The authority to impose these measures is vested in the Authority of the Heads of State and Government of member states who may impose a range of sanctions including suspension of new Community loans or assistance to erring member states, exclusion of the member state from presenting candidates for statutory and professional posts, and suspension of the erring member state or states from participating in activities of the Community.⁹⁷

Despite having accepted these provisions, and even being one of the few countries that has designated a national authority pursuant to article 6 of Supplementary Protocol of 2005, Nigeria has not always cooperated with the Court in the enforcement of its decisions. However, Nigeria's actions have not been one-dimensional such as to make an assessment in this regard clear, one way or the other and two cases are worthy of specific and important mention. In the case of *Jerry Ugokwe*,⁹⁸ despite the controversial and highly-politicised nature of the interim order of the Court over a matter which an election petition tribunal as well as the Court of Appeal as the final court had adjudicated upon, the Nigerian government complied with the interim order of the ECOWAS Court until the Court's *volte-face*. Likewise, in the *SERAP* case there were observable changes in its policy making at the level of ministries, departments and agencies, which ensured better regulation of environmental activities of oil companies in Nigeria, increased stakeholder consultation in environmental impact assessment exercise in Ogoni region and the launch

⁹⁶ Art 6.

⁹⁷ n 16 arts 77(1) & (2). The challenge lies in the Authority of Heads of State and Government applying the letters of the law to sanction an erring member state, but given the politics of the sub-region and the fact that most of the member states are guilty of the failure to implement their obligations and enforce decisions of the ECOWAS Court, it remains doubtful if sanctions would be meted out to member states who fail to honour their obligations in the foreseeable future.

⁹⁸ n 49.

of the clean-up of Ogoni land,⁹⁹ as well as a revision of the national policy on the environment to include environmental remediation, maintenance of up-to-date records of all spills and minimisation of interference with host community rights.¹⁰⁰

For a state of which its constitution adopts a dualist approach regarding the relationship of international law and national law thus making the ECOWAS Revised Treaty and Supplementary Protocols not directly applicable in Nigeria (a position confirmed in *Abacha v Fawehinmi* by its Supreme Court),¹⁰¹ the question of status of the ECOWAS Court and enforcement of its decisions is not clear-cut and the inconsistency of Nigeria's actions obfuscates the question both theoretically and practically. To detail the devil in this problem is to consider the position of the ECOWAS treaties *vis-à-vis* Nigerian law and the implication of the *SERAP* cases.

Section 12 of the Constitution of the Federal Republic of Nigeria provides that a treaty entered into by Nigeria can only have the force of law if subsequently enacted into law by an act of the National Assembly. The Nigerian Supreme Court affirmed this position in *Abacha v Fawehinmi* and stated the supremacy of the Nigerian Constitution over an unincorporated treaty to which Nigeria is a party.¹⁰² Chapter II of the Nigerian Constitution contains as fundamental objectives and directives of state policy certain social and educational objectives covering the right to education, health and environment as provided under the African Charter. The Nigerian Supreme Court has held in a plethora of cases¹⁰³ that unlike Chapter IV of the Constitution on Fundamental Rights, Chapter II is non-justiciable and unenforceable against the government. In the *SERAP* cases the ECOWAS Court held, contrary to the objection of Nigeria, that the rights to education and the environment under the Charter are justiciable.¹⁰⁴ This creates a quandary of normative contestation heightened by the absence of political will by Nigeria to follow through with obligations assumed under international law.

The enforcement mechanism of the ECOWAS Court and its powers in this regard are integrated in the Revised Treaty, the 1991 Protocol and Supplementary Protocol of 2005. The Revised Treaty of ECOWAS

99 <http://www.environment.gov.ng/ogoni> (accessed 11 October 2018).

100 UB Akamabe & G Kpae 'A critique on Nigeria National Policy on Environment: Reasons for policy review' (2017) 3 *International Journal of Geography and Environmental Management* 22 30.

101 (2000) 6 NWLR (Pt 660) 228.

102 As above.

103 *Archbishop Anthony Okogie v Attorney General of Lagos State* (1981) 2 NCLR 337 350; see also *Shugaba v Minister of Internal Affairs* (1981) 2 NCLR 459; *Nigerian Army v Mowarin* (1992) 4 NWLR (Pt 235) 345; *Badejo v Federal Ministry of Education* (1996) 8 NWLR (Pt 464) 15; *Attorney General of Ondo State v Attorney General of the Federation* (2002) 9 NWLR (Pt 772) 22.

104 On the problem of enforcement of ECOWAS Court decisions, see ES Nwauche 'Enforcing ECOWAS law in West African national courts' (2011) 55 *Journal of African Law* 193-200.

provides that the judgments of the ECOWAS Court are binding,¹⁰⁵ and member states are required to take all necessary measures to ensure execution of the judgment of the Court.¹⁰⁶ As stated earlier, decisions of the Court are to be executed vide a writ of execution submitted to member states for execution in line with their domestic civil procedure rules. In the case of Nigeria, the Foreign Judgments (Reciprocal Enforcement) Act provides the legal framework for registration and enforcement of the judgment of a court other than a court established under the Constitution of the Federal Republic of Nigeria. The judgments of the ECOWAS Court are immediately binding upon member states and the execution of a judgment can only be suspended by the ECOWAS Court itself, yet by section 12 of the Nigerian Constitution the applicability of these provisions is subject to an Act of the National Assembly transforming them into national law enforceable in Nigeria.

The assertion of direct applicability of ECOWAS law in national systems is more representative of the situation in the Francophone and Lusophone member states that adopt a monist approach, at least in theory, to the issue of the relationship between international law and national law. With regard to the Anglophone states, such as Nigeria, which lean towards a dualist approach, assertions of direct applicability of treaties is based more on 'inferences and moral justifications than on sound legal premises', and 'ultimately, the manner in which the contestations over supranational and municipal law dichotomy are addressed would also depend on political will, not just constitutional dicta'.¹⁰⁷ To bypass the quandary foisted upon by dualism, reliance has been placed on the principle of legitimate expectation articulated by the Supreme Court in *Abacha v Fawehinmi*,¹⁰⁸ by arguing that the language of the ECOWAS Treaty is indicative of a general expectation against the backdrop of the clear promise by the Authority of Heads of State and Government to give up part of the sovereignty of the state for the intentions stated in the treaties.¹⁰⁹ Furthermore, it has been argued based on the actions of the Attorney-General of the Federation of Nigeria obeying the interim order of the ECOWAS Court in the *Jerry Ugokwe* case, that the behaviour of executive arm of the federal government of Nigeria is suggestive of an expectation that the judgments of the ECOWAS Court are binding on Nigeria and that the judiciary can follow suit based on the 'endorsement of the legitimate expectation principle' and on the principle of international responsibility.¹¹⁰

To say that there is an endorsement of the principle of legitimate expectation by the Nigerian Supreme Court seems far-fetched. First, the

105 Art 15(4).

106 Art 22(3).

107 H Chuma-Okoro 'The Nigerian Constitution, the ECOWAS Treaty and the judiciary: Interplay of roles in the constitutionalisation of free trade' (2015) 4 *Global Journal of Comparative Law* 43 65.

108 (2000) 6 NWLR (Pt 660) 228.

109 Chuma-Okoro (n 107) 68.

110 n 107 68-69.

judgment acknowledged the dualist nature of the Nigerian constitutional system whereby a treaty which has not been passed into law by the National Assembly is unenforceable in Nigeria. This is a valid position because the Constitution, as the *grundnorm* of every state and the *fons et origo* of its sovereignty, prescribes the powers of the state, the powers to enter into international relations with other states and its relationship with international law. Second, it recognises that unincorporated treaties are not without effect. It is a fundamental principle of the law of treaties that a state may not rely on its domestic law to avoid its international obligations. Thus, the violation of an obligation under an unincorporated treaty may result in state responsibility under international law even if unenforceable under municipal law. This is at the heart of the theory of dualism whereby international law and national law are separate systems in contradistinction to a monist system whereby international law and national law are part of a unitary system with international law at the apex. This is exactly what the Supreme Court meant when it talked about an unincorporated treaty possibly having an indirect effect in the way a statute is construed or possibly causing a legitimate expectation with the citizens that the international obligations assumed by a state would moderate the actions of the state in line with its international obligations. It is merely a re-statement of a principle of international law. International law does not, and cannot, arrogate a competence to prescribe national law and how municipal systems receive international law which is purely a matter of constitutional appreciation and prescription. Third, and very importantly, the issue of an unincorporated issue was not in issue before the Court as the African Charter had been ratified by the National Assembly in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983.

The binary of monism and dualism in analysing the effect of decisions of the ECOWAS Court in member states is flawed and further complicates an already complex issue in international law. This is because of the inherent limitations of each theory in explaining the complex relationship between international law and national law in the practice of states and its inability to provide a holistic framework for the enforcement of international human rights at the domestic level. Inconsistency in state practice is not only regarding Nigeria as even other dualist states have applied unincorporated treaties.¹¹¹ Despite the dismissal by a High Court sitting in Accra of an application *In the Matter of Mr Chude Mba v The Republic of Ghana*,¹¹² to enforce a judgment of the Court obtained against Ghana on the grounds that Ghana's non-domestication of the ECOWAS Protocols meant that the decision of the Court could not be enforced in Ghana, the Ghanaian Supreme Court in *New Patriotic Party v IGP*,¹¹³ despite the fact that no law had been passed giving effect to the African Charter in Ghana, held that the African Charter could still be relied upon

111 Nwauche (n 104) 187-189.

112 Suit HRCM/376/15 (unreported).

113 [1993] NLPR 73.

to found a cause of action. In similar fashion, even monist states may avoid the direct application of international law through the idea of it not being self-executing, thus requiring further action by its legislature.¹¹⁴ However, insufficient as the theories of monism and dualism may be, they provide a convenient and consistent analytical framework for the assessment of the complex issues, albeit preliminary.¹¹⁵

While the Revised Treaty and Protocols of the Court envisage a direct effect on member states such that Community law may be invoked before national courts of member states, the effect of this could result in Community law clashing with and asserting precedence over the Constitution as aptly illustrated above by the *SERAP* case. While this problem exists and lingers, it does not bode well for the ECOWAS Court for Nigeria to ignore the elephant in the room, so to speak.

4 Conclusion

The relationship between Nigeria and the ECOWAS Court has contributed to human rights governance and democratic growth in Nigeria; and continues to do so. In a region traumatised by human rights violations, anomie, political instability and volatility, the re-purposing of the ECOWAS Community Court to include an expansive human rights jurisdiction remains laudable as an important means for the achievement of the social, economic and political development of the West African sub-region, and indeed the continent. Where the Nigerian courts have been constrained by constitutional impediments or political interests of the executive, the ECOWAS Court has not been so constrained. As a result of which, the Court has been leveraged by citizens and human rights activists in Nigeria seeking the expanded fora for human rights enforcement.

The reliance of the ECOWAS Court on national legal systems for the enforcement of its decisions renders the Court vulnerable to member states of the Community. Without member states enforcing and implementing the decisions of the Court, the Court is limited. Yet, all too often member states, including Nigeria, have failed to discharge their responsibility towards the Court resulting in high levels of lack of enforcement of its judgments. Enforcement is a continually challenging problem of international law and is part of its uniqueness as a system of law. If employed as the only metric in assessing the effectiveness of international law or international organisations, then they are exposed as weak systems and rendered susceptible to being assessed from only their weakness to the exclusion of their strengths. However, if effectiveness is conceptualised, and preferably so, in terms of modification of state

114 J Paust 'Self-executing treaties' (1988) 82 *American Journal of International Law* 760. See also Nwauche (n 104) 188.

115 See generally R Higgins *Problems and processes: International law and how we use it* (1994) 205-210; J Crawford *Brownlie's principles of public international law* (2012) 48-58; E Denza 'The relationship between international law and national law' in M Evans (ed) *International law* (2006) 412-440.

behaviour and not necessarily on the particularity of enforcement, then the story of the relationship of the ECOWAS Court and Nigeria transcends a reductive narrative into one that takes cognisance of the actions of Nigeria in the *Jerry Ugokwe* case and the policy changes in Nigeria in the wake of the *SERAP* case as well as the increased participation of activist forces and voices in the human rights regulatory space in Nigeria. In a similar vein, the inconsistency in Nigeria's human rights praxis as well as the ambivalence in its political and foreign policy space cannot be the only metric for assessment of Nigeria's relationship with the ECOWAS Court. Similar to any relationship, the shortcomings cannot, and do not, define or provide an aggregate picture of the dynamic and organic nature of the engagement. This must be taken into account in the construction, or deconstruction, of a narrative in this regard. Through its involvement in the establishment and evolution of the Court, Nigeria has facilitated regional human rights norm setting. Likewise, the resort to the Court by Nigerian citizens, which was made possible by member states, including Nigeria, has presented important opportunities for the Court by galvanising multi-stakeholder action in crafting a human rights jurisdiction for the Court for the enforcement of rights and fundamental freedoms guaranteed under the African Charter, even beyond other regional courts in Africa.

The Court portends more success towards the achievement of the objectives of not only the ECOWAS, but also of the African Union. The Court has had the opportunity to engage complex human rights issues that the African Commission and the African Court have not had a similar opportunity to address. It has made important contributions to regional human rights jurisprudence especially in view of the fact of the underwhelming performance of domestic courts and the supervisory mechanisms under the African Charter. Undoubtedly, the ECOWAS Court has contributed to the changing architecture of human rights governance in Nigeria, and indeed within the West African sub-region as well as on the continent.

The ECOWAS Court and member states have come a long way since the adoption of the Supplementary Protocol, with commendable strides recorded by the Court and member states working together. However, more needs to be done. Member states have to find the political will to take the necessary and vital steps to ensure that they discharge their obligations under the legal texts of the Court and that they are not advertently, or inadvertently, undermining an institution they have all come together to establish and empower. This is a challenge that the ECOWAS Court, Nigeria and indeed all member states are tasked with surmounting.