

## Acronyms

African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Report
AU	African Union
EACJ	East African Community Court of Justice
ECJ	European Court of Justice
ECCJ	ECOWAS Community Court of Justice
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EU	European Union
IACHR	Inter American Commission of Human Rights
IACtHR	Inter American Court of Human Rights
ICJ	International Court of Justice
IGO	Intergovernmental Organisation
OAS	Organisation of American States
RADH	Recueil Africain des Décisions des Droits de l'Homme
REC	Regional Economic Community
RIGO	Regional Intergovernmental Organisation
SADC	Southern African Development Community
UNTB	United Nations Treaty Bodies
VCLT	Vienna Convention on the Law of Treaties

## Summary of the thesis

The Economic Community of West African States (ECOWAS) was created in 1975 with the main aim of achieving political and economic integration among the 15 member states of the region. In its founding treaty, ECOWAS established a tribunal which was entrusted with a mandate to supervise the application and interpretation of Community norms. However, the tribunal thus established remained in limbo until it was replaced by a Court of Justice through a Protocol adopted in 1991. A series of events subsequently occurred and changed the fate of the ECOWAS Court of Justice (ECCJ), propelling it to the forefront of international human rights adjudication.

In response to regional challenges and changes on the international scene which occurred in the late 1990s, ECOWAS revised its founding treaty in 1993 and expressly mentioned the African Charter on Human and Peoples' Rights as the normative compass for realising Community objectives. This reform did not have much impact on the operation of the Court and its jurisdiction as, under the 1991 Court Protocol, individual complaints had to be instituted by member states on behalf of their citizens. In the absence of state-led complaints, the initial bench of judges was appointed in 2003 but the ECCJ did not hear a single case until 2004 when it had to reject its first individual application for lack of jurisdiction. In 2005, ECOWAS reacted to that limitation by adopting a Supplementary Protocol which, among other things, allowed the ECCJ to receive individual complaints of human rights violations.

Endowed with a rebranded mandate, over time the ECCJ drew its material jurisdiction from the Revised Treaty's reference to the African Charter and read the silence of its Protocols as allowing complainants to institute human rights cases without exhausting local remedies as traditionally required in similar international proceedings. The scene was set, and between 2005-2012, the ECCJ announced itself in the arena of international courts by delivering some of the most significant human rights judgments. Issues adjudicated by the Court include slavery, arbitrary arrest and detention, fair trial, torture, education, and environmental pollution. In cases where it found a violation of rights in the African Charter, the ECCJ granted various categories of relief ranging from orders to immediately release the complainant to the payment of compensation up to \$200,000.

As the Community Court grows into an attractive human rights forum in the region, questions arise as to the tangible effects of its jurisprudence not only in particular cases which it has adjudicated but moreover regarding the development of the entire regime supporting its operation. This study investigates the effectiveness of the human rights jurisprudence of the Court as well as its influence on the domestic systems of member states and beyond the Community. Discussing nine merits judgments delivered by the ECCJ between 2005-2012, the study reveals that defendant states complied in 66 per cent of the cases. Of the three judgments that were not complied with, two involved a state known for its poor human rights, rule of law and both domestic and international

compliance records. Cases selected are those in which the ECCJ made a specific order for defendant states to carry out.

Various reasons may explain states' behaviour towards the ECCJ's decisions. Main reasons for compliance include the political environment of the case and the nature of the remedy granted by the Court. Non-compliance instances were mainly explained by the nature of the government of the day and the nature of the rights violated and remedy afforded. It also appears that defendant states are more eager to pay compensation and undertake administrative measures than take thorough policy or legislative action. Importantly, the ECCJ's jurisprudential policy was brought to bear on compliance.

As far as the influence of the Court's jurisprudence is concerned, the study found that decisions of the ECCJ are impacting on the domestic systems of defendant states, including the executive, judiciary and legislature. The level of influence however varies from one organ of the state to the other. As a general trend, of the three arms of state, courts appear to be the leading conveyers of influence, while executives have yet to fully play their part in giving a comprehensive effect to the jurisprudence of the Court. For instance, domestic courts have adjusted their jurisprudential policies or shaped the Community Court's jurisprudence in a manner that prevents clashes through resistance. Conversely, executives and legislatures have missed valuable opportunities to address such important issues as the improvement of socio-economic rights or curbing slavery.

The human rights jurisprudence of the ECCJ has also begun to be echoed beyond West Africa. Such impact is exemplified by references to the work of the Community Court at the levels of the African Union, the African Commission on Human and Peoples' Rights, the United Nations human rights mechanisms, and in other international bodies including the International Court of Justice. In all, state compliance with decisions of the Court is good, and although it has yet to reach the irradiating model of the European human rights system, the West African Court has established itself as an effective forum in that part of the African continent. Compared with the African Commission and Court, which are its main 'competitors' in the region, the ECCJ appears to be more attractive through, among other factors, its proximity and direct access for individuals, the length of time to complete cases, remedies afforded and state compliance. With no doubt, the Court bears the promise of standing as a reknown international court if it maintains its current trends. The major recommendations made by the study in that line are for the Court to continue adjudicating with caution and favor cooperation in making use of both the judicial and political monitoring mechanisms in place to improve state compliance with its decisions.

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## Chapter I: Introduction

### 1. Background to the study

At a press conference in Dakar, Senegal, on 17 May 2006, Honourable Justice Hansine N Donli, then President of the ECOWAS Court of Justice, declared the following: ‘The Court is working in close harmony with domestic courts for the enforcement of its decisions’.<sup>1</sup> In the same vein, Judge Robert Jennings, former President of the International Court of Justice, is quoted to have once asked: ‘The judgments of the Court are binding in law, but do they, in fact, resolve the matter?’. He added: ‘More work needs to be done here. It is ironic that the Court’s business up to delivery of judgment is published in lavish details, but it is not at all easy to find out what happened afterwards’.<sup>2</sup>

The role of courts in giving effect to rights has been discussed at length.<sup>3</sup> The main idea is that courts uphold rights by acting as procedural remedies where rights are violated for without remedies rights are meaningless.<sup>4</sup> The importance of the role played by courts in protecting rights is recognized under both municipal and international law. Particularly from a human rights perspective, states have an obligation under United Nations instruments to provide for effective remedies, including independent and impartial

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<sup>1</sup> See Panapress ‘Dix plaintes déposées devant la Cour de justice de la CEDEAO’ <http://www.panapress.com/Dix-plaintes-deposees-devant-la-Cour-de-justice-de-la-CEDEAO--12-63305-0-99-lang4-index.html> (accessed 19 February 2011).

<sup>2</sup> R Jennings ‘Increasing the effectiveness of the International Court of Justice’ cited in C Paulson ‘Compliance with final judgments of the International Court of Justice since 1987’ (2004) 98 *The American Journal of International Law* 434.

<sup>3</sup> See for instance, A An-Na’Im ‘To affirm the full human rights standing of economic, social and cultural rights’ in Y Ghai & J Cottrell (eds) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) 7-16; NJ Udombana ‘Interpreting rights globally: Courts and constitutional rights in emerging democracies’ (2005) 5 *African Human Rights Law Journal* 47; I Soumanou ‘Contribution de la Cour Constitutionnelle à la consolidation de l’Etat de droit au Bénin’ mémoire de DEA Chaire UNESCO des Droits de la Personne et de la Démocratie Faculté de droit et de sciences politiques Université d’Abomey-Calavi (2005-2006) 75 ; and K Bonneau ‘Le droit à réparation des victimes de violations des droits de l’homme: le rôle pionnier de la Cour interaméricaine des droits de l’homme’ *Droits fondamentaux* no janvier-décembre (2006) 2.

<sup>4</sup> See D Diderot *Droit Naturel* (1740) reedited in D Collin (ed) (2002) *Les classiques des sciences sociales* 3. See also, D Shelton *Remedies in international human rights law* (2005) 10, GM Musila ‘The right to an effective remedy under the African Charter on Human and Peoples’ Rights’ (2006) 6 *AHRLJ* 442.

national courts, to vindicate protected rights should violation occur.<sup>5</sup> At the national level, international pledges are translated through constitutions and other laws which offer fair processes and remedies when protected rights are infringed.

These principles also apply to general international law. As the law of states in its essence, international law recognizes the role of courts in giving effect to states' rights and obligations under instruments to which they are party.<sup>6</sup> As a matter of fact, states have adopted a Charter and established an International Court of Justice<sup>7</sup> to settle their disputes and protect their 'rights' to equality, self-preservation, independence, respect, and intercourse.<sup>8</sup> In fact, prior to the creation of the United Nations and the subsequent development of international human rights law (IHRL), states have dominated the arena of international law as the main if not the only actors, particularly in litigation.

However, international law has seen unprecedented changes since the creation of the United Nations. International adjudication has gathered momentum along with the development of international human rights law (IHRL). The operation of United Nations human rights treaty bodies and the establishment of supranational judicial forums have increased international human rights litigation. Human rights courts have been established under regional treaties in Europe, the Americas, and Africa. An Asian system is underway.<sup>9</sup>

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<sup>5</sup> See for example, para 1 of the preamble, arts 8 and 10 of the UDHR, para 1 of the preamble, arts 2(2), 2(3) and 14 of the ICCPR. Even the ICESCR proclaims, in its preamble, the recognition of rights as the foundation for justice and peace in the world in accordance with the principles of the Charter of the United Nations. See also, at the regional level, African Charter on Human and People's Rights (ACHPR), art 7; American Convention on Human Rights (American Convention), art 25; and the European Convention on Human Rights (ECHR), art 13.

<sup>6</sup> See J Dugard *International law: A South African perspective* (2011) 4-5. See also, JL Brierly *The law of nations: Charter of modern system* (1949) 49 and PM Dupuy *Droit international public* Dalloz (ed) 2006.

<sup>7</sup> See Charter of the United Nations, 1945, art 7.

<sup>8</sup> As enumerated by Brierly (n 6 above).

<sup>9</sup> See for instance, D Shelton 'The promises of regional human rights systems' (2006) in RP Claude & BH Weston (eds) *Human rights in the world community: Issues and action* 356-357; C Heyns & M Killander 'Toward minimum standards for regional human rights systems' (2010) in Mahnoush H. Arsanjani et al (eds) *Looking to the future: Essays on international law in honor of W. Michael Reisman* 546-548 and JP Beya 'Droits de l'homme ou valeurs asiatiques?' (1996) 33 in *Perspectives chinoises* 68-69. See also, Asian Human Rights Commission <http://www.ahrchk.net/index.php> (accessed 3 March 2011).

In short, IHRL has changed the outlook of international law litigation. Particularly, it has elevated individuals as subjects of international law.<sup>10</sup> Over the four decades following the operation of the first United Nations human rights treaty bodies, international law has designed new regimes providing for individual and group complaints along with inter states disputes.<sup>11</sup> As a consequence, extensive litigation has changed the profile of courts into direct international law enforcers. Regional Intergovernmental Organisations (RIGOs) have been the principal laboratories of these new trends in international law. In fact, the proliferation of international courts vested with jurisdiction to deal with Community (commercial, trade) law disputes or human rights complaints or both was mainly favoured by regionalism.

In its minimalist definition, regionalism could be understood as a limited number of states linked together by a geographical relationship and a degree of mutual interdependence. A more comprehensive understanding expands ‘regionalism’ to ‘regionness’, which encompasses a greater social cohesiveness in ethnicity, race, language, history, trade patterns, economic complementarity, and formal regional institutions.<sup>12</sup> The element of regionness – increasing cohesion – contained in what is termed as ‘new regionalism’ has been suggested as being central to an effective achievement of the very purposes of regional integration. In accordance with this line of reasoning, the viability of a region will mainly depend on the extent to which it becomes functional and operational. In support of that prerequisite, the sub-concept of ‘actorness’ has been formulated as the increasing capacity of a region to act, and eventually become an actor that shapes the world order.<sup>13</sup>

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<sup>10</sup> See K Traisbach ‘The individual in international law’ paper presented at the Irmgard Coninx Foundation, the Social Science Research Centre Berlin and Humboldt University Workshop on ‘Reframing human rights III: Secular and religious sources of human rights’ (17-20 May 2006) Introduction. See also, M Longo ‘Hostile receptions: Dilemmas of democracy, legitimacy and supranational law’ (2004) 50 *Australian Journal of Politics and History* 211-228 and AL V Chaumette *Les sujets du droit international pénal: vers une nouvelle définition de la personnalité juridique internationale?* Pedone (2009).

<sup>11</sup> See R Lavergne ‘Reflections on an agenda for regional integration and cooperation in West Africa’ *Regional integration and cooperation in West Africa: A multidimensional perspective* R Lavergne (Ed) IDRC/Africa World Press Trenton-Asmara (1997) 1 and KJ Alter ‘The global spread of european style international courts’ 35(1) *West European Politics* (2012) 135-154.

<sup>12</sup> See B Hettne ‘Beyond the ‘new’ regionalism’ (2005) 10 *New Political Economy* 543.

<sup>13</sup> As above 566.

For instance, as far as regionalism in Africa is concerned, some argue that it is misleading to describe the more operational regions on the continent as ‘sub-regions’. Hettne instead rightly proposes that ECOWAS, SADC – and EAC – stand as fully-fledged ‘regions’, since they are more operational than the African Union (AU). The author consequently suggests that those Regional Economic Communities (RECs) may be seen as ‘sub-regions’ only when continental organisations such as the AU become stronger, functional and operational.<sup>14</sup> As argued further under ECOWAS’ culture of compliance in chapter VI of the present study, the West African Community has demonstrated greater regionness and actorness than continental RIGOs in Africa.

Regional integration also includes an historical element. Between the 1950s and the 2000s, integration has developed from its old approach to what is referred to as ‘regionalism’ into ‘new regionalism’. ‘New regionalism’ developed in the latter half of the 1980s as opposed to ‘old regionalism’ or ‘regionalism’ that prevailed in the 1950s and 1960s. Old regionalism was more political, concerned with peace and perceived the nation-state as a problem. New regionalism expands to new aspects of regionalism and affords more interest to globalisation,<sup>15</sup> and is therefore more preoccupied, among others, with answering the question ‘for whom and what regionalism is being pursued’. In fact, in its post-1990s version, regional integration abandons the functional approach to integration according to which states remain sole actors. New regionalism rather promotes a historical approach where non-state stakeholders including citizens and civil society groups influence the reformation of regionalism.<sup>16</sup>

In the same line of reflection, authors like Söderbaum have called to ‘rethink regions and regionalism’ bearing in mind the failure to conceptualise regionalism within a regional sphere.<sup>17</sup> Söderbaum proposes an understanding of principles such as ‘sovereignty

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<sup>14</sup> As above 566.

<sup>15</sup> As above 546-547.

<sup>16</sup> As above 545, 554.

<sup>17</sup> See F Söderbaum ‘Rethinking regions and regionalism’ (2013) *Georgetown Journal of International Affairs* 10.

transfer' and 'political unification' from the perspective that 'regions are not structurally or exogenously given, but socially constructed by historically contingent interactions'.<sup>18</sup>

The foundational philosophy of regional integration is operation through delegation. Indifferently of its geographical, social, political, or temporal perspectives, regionalism has come with operational and organisational structures by which member states of an Intergovernmental Organisation (IGO) or RIGO vest powers in institutions to act on their behalf. Under what is known as the 'delegation theory', IGOs operate with the help of a 'Principal-Agent' tandem through which the Principals (member states) create Agents (institutions: political, judicial, technical) to govern them. For that purpose, Agents are conferred some power by the Principals to make authoritative, legally-binding, decisions.<sup>19</sup> Mostly, the power to oversee the interpretation and application of norms generated in such a framework is entrusted to a body of a (quasi) judicial nature: A court, a tribunal, or a commission.

As discussed below, it appears that the authority, effectiveness, and influence of those regional courts are mainly dependent on how much power they receive from the Principals. These elements are also dependent on whether the Principals retain or strengthen the original power, or endorse interpretative developments undertaken by the Agent, here the judicial body of the Community. While these trends have been recorded on all continents and at a global level, the following illustrative discussion uses the European integration as example, since it is accepted as the model which showcases the best concepts, principles, and operationalisation of regionalism.<sup>20</sup>

Europe, particularly the European Union (EU), has shaped if not oriented the concept and practice of integration by taking the lead on regionalism, whether under the old or new waves of regional integration. As such, the EU has been used as a model in other experiences of regionalism around the world. Hettne thus suggests that the EU has shaped world regionalism and order by impacting other regional models through 'soft

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<sup>18</sup> As above 11.

<sup>19</sup> On the logics of delegation and 'Principal-Agent' relationships, see A Stone Sweet 'The European Court of Justice and the judicialisation of EU governance' (2010) 5 *Living Reviews in European Governance* 10-15.

<sup>20</sup> Chapter II of this study includes a comprehensive discussion on other systems or regimes.

imperialism’.<sup>21</sup> The European Court of Justice (ECJ) is, with little doubt, the iconic institution of the success of the European regional integration. Particularly, the ECJ was able to retain and expand its original powers through concepts such as ‘judicial supremacy’ and ‘direct effect’ by drawing from the ‘fiduciary’ responsibility received from the Community. Regarding particularly the principle of judicial supremacy, the ECJ developed the legal determinants of its powers from the principles of ‘delegation’ or ‘agency’ to the one of ‘trusteeship’. Trusteeship affords greater authority in the sense that, as far as the ECJ is concerned, the Agent is designed to govern both third parties and the Principals, and its decisions are well insulated from reversal.<sup>22</sup>

It is obvious and crucial that the ECJ primarily gained such authority from the political will of EU member states to establish a judicial institution with appropriate ‘fiduciary’ powers to govern them. Stone Sweet relevantly explains that Principals endow Agents with powers for the purpose of ‘helping them resolve commitments problems, overcome information asymmetries, enhance the efficiency of rule making, or avoid taking blame for unpopular policies’. As genuinely formulated, in the case of the EU, ‘the Principals have engaged the Agent – the ECJ – to help them govern themselves, in the face of acute commitment problems associated with market and political integration’.<sup>23</sup>

Making use of this trust, the ECJ progressively built its current effectiveness and influence through, among others, the ‘judicial empowerment’ thesis or mechanism according to which national judges gained from the europeanisation process. Through mechanisms such as the preliminary ruling, national courts throughout Europe played an important part in shaping the ECJ’s (European) supranational authority by applying the Court’s interpretation of Community law. Most importantly, it appeared over the years that ‘systemic coherence and effectiveness have depended on how the ECJ and the national courts have negotiated their relationship with one another’.<sup>24</sup> Notably, Constitutional courts have shown a greater resistance than their national counterparts,

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<sup>21</sup> See Hettne (n 12 above) 563, 565. The same author points out how the EU has become an obstacle to comparative regionalism. He further proposes there should be a post new regionalism end of cold war and beginning of globalisation, that promotes inter-regionalism and a strong global civil society to reconstruct multilateralism.

<sup>22</sup> See Stone Sweet (n 19 above) 14.

<sup>23</sup> As above 10-14.

<sup>24</sup> As above 29.



and national courts' interaction with the ECJ has been influenced by political environments that are hostile to judicial lawmaking.<sup>25</sup> The effectiveness of the ECJ has also depended on the 'fit versus cost' paradigm according to which the more EU law already fits national law, the less costly it is for member states to implement it.<sup>26</sup> Although the ECJ was eventually granted human rights jurisdiction through a Charter of Rights, the European Court of Human Rights (ECtHR) established under the aegis of the Council of Europe is said to be the most effective – human rights – system in the world.<sup>27</sup> The European human rights system and issues related to its effectiveness are discussed under chapter II.

While most of the judicial bodies created under regional integration arrangements were shaped on the European models,<sup>28</sup> authors rightly suggest that regionalism means different things to different people whether among specialist in the field or state parties to the particular arrangement. In other words, there are different regionalisms in different parts of and even across the world.<sup>29</sup> Confirming this empirical background, of the numerous RIGOs that blossomed in Africa as part of the new regionalism, most followed the European model yet each exhibits distinctive features. Moreover, of these African RIGOs, only a few have embraced what could be called a human rights approach to regionalism. Accordingly, there have been suggestions to reflect on regionalism beyond the dominant interpretation promoted by a Eurocentred approach to regionalism. Eurocentrism has accordingly been identified as one of the major mistakes of contemporary regionalism.<sup>30</sup>

As it is returned to latter in this chapter, while discussing the significance of the present study, the manifestation of regionalism in Africa was illustrated at the continental level, by the transformation of the Organisation of the African Union (OAU) created in 1963 into the African Union (AU) which came into existence in 2000. Analysis related to the

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<sup>25</sup> As above 31.

<sup>26</sup> As above 33.

<sup>27</sup> A Stone Sweet & H Keller 'The Reception of the ECHR in National Legal Orders' in A Stone Sweet & H Keller *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008) 3.

<sup>28</sup> KJ Alter 'The global spread of European style international courts' (2012) 35(1) *West European Politics* 135-154.

<sup>29</sup> See Hettne (n 12 above) 543, 558.

<sup>30</sup> See Söderbaum (n 17 above) 16, 17.



African – continental – human rights system is conducted in chapter II. Developments similar to those seen at the continental level have been recorded in the framework of ‘sub-regional’ regimes established in the framework of RECs. Under the new wave of regionalism, African RECs judicial organs have engaged in human rights adjudication although in different ways. The most active of these forums are the Court of Justice of the Economic Community of West African States (ECOWAS), the Court of Justice of the East African Community (EAC), and until recently the Tribunal of the Southern Africa Development Community (SADC).<sup>31</sup> Chapter II of this study includes analysis on how human rights protection has developed in African sub-regional integration.

This substantial introduction to regional integration and its human rights perspectives under the new regionalism was proposed to understand how and why ECOWAS developed its human rights regime. Indeed, the underlying reasons of and developments that ensued from the reforms led by ECOWAS in the 1990s cannot be disconnected from the global emergence of a new approach to regional integration. As discussed below, the establishment of the ECCJ and its subsequent expansion as an international human rights court is part of ECOWAS’ adjustment to the global new wave of regionalism described above.

In May 1975, fifteen West African states founded ECOWAS with the initial aim of realizing collective self-sufficiency through economic integration.<sup>32</sup> At the time, ECOWAS had very few human rights issues on its agenda and the advent of a Community Court with human rights mandate was no priority.<sup>33</sup> Between 1975 and the 1990s, important events at regional, continental and international levels prompted subsequent normative and

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<sup>31</sup> For a discussion of the human rights mandate of these bodies as initiated in the framework of the new regionalism, see in general S Ebovrah ‘Legitimacy and feasibility of human rights realisation through Regional Economic Communities in Africa: The case of ECOWAS’ (2009) unpublished LLD dissertation on file with Centre for Human Rights, University of Pretoria; PE Vahard & HS Adjolohoun ‘OHCHR’s perspective on mainstreaming human rights in African regional integration’ (2009), unpublished policy paper on file with author; MJ Nkhata ‘The role of Regional Economic Communities in protecting and promoting human rights in Africa: Interrogating the human rights mandate of the SADC Tribunal’ (2009), unpublished paper on file with author; and F Viljoen *International human rights law in Africa* 2<sup>nd</sup> ed. (2012) 469-516.

<sup>32</sup> See the Treaty of the Economic Community of West African States.

<sup>33</sup> Of the protocols adopted by the Community the following are of relevance: Non-Agression (April 1978), Free Movement of Persons, Residence and Establishment (May 1979), and Mutual Assistance on Defence (May 1981).

institutional developments. Those events include, to name but a few, the socio-economic crisis in most countries of the region, internal conflicts in Liberia and Sierra Leone, and the fall of the Berlin wall followed with democratic revival in sub-Saharan Africa. In response, ECOWAS member states undertook a Treaty revision in 1993, which, in their words ‘... arose ... from the need to adapt to the changes on the international scene ...’.<sup>34</sup>

In ECOWAS, old regionalism was experienced under the 1975 founding Treaty, when supranationality of community law was limited and states retained absolute discretion to give effect to Community law. Regionalism was state centered, the Community faced hegemony issues namely by Nigeria, and former colonial divides threatened an effective implementation of industrial development policies at Community level. In the late 1980s, ECOWAS launched its new regionalism fast tracked mainly by difficulties relating to liberalisation conditions to access international markets. Related crisis renewed an interest for regionalism as introduced by the 1993 Revised Treaty. The Treaty and subsequent legislation brought about more binding rules, new integration time table, and stronger institutions. In addition, security and human rights featured prominently on the regional integration agenda.<sup>35</sup>

Particularly, the human rights trend to ECOWAS’ new regionalism can be traced to the Community’s response to the violations imputed to its military wing, ECOMOG, following its intervention in internal conflicts, namely in Liberia. Subsequent conflicts and wider human rights abuses placed human rights prominently on the regional integration agenda and increased the need for relevant mechanisms to address related issues. Those events favoured the participation of non state actors in the Community project, as illustrated by the accreditation granted to a regional civil society forum in 2001. This development in turn allowed some attempts by these groups to influence Community policy making, including mainstreaming human rights in ECOWAS’ integration project.<sup>36</sup>

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<sup>34</sup> See ECOWAS Revised Treaty, 24 July 1993, para 13 of the Preamble.

<sup>35</sup> See K Alter *et al* ‘A new international human rights court for West Africa: The ECOWAS Community Court of Justice’ (2013) 108 *American Journal of International Law* 5-7.

<sup>36</sup> As above 9.

Among other reforms as part of ECOWAS' new regionalism was the creation of a Community Court in 1991.<sup>37</sup> In 1993, the ECOWAS Community Court of Justice (ECCJ) was confirmed by the revision of the 1975 Treaty<sup>38</sup> as the main judicial organ of ECOWAS but the Community still had no clear human rights ambition. However, the revised Treaty marked a notable shift from the previous solely 'ECOWAS of states' to an 'ECOWAS of peoples'. Firstly, member states accepted a proposal to 'establish Community institutions vested with relevant and adequate power'.<sup>39</sup> Secondly, they restated the need to 'improve the living standards of their people'.<sup>40</sup> Finally, they elected the African Charter on Human and Peoples' Rights (African Charter) as the main human rights instruments to guide their action towards the realisation of socio-economic development.<sup>41</sup>

The adoption of a Supplementary Court Protocol<sup>42</sup> in 2005 expressly conferred a human rights mandate to the Community Court of Justice.<sup>43</sup> From a normative standpoint, the 2005 Supplementary Protocol empowered the Court to hear cases relating to human rights violations. On the occasion of its first individual human rights case in the 2005 Protocol era, the Community Court subsequently used the recognition of the African Charter by the 1991 Revised Treaty to elevate the Charter as the reference instrument for its material human rights jurisdiction together with the Universal Declaration of Human Rights.<sup>44</sup>

These developments constituted a new trend in international law and human rights litigation in Africa. Moreover, they spoke to the peculiarity of ECOWAS' approach to new regionalism. Indeed, the ECOWAS Court of Justice was conferred express competence to hear individual human rights complaints<sup>45</sup> and to issue final judgments which are binding on member states, Institutions of the Community, individuals and corporate bodies in the

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<sup>37</sup> Protocol A/P1/7/91 of 6 July 1991 on the Community Court of Justice.

<sup>38</sup> ECOWAS Revised Treaty, art 15(1). In fact, the Court existed under the 1975 Treaty as the Tribunal of the Community.

<sup>39</sup> Revised Treaty, para 6 of the Preamble and art 3(1).

<sup>40</sup> Preamble, para 2.

<sup>41</sup> See Revised Treaty, art 4(g).

<sup>42</sup> Supplementary Protocol A/SP.1/01/05 of 19 January 2005.

<sup>43</sup> See Supplementary Protocol, art 9(4).

<sup>44</sup> In *Ugokwe v Nigeria* (2005) (unreported) Case ECW/CCJ/APP/02/05, para 29. Such acknowledgment is consistent in the subsequent practice of the Court and the Charter has primarily formed the basis of human rights complaints since 2005.

<sup>45</sup> Initially, the ECOWAS Court was not established primarily to hear human rights cases.

cases they are party to.<sup>46</sup> The establishment of the Court's human rights jurisdiction raised much hope in all sections of the Community and beyond. In fact, the new human rights regime inaugurated an era for human rights development in the region. Especially the 'goldmine' provided by the rights in the African Charter, individual direct access and the exemption from exhausting local remedies made it a unique system of its kind. This prompted various comments. For instance, Ebobrah qualifies the burgeoning mechanism as the 'emergence of a viable sub-regional human rights system'.<sup>47</sup>

Since the 2005 Supplementary Protocol brought it in the spotlight, the Community Court has been writing a new page of regional human rights history as a 'sub-regional' international tribunal. According to information obtained from its registry, the ECOWAS Community Court of Justice (ECCJ) received 160 cases between February 2003 and October 2013. Even if the ECCJ delivered only 65 judgments in the same period, jurisprudential developments are worthwhile especially since the rise of individual complaints in 2005.<sup>48</sup> Of the 65 judgments delivered, at least 50 were in respect of human rights violations. Depending on the case, the Court ordered states to pay monetary compensation or take other actions.

Virtually all human rights cases lodged before the ECCJ related to alleged violations of rights in the African Charter. As at November 2013, cases brought to the Court involved at least 12 of the 15 ECOWAS member states, namely Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. Proceedings before the Court have involved a variety of litigants ranging from common ECOWAS citizens to former heads of state. More particularly, the Court has awarded monetary compensation to individuals of up to US\$ 200 000.<sup>49</sup> While they were not initially meant to make up the bulk of the Court's backlog,<sup>50</sup> human rights cases have

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<sup>46</sup> See Revised Treaty, art 15(4).

<sup>47</sup> See ST Ebobrah 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 2 *AHRLJ* 328.

<sup>48</sup> As at October 2013 according to statistics obtained at the Court Registry. However, the overall activity is higher. Since it began its work in February 2003, the Court has held 457 sessions, made 72 rulings, and delivered 3 opinions. As at October 2013, 40 cases were pending.

<sup>49</sup> See *Musa Saïdykhan v The Gambia* Judgment ECW/CCJ/JUD/08/10 of 16 December 2010 para 47.

<sup>50</sup> As the main judicial organ of a Regional Economic Community, the ECOWAS Court was originally vested with a mandate to interpret and apply community law, mainly economic integration norms.

stolen the limelight arguably due to the involvement of individuals against states with an important participation of civil society actors and the media. Additional reasons include the absence of litigation by states or organs of the Community, particularly the ECOWAS Commission, and poor if non-existent Community law-based litigation, a decade after the ECCJ began its operation.

A close examination shows that the ECCJ is developing a growing jurisprudence and tackling some of the key human rights issues under the African Charter. The Court has dealt with issues like slavery and the justiciability of socio-economic rights (education), which are both current and burning issues in the region. A landmark judgment on the latter issue, and also one of the most significant decision since the famous *Koraou Slavery* case, is the *SERAP Education* judgment.<sup>51</sup> In the first case, decided in 2008, the ECCJ condemned Niger to pay \$20,000 to Koraou for failing to protect the complainant from slavery in which her master forced her to live for a decade between 1996 and 2005. In the second case, decided in 2010, finding the right to education justiciable under the African Charter, and by implication in Nigeria, the Court ruled that the Federal Government ‘should take the necessary steps to provide the money – embezzled by some states’ officials – to cover the shortfall to ensure a smooth implementation’ of free and compulsory basic education programmes in ten states of the Federation. For this particular order, the Court was commended by local and international civil society,<sup>52</sup> scholars,<sup>53</sup> and the media alike.<sup>54</sup>

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<sup>51</sup> *The Registered Trustees of the Socio-Economic Rights and Accountability Project v Nigeria*, ECW/CCJ/JUD/07/10, Judgment of 30 November 2010.

<sup>52</sup> See Right to Education Project ‘Landmark court decision on right to education’ (2010) <http://www.right-to-education.org/node/719> (accessed 14 February 2011), SERAP ‘ECOWAS Court to Federal Government: Nigerians have the right to education’ <http://www.serap-nigeria.org/cover/ecowas-court-to-fg-nigerians-have-a-legal-right-to-education/> (accessed 14 February 2011), Amnesty International ‘La Cour de justice de la CEDEAO attribue à l’Etat Nigérien la responsabilité de faire respecter le droit à l’éducation’ (2010) [http://www.amnestyinternational.be/doc/communiqués-et-publications/article/nigeria-la-cour-de-justice-de-la-decoupe\\_recherche-guin%E9e](http://www.amnestyinternational.be/doc/communiqués-et-publications/article/nigeria-la-cour-de-justice-de-la-decoupe_recherche-guin%E9e) (accessed 14 February 2011).

<sup>53</sup> See for instance, ST Ebobrah ‘Human rights developments in African sub-Regional Economic Communities during 2009’ (2010) 1 *AHRLJ* 251 and ‘Human rights developments in sub-Regional Economic Communities during 2011’ (2012) 2 *AHRLJ*.

<sup>54</sup> See EKOAKETE News and Report Around Nigeria (2010) ‘ECOWAS Court orders Nigeria to provide free and compulsory education’ <http://ekoakete.com/2010/12/01/ecowas-court-orders-nigeria-to-provide-free-and-compulsory-education/> (accessed 14 February 2011), AllAfricaCom ‘Nigerians have



In 2011, the ECCJ was not shy to consider the enactment of blanket amnesty laws in Niger as a violation of effective remedies by referring to international criminal law in the *Ibrahim* case.<sup>55</sup> Finally, a groundbreaking judgment of the ECCJ is the December 2012 *SERAP Environment* case in which the Court ordered Nigeria to ‘ensure restoration of the environment of the Niger Delta, prevent the occurrence of damage to the environment, and hold the perpetrators of the damage accountable’.<sup>56</sup>

While the Court manifestly deserves support for its pronouncements, its orders particularly in the *SERAP Education* and *SERAP Environment* cases have further implications than the monetary awards to abused Gambian journalist Ebrahima Manneh or Niger enslaved Hadijatou Koraou. For instance, the *SERAP Education* judgment seeks the direct implementation in ECOWAS member states of the rights enshrined in the African Charter, namely socio-economic rights (education). This should logically cause no harm as it meets the objectives of the Community as set by the Revised Treaty. Moreover, ECOWAS adopted ‘Vision 2020’ in June 2007 under which it pledged to transform the Community ‘from an ECOWAS of states to an ECOWAS of peoples’.<sup>57</sup>

Having said this, and despite the strong hopes, questions arise with regard to the effectiveness of the Community Court’s growing jurisprudence. For instance, an effective implementation of the order in the *SERAP Education* judgment raises issues with regard to budgeting, governance and other questions relating to the enforcement of socio-economic rights. A related issue is also whether the domestic legal and institutional environment is conducive for direct enforcement of Community law and decisions of the ECCJ. In general, the growing human rights jurisprudence of the ECCJ has to be weighed against its tangible effects on the situations it addresses. Indeed, what weight do rights carry if there is no remedy for their violation? Particularly, does a judgment have any

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legal right to education, ECOWAS Court rules’ <http://allafrica.com/stories/200911230024.html> (accessed 14 February 2011).

<sup>55</sup> See *Sidi Amar Ibrahim & Another v Niger*, ECW/CCJ/JUD/02/11, Judgment of 8 February 2011.

<sup>56</sup> *SERAP v Nigeria*, ECW/CCJ/JUD/18/12, Judgment of 14 December 2012.

<sup>57</sup> See The Inquirer ‘ECOWAS adopts Vision 2020’ [http://www.theinquirer.com.lr/story.php?record\\_id=3570&sub=14](http://www.theinquirer.com.lr/story.php?record_id=3570&sub=14) (accessed 21 February 2011); GhanaWeb ‘ECOWAS launches survey on non-states actors’ <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=201662> (accessed 2 March 2011) and Senego ‘Vision 2020: la CEDEAO veut accélérer son programme de développement’ <http://senegal.senego.com/vision-2020-la-cedeao-veut-accelerer-son-programme-de-developpement/> (accessed 2 March 2011).

meaning if it fails to ensure effective remedy but also prevents future potential situations? As an overall concern, will the Court fulfil its promise by filling in the human rights implementation gap in the region? Also, will the ECCJ fulfil its general rule of law mandate in the region while its judgments remain dead letters?

As discussed in this study, the result mainly depends on two major factors, which are state compliance with the judgments of the Court, on the one hand, and the influence of its jurisprudence on domestic human rights litigation and national policy trends, on the other.

Compliance is an obligation for states under both national and international law where a relevant instrument provides so. In terms of express provisions, although the Law of Treaties does not mention the word ‘compliance’, it contains obligations for states not to defeat the purpose of a treaty,<sup>58</sup> to respect its binding force and to perform obligations in good faith.<sup>59</sup> The Vienna Convention also includes an obligation not to invoke domestic law to justify the failure to abide by treaty obligations.<sup>60</sup> The Charter of the United Nations expressly makes it an obligation for states to ‘comply’ with ICJ judgments and imposes sanctions for non-compliance by Security Council measures to give effect to decisions.<sup>61</sup> General international law and human rights law also include generic compliance obligations for state to comply with norms and decisions of adjudicatory bodies.<sup>62</sup> Some commentators have even discussed the international customary law status of that obligation.<sup>63</sup>

As stated above, states have an obligation to establish national courts as local remedies. Even where litigants are exempted from exhausting local remedies, the role of domestic courts remains central as they could act prior to international adjudication. In addition,

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<sup>58</sup> VCLT 1969, art 18.

<sup>59</sup> Art 26.

<sup>60</sup> VCLT, art 27.

<sup>61</sup> UN Charter, art 94.

<sup>62</sup> For an in-depth analysis of state obligation to comply with international law and judgment, see T Mutangi ‘An examination of compliance by states with the judgments of the African Court on Human and Peoples’ Rights: Prospects and challenges’ (2009) unpublished LLD dissertation on file with Centre for Human Rights, University of Pretoria 28-94.

<sup>63</sup> See JL Atangana ‘La négociation dans l’exécution des arrêts de la Cour internationale de justice’ (2006) 7-8 *La Voix de l’Intégration Juridique et Judiciaire Africaine* 60 and Mutangi as above.

domestic courts are well placed in the process of giving effect to an international decision since foreign judgments would enter the municipal realm mainly through judicial reception.

An issue could arise as to whether the judgment of an international body has the same status as treaty provisions. Both the *pacta sunt servanda* principle and the doctrine of *effet utile* support a positive answer which is also reinforced by international jurisprudence.<sup>64</sup> In any case, compliance provisions in a treaty make it a duty for states to comply with court orders. Increasingly, especially in the framework of regional integration, an effective domestic judicial system is part of state mechanisms towards compliance with international law and judgments.

This role of domestic courts is explained by the fact that in both civil and common law systems, foreign judgments are taken into the municipal sphere mostly by a national court through judicial reception also known as *exequatur* in civil law jurisdictions. This inevitably raises the issue of the relationship between the supranational or international court and domestic courts, which is also discussed in this study preliminary to examining the fate of foreign judgments in the municipal realm. In context, under the relevant provisions of ECOWAS law, domestic courts are well situated to receive ECCJ's judgments in the form of a writ of execution, which is verified for the purpose of their enforcement according to municipal law.<sup>65</sup> Corresponding provisions exist under municipal law on enforcement, which are examined closely under chapter three of this study.

Despite these provisions, and although actual cases of non-compliance with the ICJ's judgments are said to be marginal,<sup>66</sup> international law and decisions of international bodies have always suffered from enforcement problems. As Simmons rightly suggested, despite higher peer accountability among governments by the end of the twentieth century than ever before, their reluctance to comply with IHRL is still high and cases of

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<sup>64</sup> See for instance *Baena-Ricardo et al v Panama* Inter American Court of Human Rights (Competence) Judgment of 28 November 2003, paras 61-67.

<sup>65</sup> See 2005 Supplementary Court Protocol, art 6 on the 'methods of implementation of the judgments of the Court'.

<sup>66</sup> See Dugard (n 6 above) 465-466. Professor Dugard is of the view that 'the isolated cases of non-compliance have not affected the popularity of the ICJ as an institution for the settlement of dispute'. See also BA Simmons 'Compliance with international agreement' (1998) 1 *Annual Review of Political Science* 89. According to Simmons, compliance is far higher than non-compliance.



compliance mostly have political motives.<sup>67</sup> For instance, states have accepted or refused to comply with court orders depending on several factors. Issues have related to the sovereignty of states; their ‘immunity from execution’ and the lack of international police to constrain them.<sup>68</sup> Those issues have even led some international law scholars to question the real legal nature of international law,<sup>69</sup> while others have asserted that ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’.<sup>70</sup>

In any case, compliance with international law and the decisions of international bodies remains current on the international law research agenda. Adherence to international law has been discussed, advocated and assessed.<sup>71</sup> When it comes to compliance with international judgments, Dugard notes, for instance, that ‘the explanation for the high level of compliance with the ICJ judgments can be explained by the consensual nature of the Court’s jurisdiction’.<sup>72</sup> However, questions have remained unanswered as to why it has taken so long for Libya to comply with the judgment of the International Court of Justice in the *Aouzou Strip* dispute against Chad or why Nigerian officials had first declared it ‘virtually null and void’<sup>73</sup> before accepting the judgment of the ICJ in the *Bakassi Peninsula* case.<sup>74</sup>

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<sup>67</sup> See BA Simmons *Mobilizing for Human Rights: International Law in Domestic Politics* (2009) 113-115.

<sup>68</sup> See for instance, HH Koh ‘Why Do Nations Obey International Law?’ (1997) 106 *The Yale Law Journal* 2611; Atangana (n 63 above) 9-63 and, in general, F Onana-Etoundi *L’Etat justiciable en droit OHADA* (2010).

<sup>69</sup> See for instance J Austin *Province of Jurisprudence Determined* (1954) 133, 201.

<sup>70</sup> L Henkin *How Nations Behave* cited in Koh (n 47 above) 2599.

<sup>71</sup> See for instance, in general, M Killander ‘Accountability for gross human rights violations and nations building – lessons from Africa’ paper presented at the Conference on ‘The protection of human rights through the International Criminal Court as a contribution to constitutionalisation and nation-building’ Bangkok Jan 2011. See also, Geneva Academy of International Humanitarian Law and Human Rights ‘International treaties adherence’ [http://www.adh-geneve.ch/RULAC/international\\_treaties.php?id\\_state=119](http://www.adh-geneve.ch/RULAC/international_treaties.php?id_state=119) (accessed 11 April 2011) and La Francophonie ‘Conventions internationales: état des ratifications’ <http://genre.francophonie.org/spip.php?article490> (11 April 2011).

<sup>72</sup> Dugard (n 6 above) 467.

<sup>73</sup> See AfrolNews ‘Nigeria will not give up Bakassi’ [http://www.afrol.com/News2002/nigo46\\_cam\\_bakassi4.htm](http://www.afrol.com/News2002/nigo46_cam_bakassi4.htm) (accessed 2 March 2011).

<sup>74</sup> It would be more accurate to state that Nigeria officially neither accepted nor rejected the ICJ’s ruling. In any case, President Obasanjo was quoted to have declared that ‘what may be legally right may not be politically expedient’. See *The Guardian* ‘Bakassi: I’m ready to dialogue, anytime, anywhere, says Obasanjo’ <http://news.biafranigeriaworld.com/archive/ngguardian/2002/oct/30/article06.html> (accessed 2 March 2011).

In the present context, the same applies to why The Gambia has participated in proceedings before the ECCJ and then refused to do so in a subsequent case or why the same country's President has made a call to limit individual access to the Community Court in 2009.<sup>75</sup> To understand emerging trends and design more effective regimes, there is a need for further compliance studies. Simmons thus observed that 'we are a long way theoretically and empirically from an understanding of the conditions under which governments comply with international agreements'.<sup>76</sup> Although much progress has been recorded since then, Goodman and Jinks concurred that 'the behavioural assumptions of international legal regimes must be most systematically theorized and investigated'.<sup>77</sup>

The peculiarities of the ECOWAS human rights regime equally call for a more in-depth and specific compliance study. As mentioned above, the human rights mandate of the ECCJ is important in many regards. Besides the concern about fulfilling the peoples' hope and Community objectives, there is a higher consideration. It is about the image of the Court and the confidence litigants have in the institution and ECOWAS as a whole. A deficit of compliance will definitely erode the legitimacy of the system.<sup>78</sup> The role of the ECCJ should be not only to vindicate peoples' rights but moreover to secure the confidence of the public in the law and uphold the rule of law in the entire region.

This study is justified by the need to contribute to such a goal. It also seeks to contribute to research efforts on general international law observance, implementation and legal reform in West Africa and in Africa at large. Certainly, lessons learnt from litigation and compliance with the ECOWAS Court's judgments will help relevant stakeholders improve human rights protection. The same applies to evidence of influence of the work of the Court on domestic systems and the other way round. Only cross-fertilisation has the potential of achieving a harmonised mainstreaming of the African Charter's human rights in the ECOWAS regional integration project. Ultimately, harmonisation in that context

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<sup>75</sup> See discussions on the *Saidykhon* and *Manneh* cases under chapter four, chapter five and chapter six. See also discussions on states involvement in the procedure under chapter six.

<sup>76</sup> Simmons (n 66 above) 91.

<sup>77</sup> R Goodman & D Jinks 'International law and state socialization: Conceptual, empirical and normative challenges' (2005) 54 *Duke Law Journal* 983.

<sup>78</sup> See TA Borzel 'Why do states not obey the law' Paper presented at ARENA University of Oslo (6 June 2002) 2. See also, I Currie & J de Waal *The bill of rights handbook* (2005) 195-196.

will enable West Africa to play its part in the bigger African regional integration plan, and African human rights strategy.

## 2. Thesis statement and research questions

This study argues that despite their relatively limited number, judgments of the ECCJ have started touching key issues on the African human rights agenda. The ECCJ's potential will keep developing. Its caseload currently grows by an average of 15 new cases annually.<sup>79</sup> The African Charter based human rights mandate, an individual-friendly complaint mechanism and substantive monetary awards have presented the Court as a potential human rights haven in the region.

However, the judgments of the Court mean very little if they are not complied with. As at November 2013, no formal mechanism was in operation to follow up on state compliance with the judgments of the ECCJ. No comprehensive compliance or influence study had been conducted either. In addition to these considerations, the study is also justified by the need to help maintain public confidence in the law and the Court and ensure it fulfils its mission of direct rights enforcer in ECOWAS countries. In the same vein, the Court will eventually gain authority from its laudable jurisprudence only if there is evidence of both top-down and bottom-up influence between the Community organ and national systems.

The study therefore has two main objectives. Firstly, it aims at examining the framework for enforcement and assessing state compliance with the judgments of the ECCJ. Secondly, the study will analyse actual and potential influences of the ECCJ's judgments on the jurisprudence of domestic courts and national policy developments. It is commendable to ensure that a judicial protection mechanism guarantees effective remedies and especially monetary reparations. However, it is better to secure the prevention of future infringements by ensuring that national courts borrow a leaf from the Community Court's jurisprudence and states develop related preventive policies.

In turn, if best preventive practices are developed in domestic courts or other state organs, the reverse effect would induce a judicial or policy dialogue and harmonisation as

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<sup>79</sup> See ECOWAS Court of Justice, Annual Report 2009-2011 (January 2012) 19, 46, 75.

has been the case in the European human rights system for instance.<sup>80</sup> More specifically, social and judicial dialogue could lead states to adopt progressive policies to avoid being named and shamed by the ECCJ and the Community at large.

To achieve these objectives, the study endeavours to answer the following question:

- To what extent have the states under study complied with the judgments of the ECCJ?
- What is the influence, if any, of the ECCJ's human rights jurisprudence on the domestic systems of member states, namely on the Executive, the Judiciary and the Legislature?

Answering the following sub-questions will help answer the main questions:

- What is the normative and institutional framework for the enforcement of the ECCJ's judgments in the ECOWAS countries under study?
- Have the states under study complied with the judgments of the ECCJ?
- Where states have complied, how have they done so and what are the factors influencing compliance or non-compliance?
- What are the actual and potential influences of the ECCJ's jurisprudence on the national systems of member states and the other way round?

### 3. Significance of the study

Human rights protection remains a burning issue in Africa. Since the adoption of the African Charter in 1981, African states have pledged to cater for their peoples' rights. They chose political integration as the means to achieve such a goal. At continental level, what was referred to as a 'new [approach to] regionalism'<sup>81</sup> has arisen as a result of the

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<sup>80</sup> See in general A Stone Sweet & H Keller *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008) 3.

<sup>81</sup> See J De Melo & A Panagariya *The new regionalism in trade policy* World Bank (ed) (1992) 1-14; P Robson 'The new regionalism and developing countries' (1993) 31 *Journal of Common Market Studies* 330-333 and Y Echinard & L Guilhot 'Le nouveau régionalisme: de quoi parlons-nous?' 775-792 *Annuaire Français de Relations Internationales* <http://webcache.googleusercontent.com/search?hl=fr&q=cache:-sZ9y7A2rRoJ:http://www.afri-ct.Org/IMG/pdf/54EchinardetGuilhot.pdf+le+nouveau+regionalisme+en+Afrique+en+2007&ct=clnk> (accessed 11 April 2011).

major shift from the late Organisation of African Unity (OAU)<sup>82</sup> to the recently established African Union (AU).<sup>83</sup> As a matter of fact, while the former endeavoured to fight racial discrimination and colonialism, the later seeks to pursue peace and security, socio-economic development and human rights. One major building block to that new edifice is the African Court on Human and Peoples' Rights (the African Court) that became operational in 2007.

However, until the African Court came into operation, the African human rights system had been faced with effectiveness problems for more than two decades with the African Commission operating as a quasi-judicial body.<sup>84</sup> The advent of the African Court was not an immediate panacea, as access to the body is limited and may not be the most competitive in terms of proximity if compared to its counterparts set up under the aegis of RECs. Consequently, all eyes have progressively turned to sub-regional systems where judicial bodies have started operating as alternative remedies for daily rights grievances occurring in the continent.

In this environment, the operation of the ECOWAS Community Court of Justice has brought about notable jurisprudential developments. The Court had used its re-branded human rights mandate for less than a decade as at 2013 but the significance of its judgments is striking. Most West African states still have poor records not only with civil and political but also socio-economic rights, and domestic courts have not proved to provide effective local remedies. Even in the framework of the new constitutionalism adopted in the 1990s, constitutional human rights have not met satisfactory protection.<sup>85</sup>

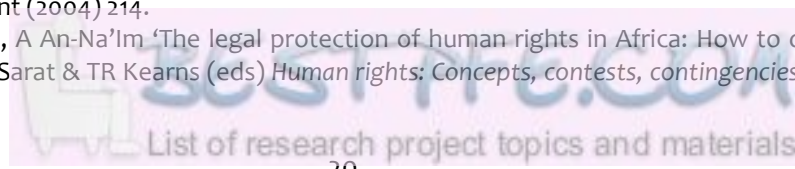
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<sup>82</sup> Established on 25 May 1963 in Addis Ababa (Ethiopia).

<sup>83</sup> The AU came to life on 11 July 2000 in Lome (Togo).

<sup>84</sup> See for instance, M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006*, F Viljoen 'State compliance under the African Charter on Human and Peoples' Rights' (2010) 16 *Interights Bulletin* 60-62, F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights' *The American Society of International Law (ed) reprinted from (2007) 1 American Journal of International Law*; JD Boukongou 'L'attractivité du système africain de protection des droits de l'homme' (2006) 2 *African Human Rights Law Journal* 15-18; M Mubiala *Le système régional africain de protection des droits de l'homme* (2005) 86-88 and G Baricako 'La mise en œuvre des décisions de la Commission africaine des droits de l'homme et des peuples par les autorités nationales' in JF Flauss & E Lambert-Abdelgawad (dir) *L'application nationale de la Charte africaine des droits de l'homme et des peuples* Bruxelles Bruylant (2004) 214.

<sup>85</sup> See for instance, A An-Na'im 'The legal protection of human rights in Africa: How to do more with less' (2001) in A Sarat & TR Kearns (eds) *Human rights: Concepts, contests, contingencies* and A Diarra



Civil society organisations, lawyers, other groups and individuals have thus turned to this new West African human rights forum with much enthusiasm. Interesting reflections have recently focused on the human rights mandate of the ECOWAS Court of Justice.<sup>86</sup> Questions related to whether such mandate was legitimate and feasible without hampering the original vocation of the regime. Discussions also covered the effectiveness of the Community Court's human rights mandate.

However, to be able to engage effectively with the Community Court and human rights regime, stakeholders will need to understand surrounding dynamics, be they legal or political. Especially, the manner in which states behave towards the Court is pivotal as the fate of its judgments lies in the hands of sovereign entities. A lack or limited knowledge of state compliance practices and jurisprudential trends in domestic courts may inhibit a beneficial use of this new rights protection mechanism. As socio-economic challenges are compounded by elections-related conflicts in the region, there must be an independent and impartial recourse such as the ECOWAS Court of Justice. However, the operation of such a court should not be an end in itself. The effectiveness of its jurisprudence is central to its very existence.

This study endeavours to help understand these dynamics through the identification of factors influencing state compliance with the judgments of the Court or otherwise. Through an examination of various factors related to the Court itself, to how its orders are formulated, the cases at hand, and the action of international and local stakeholders, the study seeks to help improve the utilisation of this body. An investigation of the relationships between the Community Court and its domestic counterparts is meant to reveal any trends of judicial dialogue. Stakeholders may then use this knowledge to promote greater dialogue that leads to harmonisation and judicial enforcement of rights at the municipal level.

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'La protection constitutionnelle des droits et libertés en Afrique noire francophone depuis 1990: Les cas du Mali et du Bénin' (2001) <http://afrilex.u-bordeaux4.fr/la-protection-constitutionnelle.html> (accessed 11 April 2011).

<sup>86</sup> See for instance Ebovrah (n 31 above).



#### 4. Clarification of terminology

In discussing the issues raised in this study, various concepts and terms are used. To provide the basis for a general understanding of those issues, it is important to indicate what meaning is given to various concepts and terms. This exercise is aimed at not only explaining the concepts but giving them a meaning in the specific context of the present study.

In international law scholarship, three concepts are generally used interchangeably as having the same meaning, namely to make the law or court orders become reality, which is to give effect to them. These are ‘compliance’, ‘implementation’ and ‘enforcement’. This clarification of terminology undertakes to define each of them before suggesting their use in the case of the present study. The clarification of terminology begins with a contextualised understanding of ‘human rights jurisprudence’.

##### **‘Human rights jurisprudence’**

In the context of this study, human rights will refer mainly to those in the African Charter as the legal basis for the ECCJ’s jurisdiction by virtue of both ECOWAS law and the Community Court’s jurisprudence. Accordingly, ‘jurisprudence’ is referred to as cases decided by the ECOWAS Court of Justice and arguments developed therein. The human rights jurisprudence of the Court should therefore mean all decisions made by the Court by virtue of its human rights mandate with no prejudice of the limitations to this study.

##### **‘Compliance’**

The Oxford Advanced Learner’s Dictionary defines ‘compliance’ to mean ‘the practice of obeying rules or requests made by people in authority’.<sup>87</sup> The same source defines ‘obedience’ to mean the action of ‘doing what you are told to do’. Under this definition compliance has the meaning of obedience to a rule or request. However, the definition sets a condition which gives a legal accent to the concept. Namely, the rule to be obeyed has to be made by people in authority. It is indeed a legal precept that law is obeyed

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<sup>87</sup> Oxford Advanced Learner’s Dictionary (2007).

among other reasons because it is issued by the legitimate authority. The authority in this context clearly refers to who has received a legal power to act. Courts' orders are known to be binding upon the parties to a case. Both constitutions and ordinary legislation confer such legal force to courts' pronouncements. Put in context, states would comply if they obeyed court orders as made by judges in whom the law has invested the authority to do so. Of course, as general principle of law, court orders would bind only parties to a particular case.

This definition of compliance as obedience to the legitimate authority appears to be simplistic when one looks at more elaborated understandings of compliance. Koh argues for instance that 'repeated compliance creates habitual obedience'.<sup>88</sup> In this view, addressees of the rule comply for external reasons, while they obey because they have 'internalized the rule as part of their internal value system'.<sup>89</sup> That may help explain for example why European human rights law is more complied with than in the African human rights system where domestic internalisation of human rights and democratic culture is less effective.<sup>90</sup> In conclusion, Koh's distinction does not set aside the understanding of compliance as some form of obedience. However, the distinction stresses the external monitoring factor associated with compliance in the sense that external mechanisms, such as monitoring bodies, peer review institutions and sanctions, are put in place to secure compliance should the addressees fail to abide by the rule.

Another understanding of compliance is execution. For Borzel, non-compliance with the judgments of the European Court of Justice refers to 'the failure of member states to execute Court judgments, which establish a violation of European law'.<sup>91</sup> This definition has the advantage of helping by giving a practical example closely linked with the present study. In this sense, compliance would mean the action of executing final orders made by a court in a particular case. Young agrees with the meaning of compliance as the capacity to execute a legitimate order. For him, 'compliance can be said to occur when the actual behaviour of a given subject conforms to prescribed behaviour, and non-

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<sup>88</sup> Koh (n 68 above) 2603.

<sup>89</sup> HH Koh 'How Is International Human Rights Law Enforced?' (1999) 74 *Indiana Law Journal* 1400.

<sup>90</sup> See Koh as above 1405. See also Viljoen & Louw (n 84 above) 23-25 and 33-34.

<sup>91</sup> Borzel (n 78 above) 14.



compliance or violation occurs when actual behaviour departs significantly from prescribed behaviour'.<sup>92</sup>

For the purpose of this study, compliance will be referred to as the final result of giving effect to the decisions of the ECCJ or express political will to do so. While the translation of these orders into tangible outcomes will be the measuring tool, compliance will also be analysed in the light of various factors and the environment of the case as discussed in greater detail under the relevant section of the current chapter. Compliance factors and the environment of the case are comprehensively discussed under chapter five and chapter six.

Chapter four below deals with a detailed overview and analysis of how compliance is categorised in the present study. The same chapter provides a detailed definition of each of the categories considered, which are non-compliance, full compliance, situational compliance, and in-progress cases. The choice of dealing with a detailed definition and analysis of compliance and related categorisation there is justified by the need to bring the information closer to the relevant or directly related chapters, which are chapter five and chapter six.

### **'Implementation'**

Implementation is also frequently used in connexion with giving effect to law or court orders. Referring to the same dictionary, implementation consists of 'making something that has been officially decided start to happen or be used'.<sup>93</sup> Examples are given of implementing changes through legislation, executive decisions, policies or reforms.<sup>94</sup> Arguing on a distinction with compliance, Simmons suggests that compliance facilitates implementation.<sup>95</sup> In that sense implementing economic and social rights for instance would imply designing programmes or adopting legislation to give effect to legal provisions conferring these rights or court orders. In the framework of this study,

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<sup>92</sup> Oran Young (1979) *Compliance and Public Authority* cited in Simmons (n 66 above) 77.

<sup>93</sup> The Oxford Dictionary.

<sup>94</sup> As above.

<sup>95</sup> See Simmons (n 66 above) 77.

implementing decisions of the ECCJ will involve undertaking the necessary steps to give effect to the orders made by the Court.

### **‘Enforcement’**

According to the Oxford Dictionary, enforcement is the action of ‘making sure that people obey a particular law or rule’.<sup>96</sup> For example, ‘it is the job of the police to enforce the law’; ‘the legislation will be difficult to enforce’ or ‘United Nations troops enforced a ceasefire in the area’.<sup>97</sup> In striking contrast to compliance and implementation, the definition of enforcement considers the use of force to obtain obedience from the addressees. This is despite the Oxford Dictionary’s soft wording of ‘making sure’. Borzel is of the same view and defines enforcement to be the ‘use of force to obtain compliance with the law’.<sup>98</sup> However, in this context, the use of force is to be understood as the use of legal authority rather than merely physical force. That enforcement is purely legal is correct. Laws may seek enforcement through three channels, which are legislative, judicial and executive action.<sup>99</sup>

The definitions given above confirm the interchangeable use of compliance, implementation and enforcement in literature. Commentators complain of the Babylonian variety of understandings.<sup>100</sup>

The present study will use all three concepts of ‘compliance’, ‘implementation’ and ‘enforcement’ to mean the same action or result, which is to give effect to the judgments of the ECOWAS Court of Justice. However, the use of each word may differ from the perspective of the addressee, the action or result required. For instance, state compliance will refer to the execution of, or unequivocal pledge to execute, the orders made by the Court in a particular case as an obligation resulting from ECOWAS and national laws. Yet, such compliance will logically include relevant measures taken by state organs, agencies or domestic courts to guarantee the enforcement of the order. If the order seeks policy measures, compliance would then imply implementation of

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<sup>96</sup> The Oxford Dictionary.

<sup>97</sup> As above.

<sup>98</sup> See Borzel (n 78 above) 15.

<sup>99</sup> See Koh (n 89 above) 1399.

<sup>100</sup> See Borzel (n 78 above) 13.

specific either legislative reforms or executive decrees and programmes to give effect to the judgment. In any case, compliance should mean, as Paulson suggests, that states comply in good faith and avoid implementing superficially or circumventing the judgment.<sup>101</sup>

For the sake of consistency, this study will however maintain the use of compliance as an obligation resulting from a judgment as opposed to other actions prompted by the judgment. For instance, the withdrawal of charges, cancelling of proceedings or any other procedural action by the judiciary in implementation of an ECOWAS Court judgment would fall under state compliance. It is correct that from the domestic perspective, compliance should be seen as broader than execution of judgments strictly understood. It would thus include influence which is however, for the purposes of this study, examined distinctly in its systemic or ‘radiance’ jurisprudential effects.

### **‘Influence’**

Although the concept of ‘influence’ has not attracted as much contribution as compliance in the field of international law, it is gradually attracting interest from the perspective of international adjudication especially within regional systems. In the Oxford Dictionary, to influence is ‘to have an effect on the way that somebody behaves or thinks, especially by giving them an example to follow’. It is therefore different from compliance which rather carries an obligation to obey. Even if it creates very little legal connotation, this definition matches with the sense intended in the present study. Here, the example giver is the ECOWAS Court of Justice. However, this study will investigate ‘influence’ as a two-way trend.

This approach to judicial or jurisprudential influence has been put forward and discussed by several international law scholars and practitioners. The doctrine has referred to it in notions as diverse as ‘cross-influence’, ‘effect’ or ‘relations’ and in some instances as ‘impact’ or ‘judicial cooperation’.<sup>102</sup> In any case, this study will adopt the use of ‘influence’

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<sup>101</sup> C Paulson ‘Compliance with final judgments of the International Court of Justice since 1987’ (2004) 98 *The American Journal of International Law* 436.

<sup>102</sup> See for instance, G Canivet ‘Les influences croisées entre juridictions nationales et internationales’ in AHJUCAF <http://www.ahjucaf.org/spip.php?article7177> (accessed 21 February 2011), L Garlick ‘Cooperation of courts: The role of supranational jurisdictions in Europe’ (2008) 6 *I.CON*, Keller & (n

as the impact of the jurisprudence of the ECOWAS Court of Justice on domestic systems, including government, legislature and courts and, in the last case, the other way round. It is worth noting that the influence phenomenon has several features. For instance, the decision of the Community Court that ‘Niger is to be blamed for the inaction of its administrative and judicial authorities’<sup>103</sup> in respect of the *Koraou Slavery* case could lead domestic courts in Niger and other ECOWAS countries to similar findings. In the same vein, the ECOWAS *Slavery* judgment has prompted several slavery suits in Nigerien courts whose outcomes are expected to be impacted by the Community Court finding.

Of course, compliance could call for executive action or enactment of legislation as is impliedly expected in Nigeria in implementation of the *SERAP Education* judgment. This would be called one-way influence. A two-way influence applies where the ECOWAS Court also borrows a leaf from domestic jurisdictions in adjudicating a particular case involving any country of the Community. Community jurisprudence would then be construed by taking from the diversity of national practices to feed the unity of supranational law. A third and more interesting variance of influence is the so-called ‘impact’, ‘systemic influence’ or ‘radiance effect’. This is where influence exerts irradiating effects on national systems to the extent that even countries which were not party to any litigation apply ECOWAS case law as their own in a systemic way. Here, the interactive community jurisprudence would have an irradiating effect on domestic legislation, executive and adjudication practices. Evidence of this third ‘spill over’ effect on human rights systems beyond ECOWAS has also been investigated in this study.

## 5. Literature review of compliance and influence

Despite the only relatively recent interest in the subject, scholarship abounds on compliance. Simmons concurs that ‘the study of compliance has gained momentum over

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80 above), and Y Shany *Regulating jurisdictional relations between national and international courts* (2009).

<sup>103</sup> *Koraou v Niger* (2008) AHRLR 182 (ECOWAS 2008).

the past few years'.<sup>104</sup> However, compliance with treaties seems to have received greater attention than compliance with court decisions.<sup>105</sup>

Almost all contributions have proposed definitions of compliance and discussed its connexion with related concepts. For the sake of the present study attention is given to those contributions discussing both compliance and non-compliance with international law and especially pronouncements of international bodies. Specific questions directing the choice of literature include why and how states have complied with law or court orders and what influence such compliance has had on other courts or organs in the surrounding environment.

As to why states comply, various international law scholars and political scientists have contributed with various and complementary views. The most relevant are mentioned here. For Koh,<sup>106</sup> four identifiable strands of thinking have emerged about compliance. In a subsequent study on how IHRL is enforced, Koh adds a fifth international legal process factor.<sup>107</sup> The first one is power or coercion, also known as realism.<sup>108</sup> The second is self-interest or rationalism.<sup>109</sup> Simmons acknowledged this factor and gave the example of states ignoring international jurisdiction when domestic interests are higher.<sup>110</sup> The third factor is liberalism explained as the nature of domestic regimes and by the fact that democracies are more likely to comply.<sup>111</sup> The communitarian theories according to which states socialise and are led to comply by peers constitute the fourth factor. Finally, the legal process approach considers that states comply because they have internalised the rule in their domestic order.<sup>112</sup>

Koh argues that compliance is principally led by transnational and international legal process. He considers that 'by interpreting global norms and internalizing them into

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<sup>104</sup> Simmons (n 66 above) 75.

<sup>105</sup> See for instance in general A Chayes & AH Chayes *The new sovereignty: Compliance with international regulatory agreements* (1995); Koh (n 68 above) and Simmons (n 66 above).

<sup>106</sup> Koh (n 68 above) 2611.

<sup>107</sup> See Koh (n 89 above) 1407.

<sup>108</sup> See Simmons (n 66 above) 79.

<sup>109</sup> See also Simmons as above 80.

<sup>110</sup> As above 90.

<sup>111</sup> As above 83.

<sup>112</sup> As above 86.

domestic law, the process leads to reconstruction of national interests'.<sup>113</sup> In other words, domestication of the rule to be obeyed is the key to compliance.<sup>114</sup> In the author's view, these five factors are not exclusive but complementary.

In a subsequent combination of theory and systematic empirical analysis,<sup>115</sup> Simmons has disqualified *outward* and demonstrated *inward* as the right direction for examining the ability of international law to influence human rights practices.<sup>116</sup> She identified a range of compliance driving factors as 'common wisdom',<sup>117</sup> 'self-enforcing agreement',<sup>118</sup> 'treaties as commitment devices',<sup>119</sup> 'treaties as agenda setting influences',<sup>120</sup> 'leverage of litigation',<sup>121</sup> and 'group demands and rights mobilisation'.<sup>122</sup>

Some authors have approached compliance from non-compliance. Others have stressed the nature of the rule to be obeyed as the key to compliance. For instance, Hurd suggested that legitimacy provides authority which prompts compliance.<sup>123</sup> Therefore compliance factors should be defined from the substance, procedure and source of the rule. States would obey because legitimacy gives the perception of rightness.<sup>124</sup> Consequently, if the definition of interest is affected one may obey a legitimate rule that is against one's interest.

Borzel instead organised compliance factors from the source of non-compliant behaviour. Using the European system as his case study, he arrived at four compliance mechanisms. These are compliance through enforcement (monitoring and sanctions), persuasion (learning), management (capacity building and contracting) and litigation

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<sup>113</sup> Koh (n 68 above) 2659.

<sup>114</sup> As above 2603.

<sup>115</sup> See Simmons (n 66 above).

<sup>116</sup> As above 114.

<sup>117</sup> State power and state interest, 114.

<sup>118</sup> The nature of the agreement itself provides incentives for the actors to maintain it even in the absence of external enforcement mechanisms, for instance, reciprocity, 116.

<sup>119</sup> Treaties assist governments in making credible commitments to behave – or refrain from behaving – in particular ways, 119.

<sup>120</sup> The need to consider ratification can rearrange a country's priorities, if not its preferences, 127; treaties do influence national politics through their agenda-setting capacity, 129.

<sup>121</sup> Implications of ratified treaties for the role of the judiciary in both monist and dualist systems, 129-131.

<sup>122</sup> Strategic use of IHRL as a tool for political and civil society mobilisation, 135-137.

<sup>123</sup> I Hurd 'Legitimacy and Authority in International Politics' (1999) 53 *International Organization* 381.

<sup>124</sup> As above 387.

(legal internalisation).<sup>125</sup> The management approach to compliance is also at the heart of the Chayeses' work where they advise the replacement of the 'enforcement model' with a 'managerial model'.<sup>126</sup> The Chayeses are indeed of the view that it is interaction to re-establish the balance of advantages rather than the threat of punishment that ensures compliance. They discussed management as a co-operative model of compliance through justification, discourse, and persuasion.<sup>127</sup>

In a broader approach, Koh has also named the reasons for non-compliance as the vagueness of norms, toothless mechanisms, weak regimes, and lack of economic interest and political will.<sup>128</sup>

Simmons concurs with Borzel's approach of compliance through management. According to Simmons, compliance must also be seen from the perspective of inability versus unwillingness.<sup>129</sup> The scholar also points out the role of courts in state compliance. In his view, independent domestic courts may force states to comply with international judicial processes.<sup>130</sup> As an important issue, he stresses the role of non-governmental organisations in states' compliance suggesting that 'NGOs raise the political costs of non-compliance with courts' decisions'.<sup>131</sup> The influence of the domestic legal system on compliance is also part of the issues discussed by Simmons.<sup>132</sup> This raises the dilemma of advocating for the 'absorption' of international rules in the corpus of domestic regulation.

The debate about whether states socialise and how they do so has also been one of interactive dialogue between prominent scholars in the fields of international law, sociology, and political science. It is interesting to learn from the legal arguments thereby developed. For instance, Goodman and Jinks have contributed their own reflections but also responded to some of Koh's main arguments on state compliance. Goodman and Jinks' contribution has the advantage of simplifying compliance factors into three main

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<sup>125</sup> See Borzel (n 78 above) 15-19.

<sup>126</sup> Chayes & Chayes (n 105 above) 15, 32.

<sup>127</sup> As above 109.

<sup>128</sup> See Koh (n 89 above) 1398.

<sup>129</sup> See Simmons (n 66 above) 83.

<sup>130</sup> See Borzel (n 78 above) 15-19.

<sup>131</sup> Simmons (n 66 above) 85.

<sup>132</sup> As above 84.



ones: ‘coercion, persuasion and acculturation’.<sup>133</sup> Through their innovation of ‘acculturation’ the two scholars have called for rethinking the previous stick and carrot models. For them, ‘acculturation’ is an emerging factor through which states comply under pressure to assimilate, some imposed by other actors and some imposed by the self.<sup>134</sup> They however note that the three factors are complementary, inclusive rather than exclusive. The case for acculturation could be exemplified by the expanding practice of ‘law copying missions’ around the world.

In response to Koh’s criticism of their previous contribution, Goodman and Jinks elaborated on a similar argument.<sup>135</sup> Law modelling could equally be said to support the acculturation approach to state compliance. In any case, Goodman and Jinks maintain the three-fold compliance factors approach in a subsequent contribution. The added value was to actualise their case studies but also to substantiate ‘acculturation’ with the community nature of regional treaties which pull states to comply through some kind of *erga omnes* norms and shared values.<sup>136</sup> This contribution had the merit of stressing the role of international and local civil society in state compliance from the acculturation perspective.

The sharpest criticisms of acculturation arguably remain with Alvarez. In response to Goodman and Jinks, Alvarez expressed worries about an ‘acculturation’ philosophy which would encourage ‘states to act [comply] like trendy and unthinking teenagers’.<sup>137</sup> Even if they socialise, they do not think they are doing so.<sup>138</sup> For Alvarez, the

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<sup>133</sup> R Goodman & D Jinks ‘How to influence states: Socialization and international human rights law’ (2004) 54 *Duke Law Journal* 622.

<sup>134</sup> As above 626.

<sup>135</sup> See Goodman & Jinks (n 77 above).

<sup>136</sup> See in general R Goodman & D Jinks ‘Socialization and the effects of treaty ratification’ Draft paper for the Conference on the domestic consequences of international human rights treaty ratification 16 October 2010 New York University School of Law.

<sup>137</sup> JE Alvarez ‘Do states socialize?’ (2005) 54 *Duke Law Journal* 970. The author refers to S Pahuja ‘This is the world: Have faith’, 15 (2004) *European Journal of International Law* 381, 382–90 (book review) (questioning whether the growing convergence of accepted human rights norms can ever be anything other than imperialistic); and A Acharya ‘How ideas spread: Whose norms matter? Norm localization and institutional change in Asian regionalism’ 58 (2004) *International Organisations* 239 (arguing that local actors do not passively act out a universal moral script but selectively borrow and adapt transnational norms in accordance with pre-constructed local normative beliefs and practices).

<sup>138</sup> See Alvarez as above 972-973.



acculturation approach may be dangerous in the human rights framework as it manifestly advances a Western imposed human rights agenda.<sup>139</sup> The writer recalls how ‘prevailing views of human rights, at least as institutionalised in global institutions, favor West’s priorities in crucial respects’. He therefore rather insists on the role of bureaucracies, personalities and positive law as central to state compliance with both international law and judgments.

As interesting as they are, these studies do not specifically focus on compliance with court orders, i.e. judgments of international law or human rights supervisory bodies. They lack case studies on regional systems and African contextualisation. The following contributions fill these gaps.

Sundberg stressed the role of political supervisory bodies, traditionally committees of ministers, and especially their function as alternative adjudicatory forums.<sup>140</sup> He also pointed out the use of circulars, or institutional memoranda, as a judicial influence tool to achieve harmonisation and strengthen the contribution of domestic courts to state compliance.<sup>141</sup> Studying the inter-American example, a team of scholars and practitioners confirmed the role of international bodies in shaping states’ behaviour towards compliance.<sup>142</sup> They concluded that there was a trend of more compliance with reparation remedies, agreed settlements and cases involving NGOs.

Paulson’s study of compliance with final judgments of the ICJ has named the political environment as the key to state compliance.<sup>143</sup> He noted the peculiarity of the ICJ cases which are mostly settled through negotiation, politically rather than legally, as they involve land disputes and touch on sovereignty. Viljoen stresses the prominence of political rather than legal compliance and points out the type of government and internal stability as being among the most significant factors.<sup>144</sup> Atangana concurs with such

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<sup>139</sup> As above 973-974.

<sup>140</sup> See in general, FGE Sundberg ‘Control of execution of decisions under the ECHR’ (2001) Alfredsson *et al* (eds) *International human rights monitoring mechanisms*.

<sup>141</sup> See Sundberg as above 574-579.

<sup>142</sup> F Basch *et al* ‘The effectiveness of the Inter-American system of human rights protection: A quantitative approach to its functioning and compliance with its decisions’ (2010) 7 *Sur – International Journal on Human Rights*.

<sup>143</sup> See Paulson (n 101 above) 434.

<sup>144</sup> F Viljoen *International human rights law in Africa* 2<sup>nd</sup> ed. (2012) 340.

views to observe that ‘the dynamic of international adjudication is manifestly based on voluntarism’.<sup>145</sup> He stresses that states have never had recourse to the Security Council to enforce the ICJ’s judgments and explained how states’ compliance process would generally be rejection, negotiation and then acceptance. This seems to correspond to the Chayeses theoretical ‘managerial model’. Atangana also analysed the French ‘judgment domestication’ mechanism of *exequatur* which truly works only where states consent to self-limitation of sovereignty.<sup>146</sup> He explained the amicable trend of enforcement in Africa by ‘the African conception whereby dispute resolution approach is not one of a winner versus a loser’.<sup>147</sup>

Legal practitioners have endorsed the political and negotiated compliance factors. Kladoum named the problems of compliance at domestic level as ones of corruption in the justice system and public administration especially among officials and law enforcement agents.<sup>148</sup> He stressed states’ immunity of execution and amicable settlement between state and individuals.<sup>149</sup> Ayadokoun discussed the law and practice of enforcement at the domestic level in West African civil law countries.<sup>150</sup> She pointed out states’ resistance to compliance because of their monopoly of the use of force. She further mentioned the adoption of recent legislation to sanction law enforcement officers. Exposing states’ immunity from execution, Onana-Etoundi singled out this waiver as an impediment to state compliance under the OHADA regime. The scholar exposed state immunity as being a breach of the rule of law.<sup>151</sup>

The African system is new in terms of international adjudication. So are related compliance studies. The study by Viljoen and Louw<sup>152</sup> focused on state compliance with the findings of the African Commission on Human and Peoples’ Rights (African

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<sup>145</sup> Atangana (n 63 above) 9.

<sup>146</sup> As above 27.

<sup>147</sup> As above 33, citing M Kamto ‘Le contentieux de la frontière maritime entre la Guinée Bissau et le Sénégal’.

<sup>148</sup> See R Kladoum ‘Difficultés dans l’exécution des décisions de justice au Tchad’ in AA-HJF (ed) *Les Cahiers de l’AA-HJF Les actes du colloque international de N’djamena sur ‘L’exécution des décisions de justice dans l’espace AA-HJF’* (11-13 November 2008) 42-46.

<sup>149</sup> As above 47.

<sup>150</sup> See JA Ayadokoun ‘Exécution des décisions de justice au Bénin’ in AA-HJF (ed) (n 148 above) 53-80.

<sup>151</sup> See in general, Onana-Etoundi (n 68 above).

<sup>152</sup> Viljoen & Louw (n 84 above).

Commission). They noted that state compliance is both ‘an indicator and a goal of greater commitment to human rights’.<sup>153</sup> The contribution by Viljoen and Louw is of a particular interest to the present study as it adapted internationally accepted compliance factors to the African context. Stressing the limiting approach of the ‘enforcement-centred optic’ commonly adopted in respect of the African human rights system, Okafor argued that ‘the key to securing state compliance in the system is to generate voluntary adherence of the relevant states’.<sup>154</sup> Calling for a stronger culture of human rights in Africa, Okafor stressed that state compliance is the result of ‘local activist forces’, activist judges and civil society actors, rather than governments or treaty-bodies action.<sup>155</sup>

Doctoral works have also contributed significantly in empirical compliance study. Investigating compliance with the findings of the African Commission, Louw identified similar factors as those used in her contribution with Viljoen. She made recommendations including the provision for a follow-up mechanism involving the Commission, its Secretariat, political organs of the African Union and civil society actors.<sup>156</sup> Mutangi highlighted the role of courts, national human rights institutions and civil society actors in bringing states to compliance with the forthcoming judgments of the African Court. He also contributed a thorough examination of states’ international human rights obligation to comply.<sup>157</sup>

Ebobrah has probably contributed the most significantly to the literature on the ECOWAS human rights system. Recognising the legitimacy and feasibility of the ECOWAS Court human rights mandate, he recommended that the African Charter remained the human rights catalogue of sub-regional regimes.<sup>158</sup> He further argued that subsidiarity should apply between the Community Court and domestic courts and judicial dialogue be encouraged.<sup>159</sup> About the human rights jurisdiction of the Community Court, he advised

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<sup>153</sup> As above 31.

<sup>154</sup> OC Okafor *The African human rights system: Activist forces and international institutions* (2007) 80-81.

<sup>155</sup> As above 2-3, 94.

<sup>156</sup> See L Louw ‘An analysis of states compliance with the recommendations of the African Commission on Human and Peoples’ Rights’ (January 28, 2005) unpublished LLD dissertation, University of Pretoria 314-330.

<sup>157</sup> See in general, Mutangi (n 62 above).

<sup>158</sup> See Ebobrah (n 31 above) 339.

<sup>159</sup> As above 340.

that careful navigation is needed to avoid ‘the lurking dangers to the system’.<sup>160</sup> Ebobrah has also briefly discussed implementation failures, namely states’ refusal to comply or lack of enforcement initiative by ECOWAS political organs.<sup>161</sup> In a similar contribution, he pointed out important procedural and substantive issues related to the Court human rights jurisprudence.<sup>162</sup>

Some studies focused on particular case studies of West African states’ compliance with international decisions. A study on compliance with the African Court Protocol provides compliance examples from Senegal and Nigeria which are ECOWAS member states from civil and common law traditions respectively.<sup>163</sup>

A survey by the Francophone Association of Courts of Cassation (AHJUCAF) provided relevant details on enforcement problems in African francophone countries. The outcome revealed various problems related to the effectiveness of enforcement rules and practices.<sup>164</sup> The domestic highest courts of all French speaking countries in ECOWAS are members of the AHJUCAF and many other similar organisations.<sup>165</sup> English speaking countries are members of similar gathering promoting inter judicial cooperation.<sup>166</sup> These networks provide a strong institutional framework for studying both compliance and influence between supranational courts and domestic courts and vice-versa.

French Constitutional Court judge Guy Canivet voted for such ‘cross-influence’ which he exemplified with the ICJ, Inter-American, European and OHADA regimes. He stressed collaboration and cooperation to be central to domestic courts’ contribution to state compliance.<sup>167</sup> Garlicki concurred on the two-way influence for which he provided a

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<sup>160</sup> Ebobrah (n 53 above) 328-329.

<sup>161</sup> See ST Ebobrah ‘Human rights development in sub-regional courts in Africa during 2008’ (2009) 9 *AHRLJ* 317-327.

<sup>162</sup> See Ebobrah (n 47 above) 242-258.

<sup>163</sup> See African Court Coalition *et al* *Harmonizing national laws and the African Court on Human and Peoples’ Rights* Country reports on Senegal and Nigeria January 2008.

<sup>164</sup> See AHJUCAF ‘L’indépendance de la justice’ <http://www.ahjucaf.org/-L-independance-de-la-justice-> (accessed 21 February 2011).

<sup>165</sup> AHJUCAF has a criminal courts membership. Constitutional and administrative jurisdictions are members of ACCPUF and AIHJA.

<sup>166</sup> For further details, see M Killander & H Adjolohoun ‘International law and domestic human rights litigation in Africa: An introduction’ (2010) M Killander (ed) *International law and domestic human rights litigation in Africa* 3-21.

<sup>167</sup> See Canivet (n 102 above).

range of cases from regional courts in Europe and suggested subsidiarity as a solution to states' resistance to comply.<sup>168</sup>

Judicial influence has also been discussed from a state socialisation perspective. For instance, Helfer and Voeten examined whether the ECHR could promote social and legal change through judicial influence. They identified political, institutional, community related and economic factors as promoting influence and state compliance. They demonstrated for instance that ECHR judgments often explicitly reflect evolving practices in Council of Europe member states. They found that all branches of states concerned have adjusted domestic policies to prevent future findings of violations.<sup>169</sup> Two major books have done in-depth discussion of these dynamics. The first one compared the impact of the ECHR on the domestic law and politics of eighteen states in Europe and found a systemic influence with notable two-way trends.<sup>170</sup> In the second book Shany discussed interplay, influence and effects at length. He pointed out the political approach adopted by most states in considering the direct applicability of international proceedings in the domestic order.<sup>171</sup> He also confirmed the importance of subsidiarity in the name of the principle of *dédoublement fonctionnel* or 'role splitting'.<sup>172</sup>

The contributions reviewed all discussed compliance and influence. Few focused on state compliance and the related influence on state organs, especially the executive and domestic courts. Of these very few afforded attention to case studies within the African context. Where the ECOWAS human rights system and jurisprudence were discussed, contributors briefly commented on various related issues. None of these contributions conducted comprehensive investigation of states' compliance with the judgments of the ECOWAS Court of Justice or studied related influences which are the singularity of this

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<sup>168</sup> See in general, Garlick (n 102 above).

<sup>169</sup> See LR Helfer and E Voeten 'Measuring judicial influence: Does the European Court of Human Rights promote social and legal change?' Conference on 'Domestic consequences of human rights treaty ratification' (15-16 October 2010) NYU School of Law's Center for Human Rights and Global Justice. For a video of the presentation, [http://www.youtube.com/watch?v=YSgZDomh\\_t8](http://www.youtube.com/watch?v=YSgZDomh_t8) (accessed 21 February 2011).

<sup>170</sup> See in general, Keller & Sweet (n 80 above).

<sup>171</sup> See Shany (n 102 above) 4-5.

<sup>172</sup> As above 97-98. Under this theory, developed by the French jurist George Scelle, national actors act in an international capacity and fill the vacuum in international institutional structures, at least temporarily.

study. However, all the contributions provide theoretical, methodological and substantive background for discussing the different issues raised in the present study.

The need for this literature review was to provide the reader with an overview of research on compliance and influence, their understanding, and related factors. The assumption is that, even if the present study focuses on a particular regime, a general knowledge of the issues discussed will provide the necessary background for analysis, comparison, and conclusions. It is hoped that the exercise has helped to show compliance as being mainly based on political will to give effect to specific norms or court orders.

The review also suggests that despite an agreement about coercion, persuasion and acculturation as general compliance factors, derivative factors may apply to specific regimes. For example, communitarianism may be a more specific explanation to compliance in the framework of regional integration regimes where the sense of belonging and a political umbrella organisation both act as incentives for compliance. The literature review equally sought to highlight the conclusions of previous studies with the purpose of putting them to the test in the particular context of ECOWAS. The same applies to comparing the ECOWAS regime with the continental human rights structure as both belong to the same African system with a shared normative basis and overlapping state membership.

## 6. Research methodology

Some writers concur that the ‘compliance question is scientific and empirical not ethical and philosophical’.<sup>173</sup> Others point out conceptual difficulties in identifying compliance and demonstrating causation.<sup>174</sup> The main difficulty is said to be methodological. One scholar suggested that ‘despite the recent interest in issues surrounding compliance, the effort to link theory with evidence is still in its infancy’<sup>175</sup> and that ‘compliance study from

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<sup>173</sup> Koh (n 68 above) 2599. On the same view, see also Hurd (n 123 above) 390.

<sup>174</sup> See Simmons (n 66 above) 77. See also, Viljoen and Louw (n 84 above).

<sup>175</sup> Simmons (n 66 above) 77.



observed behaviour is relatively recent'.<sup>176</sup> In general, a plural methodological approach is recommended,<sup>177</sup> particularly interviews.<sup>178</sup>

The present work is a case study in the sense that analysis do not deal with all the decisions made by the ECCJ since its inception. The main concern of the study is to what extent states have given effect to the human rights jurisprudence of the ECCJ and the related influence on the domestic systems of defendant states and beyond. Consequently, the topic dictated both the timeframe as well as the choice of cases and countries under study. Firstly, although the general case-law of the ECCJ is discussed where needed, the compliance and influence study focuses only specific judgments delivered by the Court from 2005, the year it was granted human rights jurisdiction, to 2012, the time limit set under the methodology of the study.

Secondly, and as a consequence, in-depth analysis covers only specific decisions of the ECCJ. This approach is explained by the fact that compliance ensues only from decisions in which an adjudicatory body makes specific orders for the unsuccessful party to carry out.<sup>179</sup> Only nine decisions of the ECCJ met that criterion within the time limit of the study and are referred to as 'study cases'. Those judgments were delivered against five states, which therefore became the five 'study countries'. It follows that 'study countries', for the purpose of this work, are to be understood as defendant states against which merits judgments were delivered within the timeframe of the study. Merits judgments mean those in which express, positive or negative orders were made. It must be recalled that within the timeframe of the study, the ECCJ made decisions, many of which were preliminary rulings, or in which the Court found no violation.

Although this is a case study, conclusions reached – and displayed in the conclusions to chapters VI, VII and VIII – could apply to ECOWAS member states other than the study countries. As explained in the conclusion to chapter VI, the major outcomes of the present study could reflect state compliance in ECOWAS to an extent, due, among

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<sup>176</sup> As above 89.

<sup>177</sup> See for instance, Goodman and Jinks (n 77 above) 622-624.

<sup>178</sup> See Simmons (n 66 above) 86.

<sup>179</sup> Follow-up of unspecified actions is rather termed as implementation or impact as discussed under chapter VII of this study.



others, to the similarities of legal system, domestic political environment, and the state of governance.

Taking these factors into account and considering the peculiarities of research questions, the present study will adopt a question-by-question approach to the research methodology employed.

The first research question examines the normative and institutional framework for the enforcement of ECOWAS Court judgments in the study countries, which are The Gambia, Niger, Nigeria, Senegal and Togo. Here, both documentary and consultative methods have been used to collect the laws of ECOWAS and study countries that are relevant to enforcement of both domestic and foreign judgments. The main ECOWAS laws include the Revised Treaty, the Court's 1991 Protocol and 2005 Supplementary Protocol and Rules of Procedure, and the 2012 Supplementary Act on Sanctions Applicable for Failure to Abide by Community Obligations.<sup>180</sup> Through an analysis of the relevant provisions of these texts, the study identified state obligations to comply and examined the status of such obligations in the municipal order of member states. The use of national laws on compliance completed the examination and analysis of compliance obligations and helped the understanding of enforcement mechanisms at the domestic level. The examination was extended to the same countries' jurisprudence and experiences. This extension allowed both comparative and perspective compliance analysis. Where required and to complete desk work, country visits were undertaken to collect information or conduct interviews.

Whether states have complied with the ECOWAS Court judgments, categories of compliance and factors influencing compliance are investigated under the second and third research questions. In order to answer these questions research visits were conducted to the seat of the Community Court and ECOWAS Commission in Abuja and to all five study countries. Copies of the judgments were used for specific identification of the remedies and orders to be complied with. Interviews were conducted to investigate compliance and influence and to help understand justifying reasons and factors.

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<sup>180</sup> See ECOWAS, 'Acte additionnel A/SA13/02/12 portant régime des sanctions à l'encontre des Etats membres qui n'honorent pas leurs obligations vis-à-vis de la CEDEAO' Abuja, 17 February 2012.

Interviews have also provided relevant insights on administrative and judicial realities surrounding compliance. Interviewees included ECOWAS Court judges and registrar, resource persons within ministries of justice / Attorney Generals' offices, national judges, lawyers, civil society organisations, public administration officers and individuals involved in the cases studied.

Regarding particularly interviews, it is worth mentioning that a structured questionnaire would have been useful if the study had been fundamentally quantitative. However, the present study is different from a classical scientific one. It is rather qualitative than quantitative in the sense that the opinion of the interviewees were sought on a diverse range of issues. For instance, issues investigated ranged from discussing compliance norms and practices with domestic actors – judges, lawyers and civil society – to questioning judges and senior staff of the ECCJ about what legal and other factors guide the operation of the Community Court. Interviewees also include officers from political organs, namely the ECOWAS Commission.

In the light of the above, it became logical that different questions were put to interviewees from different settings. In some instances, sets of questions were re-adapted according to the positions held and functions performed by the interviewees, and the information sought. To give some indication to the readers as to the questions put to the interviewees, it suffices to refer to the research questions in this chapter, and to compliance factors discussed under chapters V and VI.

The empirical study on compliance borrows from the categorisation of factors in Viljoen and Louw's study (the reference study).<sup>181</sup> Factors were investigated with reference to the ECOWAS Court, the case being examined, the respondent state, and non-state stakeholders from local and international networks. The choice of factor did not impose limitations as the factors had arisen from the surveys which were peculiar to the case studied. This choice of categorisation was motivated by the contextualised nature of Viljoen and Louw's study and the identity of African Charter rights catalogue common to the continental human rights bodies (studied by Viljoen and Louw) and the ECCJ. Besides,

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<sup>181</sup> Viljoen & Louw (n 84 above).

it had to do with the objective of investigating whether the binding or non-binding nature of findings made a difference.

Given the extensive reliance on factors formulated by the reference study, there is a need for clarification. The reference study discussed factors pertaining to state compliance with decisions of the African Commission, which considers complaints on the basis of the African Charter. The present study focuses mainly on whether, how, and why states have complied with the judgments of the ECCJ, which adjudicates human rights cases on the basis of the same Charter. Moreover, all ECOWAS states are subject to the jurisdiction of the African Commission and many were involved in litigation before the quasi-judicial body. Some of the same states defended cases before the two bodies simultaneously.

Compliance is not a new concept, nor is influence or impact. As exemplified in the literature review, an extensive scholarship has developed on both concepts, some having formulated compliance factors in great detail as did the reference study. In the present study, there was therefore no need to reinvent the wheel. Particularly, considering the similarities mentioned above, the most appropriate and feasible method of research was to use existing factors to assess state compliance with the case under study, which is the ECCJ. Due to that method of research, the study unavoidably induced a comparative analysis.

Having said that, and as discussed further in the introduction to chapters IV and V on the categorisation of compliance and related factors, the present study has formulated factors pertaining to the ECCJ specifically. The major factors include the relationships between domestic courts and the ECCJ, and the legitimacy enjoyed by the Court through its ‘win-win’ jurisprudential policy as discussed under compliance chapters.

Attendance in activities organised by or at the ECOWAS Court represented an important methodological element in the study. The author’s participation in conferences and court hearings was used to collect more material, obtain insightful information, and benefit from exchanges of ideas and experiences. Some of these activities are worth mentioning:

- International conference on ‘The role of the ECOWAS Court in human rights, democracy and good governance’, ECOWAS Court (Accra, October 2012);
- Africa workshop on ‘Strategic litigation and the duty to investigate in Africa’, Global Rights Nigeria (Abuja, September 2012);
- Civil Society Forum on ‘Enforcement of judgments of the ECOWAS Community Court of Justice and implications on democracy and human rights in West Africa’, Media Foundation for West Africa (Abuja, July 2012);
- Hearings in the case of *RADDHO v Senegal*, ECOWAS Court (Abuja, February and May 2012);
- Regional conference on ‘Strengthening the SADC Tribunal’, International Commission of Jurists (Johannesburg, July 2011);
- West African symposium on ‘The enforcement of judicial decisions from sub-regional tribunals: Gains, challenges and opportunities’, International Commission of Jurists (Dakar, June 2011).

The temporal and thematic scope of the research topic imposed some limitations in terms of cases studied. Consequently, the study investigated compliance in all human rights cases decided on the merits. If the literature is anything to go by, compliance has not proved to be easy from a purely legal perspective. Political and social trends inevitably come into play if not dominate in some instances. Obtaining relevant information may therefore be a difficult exercise. The study consequently makes use of various media information to complement interviews and desk research.

Systemic influence and judicial dialogue are the focus of the fourth research question. Data and information collected in the investigation of the second and third research questions were used to substantiate the examination of issues raised under the influence question. As the ECtHR is said to be the most developed body of supranational law<sup>182</sup> the study used it as the main reference regime, especially for the ‘radiance effect’ analysis. However, the American and African human rights systems are also alluded to where relevant. Of course, desk study is used to understand the concept of ‘radiance effect’ and its ramifications.

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<sup>182</sup> See Borzel (n 78 above) 1.

## 7. Overview of chapters

**Chapter I** – This chapter provides a background and introduction to the study. It points out the role of courts in giving effects to rights, and raises and discusses issues related to compliance with international law and judgments. The chapter also includes international litigation and jurisprudential developments in West Africa. It finally contains the objectives and significance of the study, a literature review and the methodological approach to the study.

**Chapter II** – Examining state compliance as a legal obligation, the chapter focuses on international norms and experiences. The examination begins with state compliance in general international law and discusses United Nations bodies before shifting to regional human rights systems in the Americas, Europe and Africa. Within Africa, analysis shed light on compliance norms and practices in the African Commission and African Court as well as in the most human rights-active sub-regional courts, namely the East African Court of Justice and the now defunct SADC Tribunal. Earlier in the discussion, the chapter equally singles out relevant provisions imposing an obligation on states to comply with the judgments of the ECCJ. A comparative overview sheds the light on experiences and current compliance trends in the various regimes. Enforcement mechanisms are also discussed and, eventually, the question is answered whether, compared with other systems, the ECOWAS emerging regime has the potential of attracting greater compliance.

**Chapter III** – On the assumption that an awareness of national systems will assist informed compliance and influence investigations, this chapter approaches compliance from a municipal perspective. It begins with an overview of the philosophy of reception and execution of the ECCJ's judgments as provided under ECOWAS law. The chapter then embarks on a discussion of national laws and jurisprudence on compliance with decisions of both domestic and international bodies. As expected, the outcomes display evidential data and establish whether the study countries have been entertaining a culture of compliance or disobedience.

**Chapter IV** – This chapter deals with the categorisation of compliance and its application to the cases discussed. The major categories of compliance are first recalled according to

research with a focus on studies on the African human rights system. Subsequent sections then turn to a succinct presentation of the facts of each case and the action ordered by the Court, followed by a compliance narrative.

**Chapter V** – Analysis of compliance factors relating to the ECCJ and monitoring mechanisms are the focus of this chapter. Here, in accordance with the research methodology, critical analysis showcases the findings of on-site visits and interviews, proceedings from events attendance and compliance investigations. The discussion covers various factors related to the work of the Court and provisions made in ECOWAS law for monitoring state compliance. As an introductory chapter to the overall discussion on compliance factors, the introduction and section two of this chapter include information that is also relevant to analysis in chapter six.

**Chapter VI** – This chapter builds on the previous one to deal with compliance factors relating to the cases studied, the domestic environment of defendant states as well as the political will of the Community and pressure from various actors to ensure state compliance. Being complementary to the previous chapter, the conclusion to this chapter provides an overall picture of the relevance of all compliance factors. Factors that are not, or less relevant are also discussed.

**Chapter VII** – In this chapter, the influence of the ECOWAS Court of Justice on domestic systems is investigated and vice-versa as far as courts are concerned. As suggested by the research methodology, focus is placed on states party to study cases, on the one hand, and all ECOWAS member states on the other. Evidence of ‘radiance effects’ is traced with regard not only to domestic courts but executive and legislature as well. The influence investigation then moves on to reveal the role of domestic courts in the construction of the ECCJ’s jurisprudence, thus interrogating trends of judicial dialogue. This chapter ends by demonstrating how the nascent human rights forum is gradually impacting relevant regimes and mechanisms beyond ECOWAS.

**Chapter VIII** – This chapter draws the conclusions and recommendations of the study. It gives an overview of the answers to the main questions namely whether states have complied with the judgments of the ECOWAS Court of Justice, how and why they have done so, and the influence on domestic courts, national laws and policies.

Recommendations are then made as to the way forward so to reap most benefits from this new and promising African human rights protection forum. The leading recommendation involves methods by which the Court could enhance state compliance by making use of both the judicial and political monitoring mechanisms.

## 8. Limitations of the study

The study uses a context-specific assessment method. It examines only human rights cases decided against states. Time and other material constraints, including the relatively limited number of cases, imposed a case study approach as explained in greater details under the section on methodology. The study is limited to the period of 2005 – 2012 during which the cases discussed were decided, while information harvest was, as far as possible, extended to November 2013 when the work was submitted.

As a consequence of the timeframe limitation, some landmark decisions of the ECCJ were not discussed as study cases. The most important one is arguably the *SERAP Environment* judgment of December 2012 involving Nigeria.<sup>183</sup> Another decision worth mentioning is the case of *Kpatcha v Togo*, decided in July 2013, in which the ECCJ dismissed the illegal detention claim but awarded \$40 000 to the complainant after finding he was tortured. The Court further ordered that the state should undertake all necessary measures to put an end to the violation.<sup>184</sup>

Factors that are not directly related to the decisions of the ECCJ were brought in to support the compliance and influence analysis. For instance, Senegal has been part of international proceedings, including before the UN Human Rights Committee, the Committee Against Torture, and the International Court of Justice. Nigeria, which hosts the seat of the Court, was involved in numerous cases decided by the African Commission on Human and Peoples' Rights (African Commission) from its inception in the 1980s to the early 2010s.

As for The Gambia, it has refused to take part in proceedings and its incumbent President has made an attempt to quash individual direct access to the Community Court. In

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<sup>183</sup> *SERAP v Nigeria*, ECW/CCJ/JUD/18/12, Judgment of 14 December 2012.

<sup>184</sup> *Kpatcha Gnassingbé & 25 Others v Togo*, ECW/CC/APP/19/11, Judgment of 5 July 2013.



addition, the country was involved in a several cases before the African Commission. Finally, Togo was part of litigation in the United Nations Human Rights Committee. Reports by Amnesty International and the Togolese Human Rights Commission have also established that the country's justice system is ineffective. Some of the main issues include an overcrowded prison population, torture in prisons, the lack of independence of judges, and serious limitations on freedom of assembly.<sup>185</sup>

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<sup>185</sup> See Amnesty International 'Togo: The authorities censor a report denouncing torture' (20 February 2012) <http://www.amnesty.org/en/library/info/AFR57/001/2012/en> (15 November 2012); and Jeune Afrique 'Togo : l'étrange rapport sur la torture qui embarrasse le gouvernement' (23 February 2012) <http://www.jeuneafrique.com/Article/ARTJAWEB20120223131951/> (15 November 2012).

## Chapter II: State compliance as a legal obligation: Exploring international norms and experiences

### 1. Introduction

The preceding chapter alluded to the duty of states to give effect to both international law and the decisions of international bodies. The present chapter sets out to show that because they have pledged to abide by their treaty obligations, states have a duty to comply with the orders of supervisory bodies established under particular conventions. However, such obligations should not be assumed to exist and the duty to abide by treaty provisions is different and independent from the duty to comply with the decisions of specific bodies. As this study is concerned with the duty of states to comply with orders made by adjudicatory bodies, it is worth noting that such a duty strictly proceeds from what state parties have agreed to in the instrument establishing the deciding body. This chapter examines compliance with the judgments of the ECOWAS Community Court of Justice (ECCJ) as a duty for member states under relevant ECOWAS laws.

To set the scene, a first section examines state compliance as a general obligation arising from international law and principles. Mainly based on the *pacta sunt servanda* principle, this customary law obligation is reflected in the instruments supporting specific regimes examined in the study. An overview and analysis of these regimes starts with the compliance obligation as provided for in ECOWAS law and proceeds to undertake a comparison with other international regimes. Examination of the ECOWAS compliance regime is done by looking at the provisions for and functioning of various mechanisms put in place at sub-regional level to ensure that states actually comply.

The obligation to comply with the decisions of international bodies is then examined within the framework of global regimes, namely the International Court of Justice (ICJ) and United Nations Treaty Bodies (UNTBs). The same is done with human rights regimes in America and Europe. For Africa, the examination encompasses both regional, the African Commission and Court, and sub-regional systems, namely the now 'defunct' Tribunal of the Southern African Development Community (SADC) and the Court of Justice of the East African Community (EAC).

## 2. State compliance as a general law obligation

Chapter four of the present study includes a comprehensive categorisation of compliance and related factors. However, an overview of categorisation is provided in the current chapter to facilitate an understanding of the use of the term ‘compliance’. Five categories of compliance emerged from the study by Viljoen and Louw on state compliance with the recommendations of the African Commission. Those are full compliance, partial compliance, situational compliance, non-compliance and ‘unclear’ cases.<sup>1</sup> For the purpose of the present study, none of the partial and unclear categories is considered as they are not relevant. However, the study adds two more categories, to meet the specific features of this study and contextualise compliance analysis. Those categories are cases ‘in progress’ and ‘application for review’. Although ‘applications for review’ may well be considered as cases ‘in progress’, the methodology opted for a separate categorisation to highlight the significant number of requests for review filed in the period of study and to link the frequent occurrence of such applications to compliance behaviour. As discussed under the section on factors relating to the duty imposed on the state in chapter five, the reasons supporting requests for review appear more like compliance-delaying tactics. As a matter of fact, the ECCJ has rejected applications for review in the majority of cases for lack of serious factual or legal arguments.

Full compliance refers to instances in which the respondent state has implemented all the orders in the operative part of the judgment or has unequivocally pledged to do so. Cases in which compliance was recorded as a consequence of a dramatic domestic change after the judgment, namely change to a more democratic government or regime, fall under situational compliance. Instances where none of the orders was implemented or the decision was challenged are termed as non-compliance. Cases ‘in progress’ refer to situations where the judgment is too recent, or the state has not rejected the judgment and has remained in dialogue with the Court. It also includes cases in which a new

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<sup>1</sup> F Viljoen & L Louw ‘State compliance with the recommendations of the African Commission on Human and Peoples’ Rights’ *The American Society of International Law* (ed) *reprinted from* (2007) 1 *American Journal of International Law* 5.

government had only recently come into power and has thus not had sufficient time to implement the decision.

## 2.1 *Pacta sunt servanda, reparation and effet utile*

Of the countries covered in the present study, only The Gambia<sup>2</sup> is not party to the Vienna Convention on the Law of Treaties (VCLT).<sup>3</sup> In any case, the principle of *pacta sunt servanda* has arguably gained international customary law status in both doctrine and jurisprudence. For instance, Salmon notes that the principle is widely considered as customary law in doctrine.<sup>4</sup> Doctrinal works also discussed the axiomatic compliance obligation with binding decisions of international tribunals.<sup>5</sup> Some commentators have even discussed it as a general principle of law from the perspective of its recognition in municipal laws of contract.<sup>6</sup> In the *Baena-Ricardo* judgment, the Inter-American Court of Human Rights derived its competence to monitor compliance with its own decisions from the *pacta sunt servanda* principle.<sup>7</sup> Although the American Convention contains no specific duty for states to comply with orders of courts or decisions of supervisory bodies established pursuant to a treaty, the customary law principle of *pacta sunt servanda* creates an obligation to abide by treaty provisions and implement them in good faith.<sup>8</sup>

The VCLT complements the state obligation to comply in good faith with the obligation not to invoke municipal law to escape international responsibility.<sup>9</sup> Furthermore,

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<sup>2</sup> As of 18 November 2013.

<sup>3</sup> Adopted on 23 May 1969 and came into force on 27 January 1980. Niger (1971), Nigeria (1969), Senegal (1986), and Togo (1979) have ratified the VCLT. See United Nations Treaty Collection.

<sup>4</sup> See J Salmon 'Convention de Vienne de 1969 *Pacta Sunt Servanda*' in O Corten & P Klein (eds) *Les conventions de Vienne sur le droit des traités: commentaire article par article* Bruylant: Bruxelles (2006) 1080-1081.

<sup>5</sup> See for instance EL Abdelgawad *The execution of judgments of the European Court of Human Rights* Strasbourg Council of Europe Publishing (2008) 7-10 and O Schachter 'Enforcement of international judicial and arbitral decisions' (1960) 54 *American Journal of International Law* 1-10.

<sup>6</sup> As above. For instance art 1134(1) of the French civil code applied in most civil law countries in Africa provides: '*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi*'. Legally formed conventions bind the parties; they may be revoked only with their consent or for reasons authorised by the law; they must be implemented in good faith. The common law of contracts includes corresponding principles.

<sup>7</sup> See *Baena-Ricardo et al v Panama* Inter American Court of Human Rights (Competence) Judgment of 28 November 2003 paras 61-67.

<sup>8</sup> See VCLT, art 26.

<sup>9</sup> VCLT, art 27.

provisions in the VCLT include a duty to comply with international law under obligations to give effect to ratified treaties, to respect their binding force and to not defeat the purpose and objects of the same instruments.<sup>10</sup> With the *pacta sunt servanda* principle, two other general principles of international law form the tripod underpinning the state obligation to comply with both international law and the decisions of international courts,<sup>11</sup> namely the obligation to provide reparation and the scope of the *effet utile*. The *effet utile* is concerned with the fact that a judgment must have a practical effect in a particular dispute settled by courts.<sup>12</sup> As European Court of Justice judge Pescatore suggests, the philosophy underlying *effet utile* means that ‘... legal rules, by their very nature, have a practical purpose. If a legal rule is inoperative, it is not a rule of law. The task of lawyers is therefore not to thwart effects of legal rules, but to help in putting them into operation ...’.<sup>13</sup>

This argument does not lack merit. Indeed, rights enforcement and treaty implementation are mainly dependent on state compliance and willingness to fulfil legal obligations. Accordingly, one would be inclined to think that it is illusory to split legislation from decisions of adjudicatory bodies while reading the implementing provisions in treaties. Judgments are proceedings of the interpretation and application of legislation under which a competent body adjudicates and by virtue of which it was established. As a consequence, where states agree to a treaty they should abide by the inherent obligation to comply with a decision based on a breach of the convention. A different understanding would reflect bad faith and undermine the whole rationale for constructing a body of international – human rights – law. Such a view is supported by the Inter-American Court of Human Rights in the case of *Loayza-Tamayo v Peru*. While the Court recalled its previous position<sup>14</sup> that ‘the term ‘recommendation [of the Inter-

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<sup>10</sup> VCLT, art 18.

<sup>11</sup> Strictly analysed, there is an express obligation only when the relevant treaty so provides.

<sup>12</sup> See *Baena-Ricardo* Judgment paras 61-67.

<sup>13</sup> P Pescatore ‘The doctrine of “direct effect”: An infant disease of community law’ (1983) 8 *European Law Review* 155.

<sup>14</sup> *Caballero Delgado and Santana* case, Judgment of December 8, 1995 Series C.No 22, para 67 and *Genie Lacayo* case, Judgment of January 29, 1997 Series C No 30, para 93.

American Commission]’<sup>15</sup> used by the American Convention should be interpreted to conform to its ordinary meaning’,<sup>16</sup> it held that

..., in accordance with the principle of good faith, embodied in the aforesaid article 31(1) of the Vienna Convention, if a state signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the obligation to make every effort to apply with the recommendations of a protection organ such as the Inter-American Commission, which is, indeed one of the principal organs of the Organisation of American States, whose function is to ‘promote the observance and defense of human rights’ in the hemisphere (OAS Charter, articles 52 and 111).<sup>17</sup>

Such a progressive pronouncement would have probably been difficult to reach in the absence of the provision by the American Convention that the Inter-American Commission is, like the Court, competent ‘with respect to matters relating to the fulfilment of the commitments made by the States Parties’.<sup>18</sup> The saving provision empowered the Court to decide that ‘by ratifying said Convention, States Parties engage themselves to apply the recommendations made by the Commission in its reports’.<sup>19</sup>

The state obligation to comply with the decisions of adjudicatory bodies has also been discussed in relation to decisions of domestic courts. For instance, drawing from implementing provisions contained in international instruments, human rights monitoring bodies confirm the duty of states to comply with their own courts’ decisions. In the case of *Muñoz Hermoza v Peru*, the UN Human Rights Committee held that the state is obligated, ‘under the provisions of article 2 of the Covenant on Civil and Political Rights,<sup>20</sup> to take effective measures to pay an adequate compensation as ordered by the

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<sup>15</sup> Emphasis added.

<sup>16</sup> *Loayza-Tamayo v Peru* Inter-American Court of Human Rights Judgment (Merits) of 17 September 1997 para 79.

<sup>17</sup> As above para 80.

<sup>18</sup> American Convention, art 33.

<sup>19</sup> *Loayza-Tamayo* case para 81.

<sup>20</sup> Implementing provisions of the ICCPR obligate state parties in articles (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and (c) To ensure that the competent authorities shall enforce such remedies when granted.

Tribunal of Constitutional Guarantees'.<sup>21</sup> In the subsequent case of *Rudolf Czernin v The Czech Republic*, the Committee emphasised state obligation, in the case administrative authorities, to 'act in conformity with binding decisions of national courts'.<sup>22</sup> The HRC proceeded to determine that 'excessive delay in implementing the relevant courts' decisions are in violation of article 14(1), in conjunction with article 2(3), which provides for the right to an effective remedy'.<sup>23</sup> State obligation to comply with domestic courts' decisions is restated with more clarity further in the same decision.<sup>24</sup> The African Commission on Human and Peoples' Rights has adopted a similar approach in its decisions.<sup>25</sup>

However, international law itself requires that states maintain control over national judiciaries because at the international level acts of domestic courts are attributed to states but not individual organs.<sup>26</sup> This is recalled by the ICJ in its landmark *LaGrand* case<sup>27</sup> the most relevant aspects of which are discussed further later in this chapter. This and other considerations, especially what states have committed themselves to, regulate a case-by-case approach to compliance with international decisions.

## 2.2 A case-by-case approach to compliance with decisions of international bodies

It flows from the foregoing that there exists an axiomatic state obligation to comply with binding decisions of international tribunals, including any decision on remedies. Such a conclusion is supported by doctrine.<sup>28</sup> As exemplified above, the Inter-American Court as a judicial institution has even implied a state duty to comply with decisions of a quasi-judicial body.

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<sup>21</sup> *Muñoz Hermoza v Peru* Human Rights Committee Communication No 203/1986, Views of 4 November 1988 paras 11.3 and 13.1.

<sup>22</sup> *Rudolf Czernin v The Czech Republic* Communication No 823/1998, Views of 25 March 2005 para 7.4.

<sup>23</sup> As above para 7.5.

<sup>24</sup> Paras 9 and 10.

<sup>25</sup> See for instance *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006) and *Zimbabwe Lawyers for Human Rights and Another (on behalf of Meldrum) v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009).

<sup>26</sup> See Articles on the Responsibility of States for Internationally Wrongful Acts 2002 UN Doc A/RES/56/83, art 4.

<sup>27</sup> *Germany v USA* ICJ Reports (2001) 468.

<sup>28</sup> The obligation is established when the decision is rendered, see Abdelgawad (n 5 above).



Notwithstanding these considerations, as mentioned earlier the obligation to obey international law is different from the one to comply with orders made by an international tribunal. In reality, the teleological argument of the *effet utile* is constrained by the limits of article 31 of the VCLT on interpretation of treaties.<sup>29</sup> In other words, the intention of the parties to a treaty prevails as to whether a specific provision is binding or not.<sup>30</sup>

Accordingly, state obligation to comply with such orders has been approached differently from one regime to another, in both the norms and jurisprudence. In fact, state obligation to comply is dependent on whether the treaty establishes a body that settles disputes, whether the decisions of such body are binding and on whom they are binding. A number of factors may therefore come into play as to the nature of the deciding body and its findings, whether there is a treaty obligation to comply at all, whether states have agreed to provide for compliance-supervisory mechanisms and sanctions for failure to comply. For example, some treaties provide for quasi-judicial bodies while others provide for judicial bodies. As a general principle, the decisions of quasi-judicial bodies are recommendatory while those of judicial bodies are binding. With a few exceptions, decisions of international judicial bodies are binding only on parties to the case. Finally, while the business of most bodies is understood to end with decision, the practice of self-compliance monitoring has largely developed over the years. The following examination reveals the peculiarities of various regimes in respect of state obligation to comply with decisions of supervisory bodies.

### **3. Compliance obligation in ECOWAS: Law, institutions and mechanisms**

In terms of the law, the duty for states to comply with the ECOWAS Community Court of Justice (ECCJ) judgments arises from the 1993 ECOWAS Revised Treaty, the 1991 ECCJ Protocol and 2005 Supplementary Protocol of the same Court. Relevant provisions in these instruments are supported by the Revised Treaty, which endows ECCJ judgments

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<sup>29</sup> Art 31(1) of the VCLT provides that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

<sup>30</sup> See VCLT, art 31(4).

with binding force and obligates states and the Community as a whole to immediately ensure execution of these judgments.

In 2012, the ECOWAS Authority of Heads of States and Government went further to adopt the Supplementary Act on Sanctions Applicable to Member States for Failure to Abide by Community Obligations. The Act represents a major development in state duty to comply with ECOWAS law and decisions of the Community Court. In the relevant parts of this study, the discussion of ECOWAS member states' duty to comply will therefore adopt a concomitant analysis of the normative framework before and after the adoption of the Supplementary Act. As related analysis reveal, normative reforms led by the new wave of regionalism strengthened the supranational character of ECOWAS law.

### **3.1 General obligation to obey ECOWAS rules**

States bear a general legal obligation to comply with the ECOWAS treaty provisions, decisions and regulations.<sup>31</sup> It is understood that ECOWAS rules include the main instrument and secondary legislation. According to treaty provisions, the 2005 ECCJ Protocol forms part of the Revised Treaty<sup>32</sup> and judgments of the Community Court 'shall be binding on the member states, the Institutions of the Community and on individuals and corporate bodies'.<sup>33</sup> As a general principle, decisions of the Court have 'no binding effect except between the parties and in respect of that particular case'.<sup>34</sup> By virtue of article 76(2) of the Revised Treaty, such judgments are final, the Court being one of first instance with final jurisdiction. Although revision of a decision is made possible where new facts of a decisive nature are discovered,<sup>35</sup> the Court may require prior compliance before it admits proceedings in revision.<sup>36</sup>

A general duty for states to comply with treaty law and binding decisions of competent bodies may also be read from ECCJ's jurisprudence, though indirectly or implicitly. For instance, arguably against the backdrop of the Law of Treaties and general international

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<sup>31</sup> ECOWAS Revised Treaty, art 5.

<sup>32</sup> Revised Treaty, art 89.

<sup>33</sup> Revised Treaty, art 15.

<sup>34</sup> 1991 ECOWAS Court Protocol, art 25(5).

<sup>35</sup> 1991 Court Protocol, art 25(1).

<sup>36</sup> 1991 Court Protocol, art 25(3).

law, the ECCJ blamed Niger for the inaction of its administrative and judicial authorities in the *Koraou Slavery* case. Although the Court found inaction on the part of implementing authorities in the framework of article 5 of the African Charter, it declined to find a violation of article 1 which imposes the duty on Niger to adopt implementing measures.

Notwithstanding this, it is contended that such findings confirm compliance related inaction as a violation and, implicitly, set ‘immediate’ action as a duty. In the *SERAP Education* case, it is contended that the ECCJ has also, though not with express reference, confirmed Nigeria’s duty to abide by international law compliance principles and by extension with its findings in the case. While acts of embezzlement of funds devoted to basic education were attributable to the states concerned, the ECCJ determined that because ‘the alleged suspects are not parties’ before it<sup>37</sup> the first defendant [the Federal state] ‘should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education’.<sup>38</sup> This pronouncement, it is submitted, is an acknowledgment by the ECCJ of a state’s responsibility for acts of its organs in breach of international obligations.

### 3.2 Specific compliance with ECCJ judgments

More specifically, the 2005 ECCJ Protocol provides that states have an individual duty to receive the ECOWAS Court judgments in their municipal order and give effect to them according to domestic rules of procedure.<sup>39</sup> It is important to stress that reference to domestic rules entails no further measure than for the competent national authority to verify that the writ of execution is one from the Community Court’s Registry.<sup>40</sup> The law is silent on whether states’ duty to receive and execute ECCJ judgments refers to cases they are party to or if non-parties to the case may also register the judgments domestically and give effect to them. A combined reading of both provisions supports the latter view. Indeed, the provision that all ECOWAS member states must immediately

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<sup>37</sup> *SERAP v Nigeria* ECW/CCJ/JUD/07/10 Judgment, 10 November 2010, para 27.

<sup>38</sup> As above para 28.

<sup>39</sup> 2005 Supplementary Court Protocol, art 24.

<sup>40</sup> As demonstrated later in this chapter, the verification procedure provided under sub-regional regimes in Francophone Africa is different from the ‘traditional’ *exequatur* process required to bring foreign judgments ‘home’ through an *exequatur* judgment.

take all necessary measures to give effect to the ECCJ's judgments<sup>41</sup> obligates states that are not party to the dispute to register any judgment and have it enforced domestically.<sup>42</sup>

As mentioned earlier, a subsequent norm has detailed and strengthened states' obligation to comply with the judgments of the Court as ECOWAS rules. The 2012 Supplementary Act on Sanctions Applicable to member states for failure to abide by Community Obligations is unequivocal. In the Preamble to the Act, the ECOWAS Authority of Heads of States and Government recalls that 'ECOWAS has established supra-national institutions whose decisions are binding and enforceable in full and directly both in its institutions and in member states'.<sup>43</sup> The Preamble goes further to state that it is adopted in the implementation of article 77 of the Revised Treaty.<sup>44</sup> Most importantly, article 1 of the Supplementary Act defines 'obligations owed to the Community' as: 'Application and respect of ... the Treaty, conventions, protocols and supplementary acts, regulations, decisions, directives, and *the decisions of the Community Court of Justice*'.<sup>45</sup> Finally, the Act enumerates 'the protection and respect of human rights, the rule of law, democracy, and constitutional order' as obligations that states owe to the Community.<sup>46</sup> In the light of these provisions, the Act therefore is a clear departure and development from the Treaty in terms of what constitutes obligations, which ECOWAS member states owe the Community.<sup>47</sup>

Most importantly, the Supplementary Act represents a significant normative development as it clears doubts about whether state compliance with the decisions of the ECOWAS Court are obligations which member states owe the Community in the

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<sup>41</sup> See 2005 Supplementary Court Protocol, art 33(3).

<sup>42</sup> See L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal – Final report' World Trade Institute Advisors (6 March 2011) 54-55.

<sup>43</sup> ECOWAS, Acte additionnel A/SA13/02/12 portant régime des sanctions à l'encontre des Etats membres qui n'honorent pas leurs obligations vis-à-vis de la CEDEAO' Abuja, 17 February 2012, Preamble, para 2.

<sup>44</sup> As above, para 4.

<sup>45</sup> Emphasis of the author.

<sup>46</sup> See 2012 Supplementary Act A/SA13/02/12, art 2(2) iv.

<sup>47</sup> The 1993 ECOWAS Treaty includes 'the protection of human rights' and 'consolidation of democracy' not as obligations vis-à-vis the Community but only as fundamental principles which states 'affirm and adhere to ... in the pursuit of community objectives'. See ECOWAS Revised Treaty, art 4.

meaning of article 77 of the Revised Treaty.<sup>48</sup> Put otherwise, the Act confirms that non-compliance with the decisions of the Court amounts to failure to abide by a Community obligation and attracts sanctions from the Authority. In fact, the Act appears to crystallise several article 77 references in other ECOWAS instruments.<sup>49</sup> As discussed further in subsequent chapters of this study, ECOWAS has gone much further ahead by providing for detailed sanctions to be imposed by the Authority in case of non-compliance, which sanctions cannot be appealed before the Community Court.

### **3.3 Implementation procedure and compliance-securing mechanisms**

#### **3.3.1 Implementation of judgments at the domestic level**

Implementation details are dealt with under article 24 of the 2005 Supplementary Court Protocol. The Community Court is the only ECOWAS organ expressly assigned with a role in the implementation process. According to the relevant provision, the Registrar of the Court shall ‘submit a writ of execution of the judgments to the relevant member state for execution according to the rules of civil procedure of that member states’.<sup>50</sup>

While the ECOWAS Court is given a role ahead of implementation, the most important duty seems to rest on member states and final realisation of judgments is manifestly reliant on domestic mechanisms. As a consequence, no judgment may be registered if the writ is refused certification by a national authority<sup>51</sup> which member states have the duty to determine and notify the Court.<sup>52</sup> A legal officer in the Court considers that a major issue arises here in respect of the effectiveness of the ECCJ as a human rights

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<sup>48</sup> See also discussions on the sharpening of the ECOWAS non-compliance sanctions regime under chapter VI. According to Justice Awa Nana Daboya, President of the ECCJ, the Community Court is aware of the opportunity the new sanctions’ regime offer to secure greater compliance without abandoning the cooperation option to compliance. See interview on the occasion of the Forum organised by the Media Foundation for West Africa on the enforcement of ECCJ’s judgments (Abuja, 30 July 2012). See also Media Foundation for West Africa ‘ECOWAS Court calls for sanctions against non-compliance member states’ (19 September 2012) <http://www.mediafound.org/en/?p=2281> (accessed 5 November 2012).

<sup>49</sup> See ECOWAS, Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, 14 June 2006. As the preamble of the Convention states, high contracting parties are ‘mindful of article 77 of the Treaty relating to sanctions applicable in cases where a Member State fails to fulfil its obligations to the Community’, and further ‘mindful of the relevant provisions of the Protocol on the Community Court of Justice adopted on 16 July 1991’.

<sup>50</sup> 2005 Supplementary Court Protocol, art 24(2).

<sup>51</sup> 2005 Supplementary Court Protocol, art 24(3). Although it would not prove difficult to certify that the judgment originates from the ECCJ.

<sup>52</sup> Art 24(4).

protection avenue.<sup>53</sup> This is the fact that implementation of its judgments is largely if not exclusively dependent on political will. However, designation of a national enforcement authority is an administrative requirement and the lack of such designation may not discharge the state from its compliance obligation. The implementation survey in chapter four shows that none of the compliant states had designated its authority at the time of compliance.

ECOWAS member states have not shown eagerness to give effect to the provisions of article 24(4) of the 2005 Supplementary Court Protocol. This attitude has caused a voice from within the Court to lament that ‘up till date however, despite repeated reminders from the Court, only the Republic of Guinea has complied with the requirement to designate an authority to receive and execute the courts decisions’.<sup>54</sup> However, the situation has evolved somewhat. Niger and Nigeria have subsequently designated their respective authorities. In any case, this situation raises a related issue as regards to whom the ECOWAS Court’s Registry should transmit the judgments of the Court where the national authority has not been designated.

It may be argued that the role of the ECCJ in the process of bringing states to comply with its judgments could be gravely undermined especially where there had been resistance and attempts to limit the scope of the Court.<sup>55</sup> In fact, such conditions would render state compliance impossible for the transmission of judgments cannot occur as long as a key is missing which is the national authority. Fortunately, as indicated earlier, because compliance has been recorded prior to the designation of national authorities by Niger and Nigeria, one may consider the prescription as purely administrative. As

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<sup>53</sup> See F Ofor ‘Experiences of ECOWAS Court in enforcement of its judgments’ Colloquium on African Human Rights Courts and Similar Institutions (Arusha, 4-6 October 2010) 5. Mrs Franca Ofor is Principal Legal Research Officer at the ECOWAS Court of Justice.

<sup>54</sup> Ofor as above.

<sup>55</sup> In 2005, the ECCJ faced criticisms from Nigerian domestic actors for issuing a provisional ruling in the case of *Ugokwe v Nigeria* concerned with elections. In 2009, the Government of The Gambia put forth a proposal to shrink the jurisdiction of the case to entertain individual human rights complaints. For greater details on those cases, see discussion on ECOWAS culture of securing compliance under chapter VI. As the relevant sections briefly alluded to later in this chapter, similar trends have been observed to those observed in ECOWAS, which were fatal to the SADC Tribunal and sought to control the independence of East African Community Court judges.



discussed in subsequent chapters, no state has argued its failure to designate the competent authority as a reason not to comply.

However, bearing in mind the reasons that states may use to avoid fulfilling their obligations and allowing a smooth domestic implementation, it is still relevant that national authorities be designated. The issue is discussed further in the chapter on compliance. Having provided an overview of the implementation procedure, the discussion now turns to whether and what measures have been put in place in case states fail to comply.

### **3.3.2 Compliance securing mechanisms: Sanctions with no appeal?**

While no clear provision has been made specifically to address non-compliance instances in either the Revised Treaty or Court Protocols, several compliance-securing provisions may be implied from these instruments. In addition, the 2012 Supplementary Act has subsequently filled the gaps and expressly provided for compliance monitoring mechanisms backed by sanctions. Provisions of the Treaty and Protocols are therefore reinforced by those of the Supplementary Act. Compliance monitoring or follow-up mechanisms and sanctions for non-compliance will be discussed in depth in chapter five. Here, the existence of provisions for these mechanisms are only mentioned and discussed within the limits of the section.

First, states and the Community are jointly mandated to guarantee that defendant states comply with the ECCJ's judgments. Article 23(3) of the 2005 Supplementary Court Protocol accordingly enjoins 'Member states and Institutions of the Community to immediately take all necessary measures to ensure execution of the judgments of the Court'. This obligation may involve not only ensuring implementation and follow-up but also securing compliance or supervised enforcement in case states fail to comply. Second, article 77(1) of the 1993 ECOWAS Revised Treaty provides that 'where a Member state fails to fulfil its obligations to the Community, the Authority may decide to impose sanctions on that Member state'. As mentioned earlier, the argument that the compliance obligation arising from the Revised Treaty constitutes an obligation that states owe to the Community is confirmed by the 2012 Supplementary Act. This obligation consequently falls under article 77 obligations, the breach of which may



attract sanctions from the Authority. Finally, an even more interesting provision of the Act is that: 'Acts imposing sanctions on a non-compliant state cannot be appealed before the Community Court or any other tribunal'.<sup>56</sup> As discussed in chapter five and chapter six, this normative reform brings clarity about ECOWAS's choice to adopt a compliance monitoring mechanism in which the political bodies have the final say.

Another important issue is who will move the mechanisms and how it will be done. Prior to the adoption of the 2012 Supplementary Act, none of the Treaty or Court Protocols assigned ECOWAS political bodies with specific tasks with regard to follow-up or supervision of state compliance with the ECCJ's decisions. The same applied to the Community Court. Various provisions of the Treaty and Protocols referred to earlier imply a role for the ECOWAS Authority of Heads of States and Government. The Authority is, in terms of the Treaty, the only Community organ vested with an implied supervisory competence in relation to implementation. Probably because it is generally understood that courts' duty ends at the delivery of judgments, the role of the Community Court itself is limited to the secretarial or procedural parts of implementation. However, as alluded to earlier, consistent practice in international law and other regional regimes has shown the prominent involvement of both judicial and non-judicial bodies in compliance monitoring.

With regard to how the mechanism should be moved, the wording of the ECOWAS Treaty provision is imprecise. For lack of a clear and comprehensive identification of actors in the compliance-securing process, one may revert to any relevant provision of the Treaty. Two provisions are of help. Article 19 of the ECOWAS Revised Treaty reads, '... the Executive Secretary [read President of the Commission] shall be the chief executive officer of the Community and all its institutions'. This provision is complemented by article 88(3) of the same treaty which provides that 'in the exercise of its legal personality ..., the Community shall be represented by the Executive Secretary'. It transpires from article 19 that the ECOWAS Commission is responsible for the smooth functioning of the Community and, thus, has the obligation to see to the coordination of the activities of member states or ECOWAS Institutions in relation to ECOWAS law. It may

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<sup>56</sup> 2012 Supplementary Act A/SA13/02/12, art 16(4).

also be argued, upon the provisions of article 88(3), that the President of the ECOWAS Commission has been vested with the power, on behalf of ECOWAS, to demand that states fulfil their obligations to the Community. As noted earlier, the President is the chief executive officer of ECOWAS and all its institutions and is the legal representative of the Community.

These constructions are validated by the 2012 Supplementary Act. First, article 14 of the Act provides that the Authority, a Member State, or the President of the ECOWAS Commission may initiate a procedure for sanction against a Member State which does not fulfil its obligations to the Community. Second, in terms of article 15(1) of the Act, reports of non-compliance may be filed by any natural or legal person of a Member State, by any institution of the Community, and by any Member State. The reports will be examined by either the Council of Ministers or the Authority. The prominent role of the ECOWAS Commission is emphasised by the provision under article 15(2) that non-compliance reports filed by institutions of the Community, individuals and legal persons are sent to the President of the Commission. Non-institutional reports may be channelled through national authorities in charge of regional integration.

As discussed in chapter five and chapter six on compliance, the Supplementary Act positions the President of the Commission as the coordinating institution throughout the process. The President of the Commission liaises with the state within specific timeframes provided for in the Act and reports to the Council of Ministers. The Council makes recommendations to the Authority for sanctions to be meted out against the non-compliant state. While the Act does not make specific provision for the majority required for such a decision, the 1993 Treaty provides that the Authority reaches decisions by unanimity, consensus or by a two-thirds majority, depending on the matter under consideration.<sup>57</sup> The same applies to regulations adopted by the Council.<sup>58</sup>

It transpires from the previous discussion that states are obligated to comply with final decisions of the ECOWAS Community Court of Justice in cases to which they are party. While the Treaty addresses compliance monitoring mechanisms and non-compliance

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<sup>57</sup> See art 9(2).

<sup>58</sup> See art 12(2).

sanctions in vague terms, the 2012 Supplementary Act tasks institutions of the Community and nationals of member states with specific roles in compliance monitoring and provides for detailed sanctions in case of non-compliance.

#### 4 Compliance with the decisions of United Nations bodies

This section undertakes an analysis of state compliance with the decisions of the bodies established under United Nations treaties. The discussion focuses on the International Court of Justice and human rights treaty bodies as the most important international litigation forums in terms of states' involvement.

##### 4.1 Decisions of the International Court of Justice

The International Court of Justice was established by the Charter of the United Nations as the principal judicial organ of the United Nations and its Statute forms an integral part of the Charter.<sup>59</sup> Accordingly, article 93 of the UN Charter provides that 'All members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice'. Therefore, primary sources of state obligation to comply with the ICJ judgments are to be found in both the Charter and ICJ Statute.

As a preliminary, the content and scope of compliance obligation are deemed of interest. Firstly, the *ipso facto* jurisdiction granted to the ICJ through ratification of its Statute and Membership of the UN should be interpreted only as a general competence to deal with disputes arising between states. Actually, ICJ jurisdiction is optional and non-exclusive. Indeed, article 36(2) of the ICJ Statute provides that 'states parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, (...), the jurisdiction of the Court (...)'. The entire article 36 is plagued with specific consent requirements. Furthermore, article 33(1) of the UN Charter entrusts states with the right of recourse to methods of settlement 'of their own choice'. Considering the argument that obedience is motivated by consent,<sup>60</sup> the consensual jurisdiction of the ICJ is important to understanding state compliance. This argument is

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<sup>59</sup> See UN Charter, arts 92 and ICJ Statutes, art 1. Both texts were adopted on 26 June 1945 and entered into force on 24 October 1945.

<sup>60</sup> An illustration of this is well provided through the three Rs of compliance as proposed by AT Guzman *How international law works: A rational choice theory* Oxford (2008) 33-48.

equally supported by the idea that only less independent courts are more likely to attract acceptance by both parties and compliance by the judgment creditor.<sup>61</sup>

Secondly, and in any case, the binding nature of the ICJ judgments has exceptions. Importantly, the judgments are binding only on the parties and in respect of the particular case. Both limitations are provided under article 59 of the ICJ Statute. While the judgments are final and without appeal,<sup>62</sup> revision is allowed upon discovery of decisive fact<sup>63</sup> and compliance may be required prior to acceptance of revision proceedings.<sup>64</sup> Finally, an express duty to comply with ICJ judgments is stated in article 94(1) of the UN Charter which provides: ‘Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party’. The scope of state duty to comply under article 94(1) is determined by the *res judicata*<sup>65</sup> nature of final decisions as delineated by article 59 of the ICJ Statute. However, the terminology of ‘decisions’ has raised issues as to whether article 59 encompasses only judgments on the merits or any other decisions made by the ICJ. Commentators point out the interchangeable use of ‘judgment’, ‘decision’, ‘judicial decision’ and even ‘*arrêt*’ during the drafting process.<sup>66</sup> The term ‘decision’ might be more appropriate after the ICJ found in the *LaGrand case*<sup>67</sup> that provisional measures are also binding.

As far as the material scope of compliance obligation is concerned, it depends on the category of decision. Decisions fall under two main categories. The operative part of the decision may enclose a specific order. In this category, the Court may call the defendant State to take measures of its own choice to repair violations, to pay a financial compensation or provide a guarantee of non-repetition. Under the second category, a decision may be a declaration of a legal situation or relationship. Although no performance is requested from the parties, declaratory decisions establish a legal

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<sup>61</sup> As above 53.

<sup>62</sup> ICJ Statute, art 60.

<sup>63</sup> ICJ Statute, art 61(1).

<sup>64</sup> ICJ Statute, art 61(3).

<sup>65</sup> In *Barcelona Traction, Light and Power Company (Belgium v Spain)*, ICJ Reports (1970) 3, the ICJ defined the *res judicata* as a decision of the consequence that the matter ‘is finally disposed of for good’.

<sup>66</sup> See K Oellers-Frahm ‘Article 94 UN Charter’ in A Zimmermann *et al The statute of the International Court of Justice: A commentary* 2<sup>nd</sup> ed. (2012) 186-203.

<sup>67</sup> *Germany v USA* ICJ Reports (2001) 468.

position which cannot again be called in question.<sup>68</sup> The duty to comply does not lie upon non-parties to the case since the decision is binding only on the parties. It follows that decisions may not prejudice other cases, either pending or future between parties to a specific dispute or to disputes with and between other States.

However, in the *Avena* case, the ICJ adopted a more nuanced position by stating that the conclusion reached may apply to ‘other foreign nationals in similar situations in the United States’.<sup>69</sup> In the matter, Mexico instituted proceedings against the United States of America in a dispute concerning alleged breaches of provisions of the Vienna Convention on Consular Relations in relation to the treatment of a number of Mexican nationals who had been sentenced to death in the United States. The original claim related to 54 Mexican nationals, but as a result of subsequent adjustments by Mexico, only 52 individual cases were involved. Mexico also asked the ICJ to request the USA to take provisional measures to ensure that no Mexican national was executed until the Court passed its final decision.

Importantly, and as far as its domestic effect is concerned, state obligation to comply with ICJ decisions is indivisible and incumbent upon the party concerned in its capacity as a subject of international law. The meaning of it is that states carry out responsibility on behalf of internal organs including the executive, legislature, courts and tribunals. Internal organs are not direct addressees of the decision unless such is provided for in domestic law. Consequently, as indicated earlier, states are responsible internationally for acts and omissions of their organs. In the *Breard*, *LaGrand* and *Avena* cases, the argument of the United States that it could not interfere with its constituent states led the ICJ to an explicit finding on the issue. The Court stressed that while the implementation of its provisional measures not to execute Walter LaGrand fell within the jurisdiction of the Governor of Arizona, the United States was obligated to transmit the order to the Governor who ‘is under the obligation to act in conformity with the international undertakings of the United States’.<sup>70</sup>

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<sup>68</sup> See Oellers-Frahm (n 66 above) 189.

<sup>69</sup> *Avena and Other Mexican Nationals (Mexico v United States of America)*, ICJ Reports (2004) 12, 70.

<sup>70</sup> *LaGrand case Provisional measures* ICJ Reports (1999) para 28.

This jurisprudential development seems to have impacted domestic courts in the United States. Following up on the *Avena* case, the Court of Criminal Appeal of Oklahoma ordered the stay of execution of the individuals concerned.<sup>71</sup> A concurring voice within the Court explained that the Oklahoma Court found itself bound by the Vienna Convention and its Protocol via the Supremacy clause of the United States Constitution.<sup>72</sup> The same opinion concluded that the Court was consequently bound by the *Avena* decision. This view is supported by both international law<sup>73</sup> and ICJ jurisprudence, namely in the *Arrest Warrant* case.<sup>74</sup>

The Oklahoma position is however not the dominant one as well illustrated by the reaction of another state of the same US federation. Indeed, the Appeal Court of Texas was of the view that none of the ICJ decisions, namely the *Avena* judgment, and US President's Memorandum giving effect to such decisions, were binding law.<sup>75</sup> Affirming the Texas Appeal Court decision, the US Supreme Court recently determined that 'neither *Avena* nor a US President's Memorandum directing state courts to give effect to the *Avena* decision constituted directly enforceable federal law that pre-empted state limitations on the filling of habeas corpus petitions'.<sup>76</sup> The Supreme Court was of the view that the relevant treaty obligations addressed by the *Avena* judgment are not self-executing treaty obligations.<sup>77</sup>

Just as recognition of jurisdiction, methods of implementation of ICJ's decisions are flexible. As neither the UN Charter nor the ICJ Statute provide for procedures to implement ICJ judgments, commentators have argued, rightly, that methods of compliance are left to the discretion of states.<sup>78</sup> It transpires from article 94(1) of the UN

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<sup>71</sup> *Osbaldo Torres v The State of Oklahoma* Order granting stay of execution and remanding case for evidentiary hearing 13 May 2004.

<sup>72</sup> *Torres v State of Oklahoma*, Application for post-conviction relief, No PCD-04-442 (Oklahoma Court of Criminal Appeals) ILDC 113 (US 2004).

<sup>73</sup> See art 4 of the Draft Articles on State Responsibility, which provides that 'the conduct of any state organ shall be considered an act of that State under international law'.

<sup>74</sup> *Arrest Warrant of 11 April 2000* ICJ Reports (2002).

<sup>75</sup> See *Medellin v Dretke*, Decision of Court of Criminal Appeals (Texas), Application No AP-75, 207; ILDC 669 (US 2006) para 14.

<sup>76</sup> *Medellin v Texas*, Appeal Judgment, No 06-984 ILDC 947 (US 2008) para 11.

<sup>77</sup> As above 55.

<sup>78</sup> See Oellers-Frahm (n 66 above) 190-193 and C Schulte *Compliance with Decisions of the International Court of Justice* (2004) 29-30.



Charter that compliance obligation is individual as ‘each member’ undertakes responsibility. Because such a discretionary determination does not bind the other party to the case, it may however challenge it and parties may refer to the Court to interpret the judgment.<sup>79</sup> The findings in the *Haya de la Torre* judgment suggest that the ICJ leaves it to the parties to make political choices as to the mode of compliance.<sup>80</sup> This discretion explains why states generally enter negotiation on the implementation of ICJ decisions.<sup>81</sup> The fact that states generally comply by means of negotiations also adds to the difficulty of ascertaining a violation of the duty to comply as international law does not determine any time limit for non-compliance to be constituted.<sup>82</sup> International negotiations are known to involve series of top government meetings which exhaust time. Therefore circumstances of the case may delay implementation even though the judgment debtor is willing to fulfil its obligation. The proceeding itself may delay compliance if, for example, there is more than one judgment on the merits as has occurred in the *Corfu Channel* case.<sup>83</sup> In the instance, Albania was unable to comply until the Court issued a judgment assessing the amount of the obligation.

Even though states are left to decide how to implement ICJ decisions, the United Nations Security Council is mandated to enforce such decisions under article 94(2) of the Charter. One could therefore suggest that individual control granted to states over the fate of ICJ judgments is monitored by a collective control laid down in article 94(2) which states

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The powers of the Security Council to supervise compliance have raised debates. At a first glance, there seems to be no confusion about conditions under which the enforcement provision may be moved. The first is when a judgment debtor has failed to comply with a final decision. Of course, whether and when failure to comply is

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<sup>79</sup> As provided in article 60 ICJ Statute.

<sup>80</sup> *Colombia v Peru* ICJ Judgment of 13 June 1951, ICJ Report (1951) 71.

<sup>81</sup> See Schulte (n 78 above) 29.

<sup>82</sup> As above.

<sup>83</sup> *United Kingdom v Albania* ICJ Decision of 9 April 1949.



constituted must be cautiously assessed bearing in mind potential dispute on interpretation of the order to be complied with and the length of political negotiations towards compliance.<sup>84</sup>

As far as the author of the non-compliance referral is concerned, only the ‘other party’ may request the intervention of the Security Council. Then, only where deemed necessary, will the Security Council activate the possibility of making recommendations or decide upon relevant measures to give effect to the decision. On the one hand, consideration of action by the Council is not compulsory and the political nature of the Council does not bear promises of an easy utilisation of the provision. As a matter of fact, this has never happened. Only once, in the *Nicaragua* case, had a country brought non-compliance before the Security Council on the basis of article 94(2). The case was discussed by the Council but subsequent action was vetoed obviously by permanent members. Similar complaints were filed in further cases in which no requests followed for a Security Council meeting.<sup>85</sup> On the other hand, no specific ‘recommendation’ or ‘measure’ is spelt out in the provision. It is evident that the wording leaves it at the wide discretion of the Security Council as to what range of actions are deemed necessary.

However, because the *res judicata* nature of an ICJ decision is unimpeachable by the Council, the latter may in no instance move away from the pronouncement.<sup>86</sup> Of course, the question arises whether the Security Council may use any other of its powers to secure state compliance with ICJ decisions. Clearly, the question is whether any relation can be established between the UN Charter’s article 94(2) enforcement powers and those granted to the Council under chapters VI and VII of the Charter. The majority of commentators concur in a negative answer thus considering article 94(2) powers as autonomous and independent.<sup>87</sup> One major argument is that no action would be possible against non-compliant states in the absence of a potential threat to or breach of international peace and security. Accordingly, chapter VII measures may be used only

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<sup>84</sup> See JL Atangana ‘La négociation dans l’exécution des arrêts de la Cour internationale de justice’ (2006) 7-8 *La Voix de l’Intégration Juridique et Judiciaire Africaine* 9.

<sup>85</sup> There is a sustainable argument that such complaints were rather initiated as compliance-securing strategy on the part of their authors. See Schulte (n 78 above) 30-39.

<sup>86</sup> Oellers-Frahm (n 66 above) 189-190.

<sup>87</sup> See Schulte (n 78 above) 40. According to the author, the large majority of commentators agrees that article 94(2) is an independent source of competence for the Security Council.

when conditions are fulfilled. In that line, it has been considered that the Security Council could change an ICJ judgment into a political decision and bring it under chapter VII.<sup>88</sup> As compliance-securing actions, the Council may suggest modalities of implementation or reiterate the Court's order.

With regard to state compliance, a high level has been recorded.<sup>89</sup> For instance, a study covering 1987-2004 reveals that only five of the fourteen judgments by the ICJ have met 'less compliance'.<sup>90</sup> The fact that difficulties arose in quite few cases should not lead to overlooking states' reluctance to comply voluntarily and promptly. For instance, it took 40 years for the judgment to be implemented in the *Corfu Channel*<sup>91</sup> and *Monetary Gold*<sup>92</sup> cases. In the Temple of *Preah Vihear* case,<sup>93</sup> Thailand first rejected the judgment but finally returned the temple to Cambodia. In the *Nicaragua* case, one of the most important heard by the ICJ, the US never formally accepted the decision but it did pay compensation as ordered by the Court.<sup>94</sup> The rejection-negotiation-compliance cycle is also largely confirmed especially in the cases involving African states, as discussed further later under the overview of African states' compliance with the outcomes of international adjudication.

#### 4.2 Views and decisions of UN human rights treaty bodies

Seven of the ten UN Human Rights Treaty Bodies (UNTBs) in operation as at 2013 may, where a state has agreed, consider complaints or communications from individuals. Consideration of communications from individuals is subject to ratification of an optional protocol or a specific declaration provided under the considered treaty. For instance, by virtue of optional protocols, the ICCPR, CEDAW and CRPD committees have full competence to consider individual complaints only where states brought to the body are party to the treaty. A declaration is necessary for individual communications to be

<sup>88</sup> As above 49.

<sup>89</sup> See J Dugard *International law – A South African perspective* (2011) 466 and BA Simmons 'Compliance with international agreement' (1998) 1 *Annual Review of Political Science* 89.

<sup>90</sup> See C Paulson 'Compliance with final judgments of the International Court of Justice since 1987' (2004) 98 *The American Journal of International Law* 436-437.

<sup>91</sup> *United Kingdom v Albania* Judgment of 9 April 1949 ICJ Reports (1949) 244.

<sup>92</sup> *Italy v France, United Kingdom and United States* Judgment of 15 June 1954, ICJ Reports (1954) 32.

<sup>93</sup> *Cambodia v Thailand* Judgment of 15 June 1962 ICJ Reports (1962) 6.

<sup>94</sup> See Oellers-Frahm (n 66 above) 195-196.

considered by the CAT,<sup>95</sup> CERD,<sup>96</sup> CMW,<sup>97</sup> and CED<sup>98</sup> committees. Adopted on 10 December 2008,<sup>99</sup> an optional protocol to the ICESCR was opened to signature in 2009 to allow individual complaints. Since they began operations in 1997, UNTBs have decided 1 906 individual communications and about 500 cases were pending as at October 2010. The Human Rights Committee is reported to account for 80 per cent of all cases.<sup>100</sup>

Although their contribution to the development of international human rights law (IHRL) is undeniable,<sup>101</sup> UNTBs suffer limitations inherent to the degree of consent afforded by states in the founding instruments. This has much to do with the force carried by their decisions and, arguably, with state compliance. For instance, unlike courts, UNTBs do not entertain cases per se but only consider ‘communications’ as they are not judicial bodies. The language of the relevant conventions speaks as well to the non-binding nature of their decisions. Indeed, should they find human rights violations, these bodies may issue only ‘views’,<sup>102</sup> ‘decisions’,<sup>103</sup> ‘findings’,<sup>104</sup> ‘suggestions and recommendations’.<sup>105</sup> It follows that nothing in the various instruments obligates states to comply with the decisions of UNTBs.

Despite this major lacuna, it has been argued that states have a duty to comply with the decisions of human rights treaty bodies. Some have contended, for instance, that states ratify a convention in good faith with the intention of abiding by the decisions of supervisory bodies.<sup>106</sup> However, such arguments were founded on the doctrine of implied powers to establish compliance monitoring mechanism, especially in the case of

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<sup>95</sup> Art 22.

<sup>96</sup> Art 14.

<sup>97</sup> The relevant provisions will become operative when 10 state parties have made the necessary declaration under article 77 of the Convention.

<sup>98</sup> Art 31.

<sup>99</sup> General Assembly Resolution A/RES/63/117.

<sup>100</sup> A Kjærum ‘The Treaty Body complaint system: Expanding protection against refoulement, a survey or recent views by treaty bodies on individual complaints’ (October 2012) *Human Rights Monitoring Quarterly* 1.

<sup>101</sup> See MG Schmidt ‘Follow-up procedures to individual complaints and periodic state reporting mechanisms’ in G Alfredsson *et al* (eds) *International human rights monitoring mechanisms* (2001) 201.

<sup>102</sup> See First Optional Protocol to ICCPR, art 5(4); CAT, art 22(7) and CMW, art 77(7).

<sup>103</sup> See Optional Protocol to CEDAW, art 5.

<sup>104</sup> See Optional Protocol to CRPD, art 6(3).

<sup>105</sup> See CERD, art 7(b).

<sup>106</sup> See Schmidt (n 101 above) 202.

the Human Rights Committee (HRC). The Committee adopted this doctrine on the ground that the primary purpose of international investigation is to determine if a settlement has been reached and whether it is being observed. The treaty body thus explained that it ‘could not let its work under the Optional Protocol degenerate into an exercise of futility; ....’; that if it ‘believed that certain appropriate action was reasonably open to it, or was not expressly prohibited, the Committee should take it ....’.<sup>107</sup> The Committee eventually assumed specific implied powers through its Rules of Procedures.<sup>108</sup> With regard to compliance obligation itself, one would have expected UNTBs to borrow the *pacta sunt servanda*-based argument used by the Inter-American Court to instil binding force into the recommendations of the Inter-American Commission in the *Loayza-Tamayo* case.

Arguably due to lack of treaty provisions, none of the treaty bodies has interpreted its decisions as binding on states. However, the silence of the treaty did not prevent the Human Rights Committee for example from using the proxy-binding nature of domestic courts to enforce its findings. Illustrations of this practice were provided earlier in the present discussion, namely under instances where the HRC again made use of the *pacta sunt servanda* principle. In those instances, the Committee explained that the implementing provisions in the ICCPR, namely the obligation to provide for effective domestic remedies, obligates states to give effect to the decisions of their own domestic courts. The treaty body therefore was of the view that states should comply with its decisions when they confirm the findings of domestic courts.<sup>109</sup> Yet, those were not findings of the body as such but only calls for states and their organs to abide by domestic courts’ decisions which were binding in the first place. Of course, several decisions of UNTBs have been met with compliance. One instance is direct compliance whereby states would implement views or findings of the body as if they were binding, though on a case-by-case basis. The other instance is states’ deciding to develop

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<sup>107</sup> See Human Rights Committee, Seventh Annual Report, United Nations General Assembly Official Records, 38th session, Suppl. No. 40 (UN Doc. A/38/40) (1983) para 393.

<sup>108</sup> As an example of the HRC’s implied power on desirability of provisional measures see *Piandiong et al v The Philippines*, Communication No. 869/1999, Views (19 October 2000), UN Doc.CCPR/C/70/D/869/1999.

<sup>109</sup> Namely in the *Muñoz Hermoza* and *Rudolf Czernin* cases.

‘enabling legislation’ as was the case under the HRC. Through such practice, countries like Peru and Colombia have given the status of legal title to decisions of the Committee.<sup>110</sup> In any case, the wide majority of state parties to UN human rights treaties still do not recognise the decisions of treaty bodies as binding.<sup>111</sup>

No express enforcement mechanism is provided under UN human rights treaties. The lack of mechanism could be understandable since decisions have no binding force. Arguably in response to poor state compliance with their decisions, UN Treaty Bodies have organised informal monitoring mechanisms. As the first operating body and one which has adjudicated the vast majority of individual communications to date, the Human Rights Committee (HRC) has taken the lead in compliance monitoring.<sup>112</sup> Compliance with the decisions of UN Treaty Bodies can accurately be assessed through an overview of the HRC because its follow-up procedures have largely inspired the modelling of subsequent monitoring mechanisms. The HRC went as far as creating a position of Special Rapporteur to follow-up on its decisions from 1990. The follow-up procedures include a response from states within six months of decisions to explain how they intend to implement the views of the HRC. This confirms again the practice in international adjudication of leaving means of implementation at the discretion of states. Responses and status of compliance are then published in a report to the UN General Assembly. This step is followed with diplomatic consultations led by the Special Rapporteur with a view to facilitating compliance. In any case, relevant records<sup>113</sup> show that compliance with the decisions of treaty bodies is poor.<sup>114</sup>

Relying on a 2009 Report, of the 546 cases in which the HRC found violations of the ICCPR, only 67 have received a ‘satisfactory’ response, although even that means only that the state has proposed a remedial scheme<sup>115</sup> but not that the violation was remedied. A better compliance level was recorded for other treaty bodies though they have adjudicated relatively lesser numbers of cases. The figures are accordingly 50%

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<sup>110</sup> See Schmidt (n 101 above) 208.

<sup>111</sup> As above.

<sup>112</sup> See Open Society Justice Initiative *From judgment to justice: Implementing international and regional human rights decisions* (2010) 118.

<sup>113</sup> Namely OHCHR’s Petitions Section.

<sup>114</sup> See OSJI (n 112 above) 27.

<sup>115</sup> As above.

compliance for the CAT which is quite high with regard to one particular violation and especially due to the fact that relatively high compliance has been recorded with regard to non refoulement cases. A few cases of compliance have been recorded with the CEDAW which has received only 24 communications as of October 2010. Of the 10 cases in which the CERD has found violation, compliance was secured in three instances.<sup>116</sup>

## 5 Compliance in regional human rights regimes

### 5.1 Americas

The American human rights system is constituted of two institutions, the Inter-American Commission on Human Rights (IACHR)<sup>117</sup> and the Inter-American Court on Human Rights (IACtHR).<sup>118</sup> The primary mission of the IACHR is to promote and defend human rights.<sup>119</sup> It may do so by creating human rights awareness, making recommendations to member states on human rights legislation, preparing reports and conducting on-site observations.<sup>120</sup> As to the IACtHR its main function is to interpret and apply the provisions of the American Convention.<sup>121</sup>

Importantly, only the IACHR is competent to entertain direct individual human rights complaints<sup>122</sup> as such petitions to the IACtHR are not permitted.<sup>123</sup> While it has exclusive competence to receive direct individual petitions, the IACHR may issue only non-binding recommendations for complaints based on the American Declaration. For petitions based on the American Convention, the IACHR, failing a friendly settlement,<sup>124</sup> may refer the case to the IACtHR under the condition that the involved member state is party to the American Convention<sup>125</sup> and has consented to the jurisdiction of the Court.<sup>126</sup> As referral

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<sup>116</sup> As above.

<sup>117</sup> Created in 1959.

<sup>118</sup> The Court started in 1979; that was 11 years after its creation by the American Convention on Human Rights in 1969.

<sup>119</sup> See Statute of the Inter-American Commission 1979, art 1.

<sup>120</sup> See IACHR Statute, arts 18(a)(b)(c) and (g).

<sup>121</sup> See IACHR Statute, art 1.

<sup>122</sup> See IACHR Statute, art 19.

<sup>123</sup> See American Convention, art 61(1). Only state parties and the IACHR may submit cases to the IACtHR.

<sup>124</sup> See Regulations of the IACHR, 1980 modified 1996, art 45.

<sup>125</sup> See American Convention, art 62.

<sup>126</sup> See IACHR Statute, art 19(c) and American Convention, 62(3).



is optional, the IACHR may equally dispose of the cases though its findings would remain with no binding force.

To overcome the lack of individuals' direct access to and engagement with the Court, the IACHR had developed the practice of appointing victims and their representatives as assessors right from the *Velasquez* case.<sup>127</sup> Through that procedural innovation, individuals and their representatives would attend proceedings and assist the Commission although only the former would be recognised as parties before the Court.<sup>128</sup> The same practice was used until the 4<sup>th</sup> Rules of Procedure of the Court came into force in 2009 allowing the IACHR and victims to represent different interests, particularly in respect of reparation. Petitioners were therefore allowed to engage in proceedings alongside the Commission. The system has changed dramatically from 2010 with an extended autonomy for individuals to participate at all stages of proceedings.<sup>129</sup> Under the current procedure, once notice of the brief submitting a case before the Court has been served, alleged victims and their representatives may submit their briefs containing pleadings, motions and evidence autonomously and continue to act so throughout proceedings.

Decisions of the IACtHR are final<sup>130</sup> and binding<sup>131</sup> and appropriate remedies are available.<sup>132</sup> Although the present study does not focus on reparations, they constitute an integral part of the outcome of adjudication and therefore have a bearing on compliance. The IACtHR is famous for developing innovative remedies that speak to the specificity of the violation and its orders in that line are known to be more elaborated than most of those issued by its regional counterparts.<sup>133</sup> From *Velásquez* to *Loayza Tamayo*, measures ordered by the Court have thus included material reparations, such as

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<sup>127</sup> *Velásquez Rodríguez v Honduras* Judgment of 29 July 1988 (Merits). Initially, independent participation of victims in the IACtHR was limited to the reparation stage.

<sup>128</sup> See JL Cavallaro & SE Brewer 'Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-American Court' (2008) 102 *The American Journal of International Law* 767-768.

<sup>129</sup> Since the amendment of art 25(1) of the 2001 Court Rules of Procedure.

<sup>130</sup> See American Convention, art 67.

<sup>131</sup> Subject to recognition of jurisdiction. See American Convention, arts 62(1) and 63(2).

<sup>132</sup> See American Convention, art 63(1).

<sup>133</sup> See in general K Bonneau 'Le droit à réparation des victimes de violations des droits de l'homme: le rôle pionnier de la Cour interaméricaine des droits de l'homme' (2006) 6 *Droits fondamentaux* <http://www.droits-fondamentaux.org/IMG/pdf/df6kbciaadh.pdf> (accessed 7 March 2013).



the payment of monetary damages, as well as symbolic reparations, usually in the form of public ceremonies or the erection of memorials for the victims.<sup>134</sup>

The Court has also ordered states to investigate violations and try perpetrators as part of the ‘right to the truth’.<sup>135</sup> Another range of measures comprises orders to adjust laws, policies or practice according to the American Convention or to take positive measures such as providing training to police.<sup>136</sup> Some of the most innovative remedies included a reparation of the ‘damage to a life plan’ as a third category of damage along with traditional material and moral damages.<sup>137</sup>

States’ duty to comply with IACtHR judgments in cases in which they are parties is expressly stipulated in the American Convention.<sup>138</sup> As regards orders on compensatory damages, they may be executed in the country concerned according to domestic procedure governing the execution of judgments against the state.<sup>139</sup> Clearly, states have an obligation to comply only with decisions of the IACtHR. However, for cases fulfilling the required conditions, the IACHR may have recourse to the IACtHR for making its recommendations binding. As illustrated in an earlier section, the IACtHR found in the *Loayza-Tamayo* case that states are obligated by recommendations of the IACHR.<sup>140</sup> The arguments were that ratification involved good faith and the IACHR has competence under the treaty to see to the fulfilment by states of their obligations.

These developments should not overlook states’ reluctance and opposition towards the Court. First of all, the establishment of the IACtHR was a lengthy process.<sup>141</sup> In its earliest,

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<sup>134</sup> See for instance, *Cantoral Hermani v Peru* Serie C N° 167 (IACtHR, 17 July 2007) para 193; *Villágran Morales v Peru* (Reparation) Serie C N° 77 (IACtHR, 26 May 2001) para 84.

<sup>135</sup> *Carpio Nicolle v Guatemala* (Merits, reparations and costs) (IACtHR, 22 November 2004) para 128; *Castillo Páez v Peru* (Reparations) Series C No 34 (IACtHR, 27 November 1998) para 90.

<sup>136</sup> *Montero Aranguren v Venezuela* Serie C N° 150 (IACtHR, 5 July 2006) para 129. On these types of reparations, see also Cavallaro & Brewer (n 128 above) 785.

<sup>137</sup> *Loayza Tamayo* (reparation) paras 145-148. In the case, the complainant was released but had to leave the country and live alone abroad in difficult economic conditions, which in the view of the Court prevented her from achieving personal, familial and professional objectives that she had reasonably set for herself.

<sup>138</sup> See art 68(1).

<sup>139</sup> See American Convention, art 68(2).

<sup>140</sup> Weaknesses in this argument have been pointed out earlier namely when assessed against provisions of article 31 of the VCLT.

<sup>141</sup> See L Burgogue-Larsen & AU de Torres *The Inter-American Court of Human Rights: Case law and commentary* Oxford (2011) 7-8. Created in 1969, the Court operated only in 1979. Ratification of the

the Court has not attracted much litigation either.<sup>142</sup> Last but not least, states have continuously strongly asserted sovereignty over the Court arguably due to the very liberal jurisdiction provision.<sup>143</sup> For instance, the Dominican Republic accepted jurisdiction of the Court 20 years after ratifying the American Convention. In the same vein, Peru withdrew from the Court jurisdiction in 1999 reportedly to avoid being condemned on the occasion of the *Ivcher* case<sup>144</sup> then pending before the IACtHR. The case concerned three constitutional justices who had allegedly been removed for ruling against then President Fujimori's running for another consecutive term.<sup>145</sup>

Trinidad and Tobago took an even more radical stance in 1999 by simply withdrawing from the Convention.<sup>146</sup> The reasons for Trinidad and Tobago's behaviour may, if analysed against the context, be understood as aimed at avoiding future compliance. The state's communiqué explained the necessity to abide by a decision of the Judicial Committee of the Privy Council in the case of *Pratt and Morgan v Jamaica*,<sup>147</sup> which national authorities said represented the constitutional standard for Trinidad and Tobago. The Privy Council had ruled that execution must take place within five years of the imposition of the death sentence or it would amount to inhuman and degrading treatment. Trinidad and Tobago's denunciation of the American Convention followed its unsuccessful attempt to win the American Commission's cooperation in implementing this timeframe. The Commission made it clear that management of cases brought before it must follow its internal rules.<sup>148</sup>

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Convention moved at a very slow pace coming to standstill in 1993 since when no new country had signed up as at November 2013.

<sup>142</sup> For instance, the Court did not receive a single case in its first seven years of operation 1979-1986. The Commission referred only 29 cases to the Court between 2001-2004, which generated 28 judgments.

<sup>143</sup> Ratification of the American Convention is not a condition for OAS membership nor is recognition of jurisdiction permanent. See American Convention, art 62(1).

<sup>144</sup> *Ivcher-Bronstein v Peru* Judgment of 6 February 2001 (Merits, Reparations and Costs).

<sup>145</sup> International Justice Resource Center 'Venezuela denounces American Convention on Human Rights as IACHR faces reform' <http://www.ijrcenter.org/2012/09/19/venezuela-denounces-american-convention-on-human-rights-as-iachr-faces-reform/> (accessed 8 March 2013)

<sup>146</sup> See Burgorgue-Larsen & de Torres (n 140 above) 9.

<sup>147</sup> *Pratt and Morgan v Attorney-General of Jamaica* (1993, 4 ALL ER 769).

<sup>148</sup> See Organisation of American States Department of International Law 'Multilateral treaties' [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm) (accessed 21 October 2013).

A subsequent case of withdrawal from the Convention is Venezuela's denunciation of September 2012, with the denunciation to take effect in September 2013.<sup>149</sup> Longstanding tension between Venezuela and the Inter-American human rights system is a notorious fact and the now late President Hugo Chavez had, on occasions, accused the Inter-American Commission of being biased.<sup>150</sup> However, the proxy cause for the country's withdrawal should be traced to the June 2012 *Díaz Peña* judgment of the IACtHR.<sup>151</sup> The Court held that Venezuela had violated *Díaz Peña*'s rights under the American Convention because he did not receive adequate medical treatment while he was detained prior to his trial for his alleged participation in the 2003 bombings of the Spanish Embassy and Colombian Consulate in Caracas. The Court consequently ordered Venezuela to grant *Díaz Peña* compensation of \$15 000.

The problem is that *Peña* had been found guilty and sentenced to nine years in prison by a Venezuelan court in 2008 for participating in the bombings that left three people injured. *Peña* later escaped to the United States, which subsequently refused his extradition. The IACtHR ruling reportedly led President Chávez to accuse the Court of 'supporting terrorism', which he is said to have pointed out as the 'final and definitive reason to withdraw'.<sup>152</sup> According to a certain public perception in Venezuela, by refusing to uphold the domestic court decision and grant compensation, the IACtHR failed the victims of the bombings. The impression left by the judgment is that the *Díaz Peña* decision 'privileged an alleged victim over other victims and privileged supposedly

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<sup>149</sup> See Inter-American Commission on Human Rights 'IACHR regrets decision of Venezuela to denounce the American Convention on Human Rights' [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/117.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/117.asp) (accessed, 25 February 2013).

<sup>150</sup> Accusations included the Inter-American Commission recognising the *de facto* Government that took power during a short-lived coup d'état in 2002 by writing to the Government to ask of President Chavez's whereabouts in response to precautionary measures requested on his behalf. President Chavez has also always accused the Commission of 'campaigning against his government and acting at the behest of the United States'. See Huffingtonpost 'Venezuela pulling out of OAS human rights bodies' <http://www.huffingtonpost.com/huff-wires/20120910/lt-venezuela-human-rights/> (accessed 8 March 2013).

<sup>151</sup> *Díaz Peña v Venezuela* (Preliminary objections, merits, reparations and costs) Series C No 244 (IACtHR, 26 June 2012).

<sup>152</sup> Washington Office on Latine America 'Red de Apoyo on the decision to withdraw from the Inter-American Court of Human Rights' <http://venezuelablog.tumblr.com/post/30334221180/red-de-apoyo-on-the-decision-to-withdraw-from-the> (accessed 8 March 2013).

imperial “rights” over justice, the fight against impunity, and the prevention of terrorism.<sup>153</sup>

It should be noted that while the American Convention is silent on withdrawal of acceptance, it is possible to withdraw from the Convention under specific conditions.<sup>154</sup> For instance, withdrawal is not permitted before five years of the entry into force of the Convention with a one-year notice. In addition, the state will continue to be subject to the jurisdiction of the Inter-American Commission and violations that take place until the date on which the denunciation takes effect may be examined by the IACtHR.<sup>155</sup> Those conditions were fulfilled in the two cases of withdrawal from the Convention referred to earlier.

However, the use of the silence of the Convention on withdrawal from the jurisdiction of the IACtHR as implying a possibility of such withdrawal has been denounced by the Court. As a consequence, the IACtHR has declared invalid Peru’s withdrawal of acceptance on the occasion of the *Ivcher* case discussed earlier in this section.<sup>156</sup> Besides withdrawal, as no form is prescribed for jurisdiction declaration, states have also used ‘claw-back’-like clauses to shape a jurisdiction ‘à la carte’.<sup>157</sup> Similarly, because of the too liberal drafting of the Convention, states like Bolivia and El Salvador could put a constitutional bar to the Convention.<sup>158</sup>

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<sup>153</sup> As above.

<sup>154</sup> See Burgorgue-Larsen & de Torres (n 142 above) 13.

<sup>155</sup> See American Convention, art 78(2).

<sup>156</sup> For a comprehensive discussion of the decision of the Court, see JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (2003) 115-116.

<sup>157</sup> See Burgorgue-Larsen & de Torres (142 above) 7, 10. The authors pointed out the case of Chile which had set the date of entry into force of its declaration because of the ‘darkest errors of the past’ and to ‘avoid an avalanche of applications’.

<sup>158</sup> See Burgorgue-Larsen & de Torres (142 above) 12. The same problems are predictable in respect of declaration required under art 34(6) of the African Court Protocol to grant individuals and NGOs access to the African Court. For instance, Tanzania’s declaration includes a reservation that ‘entitlement should only be granted to such NGOs and individuals ... in accordance with the Constitution of Tanzania’. See ‘Article 34(6) Declaration’ by the United Republic of Tanzania, 9 March 2010. However, Tanzania has not opposed individual direct access to the African Court in the *Reverend Mitikila* (independent candidates) case. See discussion of the case under the section on the African Court in the present chapter.

The Inter-American human rights system is said to have had a positive impact on socio-political development in the Americas over the past 25 years.<sup>159</sup> Yet, state compliance with both the Inter-American Commission and Court is relatively low. In a selected five-year (2001-2006) study<sup>160</sup> covering 51 decisions of the Commission and 41 of the Court,<sup>161</sup> full compliance was found for only 36 per cent of the surveyed remedies, and 14 per cent partial compliance. While greatest compliance, up to 47 per cent, was secured in all types of reparation,<sup>162</sup> a very low 10 per cent was recorded for investigation and punishment of wrongdoers. It is important to mention that remedies approved by the IACHR through friendly settlement have registered the highest degree of compliance. However when it comes to binding decisions, such decisions of the IACtHR secure highest compliance.<sup>163</sup> In any case, the system has experienced serious problems in respect of compliance which in one matter was yet awaited 16 years after the events and seven years after the judgment.<sup>164</sup>

It was also observed that compliance in the system generally depends on the form of reparation and two major domestic obstacles to payment are budgetary constraints and the inability of state to seize public funds.<sup>165</sup>

Under its current practice, the Inter-American Commission does not evaluate the level of compliance with each recommendation. The too-broad or vague recommendations and the lack of clear and uniform compliance evaluation criteria have been exposed as encouraging the current superficial control.<sup>166</sup> The diverse interpretation of vague recommendations has raised contradictions as to whether compliance occurred or not, depending on parties to the case. Similar problems also undermine the evaluation of state compliance by the Court. Its present practice includes no 'categorisation' of

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<sup>159</sup> See OSJI (n 112 above) 19.

<sup>160</sup> The report, however, included reports of the Commission up to June 2009.

<sup>161</sup> See Basch, F *et al* 'The effectiveness of the Inter-American system of human rights protection: A quantitative approach to its functioning and compliance with its decisions' (2010) 7 *Sur – International Journal on Human Rights* 18-19.

<sup>162</sup> Monetary reparations take the lead with 58 per cent degree of compliance.

<sup>163</sup> See Basch *et al* (n 161 above) 19-20. The study recorded 29 per cent compliance for remedies ordered by the Court and 11 per cent for those recommended in the Commission's final reports.

<sup>164</sup> For instance in the *Baena Ricardo* case.

<sup>165</sup> See Burgorgue-Larsen & de Torres (n 142 above) 184.

<sup>166</sup> See Basch *et al* (n 161 above) 32.

compliance. As a consequence, the Court has declared states in full compliance despite the petitioners expressing their disagreement with the way the order was complied with.<sup>167</sup>

With regard to enforcement mechanisms, political organs of the Organisation of American States have no role under the American Convention to pursue enforcement of IACtHR judgments. The IACtHR has no such authority either. In fact, the Convention is silent on compliance monitoring competence. Compliance is mentioned in a single provision of the Convention which requires the Court to specify non-compliant states and make pertinent recommendations while submitting its Annual Report to the General Assembly of the OAS for its consideration.<sup>168</sup> The silence of the Convention has not prevented the Court from requesting information and adopting resolutions on state compliance since its first judgments on reparations in 1989.

The Court determined it had a compliance monitoring power and used it over the years until it was challenged in *Baena Ricardo et al v Panama*.<sup>169</sup> In the *Baena Ricardo* case, the Government of Panama challenged the power of the IACtHR to request for information from states and issue resolutions on non-compliance. According to Panama, the Court had exceeded its authority since only the OAS General Assembly was empowered to monitor member states pursuant to article 65 of the American Convention. The IACtHR responded by reasserting the *compétence de sa compétence*, that is the authority to determine the scope of its own jurisdiction.

Among other additional arguments the Court held that it inferred monitoring competence from the intention of states, namely on the basis that it has exercised the function since 1989. The Court was of the view that its exchanges with governments in monitoring activities is *opinio juris communis*, that is a continued commitment or acceptance that creates a legal obligation. In exercising its implied mandate to monitor compliance, the Court has developed the practice of systematically publishing orders

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<sup>167</sup> As above.

<sup>168</sup> See American Convention, art 65.

<sup>169</sup> *Baena-Ricardo et al v Panama*. The Court inferred monitoring competence from the intention of states, namely on the argument that it has exercised the function since 1989. The Court was of the view that its exchanges with governments in monitoring activities is *opinio juris communis*.



issued by the President of the Court. The procedure starts with the Court requesting states to submit compliance reports and indicate the time frame within which they intend to implement the judgment. The Court also compiles reports prepared by the Commission and victims and then uses such information to assess state reports. The Court guarantees an adversarial process and informs the General Assembly of existing problems.<sup>170</sup>

In practice, the few instances where the Court reported non-compliance to the Assembly, the political body has not acted eagerly. For instance, in 1994, when the IACtHR reported Suriname's non-compliance, the Assembly failed to act. When refusal to comply by the same country was referred again in 1995, the Assembly responded with a resolution which urged the Government of Suriname to report to the Inter-American Court of Human Rights on the status of compliance with the Court's judgments.<sup>171</sup> It appears that the political organs have not pushed compliance monitoring initiatives towards the implementation of both the Inter-American Commission and Court's decisions.<sup>172</sup> Arguably as a sign of political will, the General Assembly of the OAS adopted a Resolution underlying the importance of the monitoring function.<sup>173</sup> The Court was quick to cite this resolution in its compliance monitoring activities.<sup>174</sup>

## 5.2 Europe

The European human rights model is generally praised for being the most effective in terms of attracting state compliance, or in fact 'the most effective human rights system in the world'.<sup>175</sup> Since the European Commission of Human Rights was abolished in 1998,<sup>176</sup> the European Court of Human Rights (ECtHR) has remained the sole organ of the Council of Europe with a mandate to entertain alleged violations of the European human

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<sup>170</sup> See Basch *et al* (n 161 above) 82-83.

<sup>171</sup> See L Groo 'The Contentious Mechanism of the Inter-American Human Rights System: Looking Towards the Future' (1997) *The Human Rights Brief*.

<sup>172</sup> See Basch *et al* (n 161 above) 32.

<sup>173</sup> Resolution AG/RES 2500 (XXXIV-O/09) 4 June 2009.

<sup>174</sup> See Burgorgue-Larsen & de Torres (n 142 above) 181.

<sup>175</sup> A Stone Sweet & H Keller 'The Reception of the ECHR in National Legal Orders' in A Stone Sweet & H Keller *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008) 3.

<sup>176</sup> When Protocol no 11 entered into force.



rights Convention brought by individuals, groups and NGOs.<sup>177</sup> Indeed, Protocol no 11 not only abolished the Commission but it also centralised authority to entertain claims in the new ECtHR and allowed individuals to petition the Court once they had exhausted local remedies.<sup>178</sup> The abolition of the Commission and direct individual access contributed significantly to the ‘explosion’ of the docket of the Court from 61 judgments on the merits in 1982 to 1 560 in 2006 while 50 500 individual applications had been received the same year.<sup>179</sup> The Court has final and exclusive jurisdiction over matters pertaining to the interpretation and application of the Convention.<sup>180</sup> Its final judgments are binding on parties to the case.<sup>181</sup>

In respect of execution of judgments of the ECtHR, article 46(2) of the Convention provides: ‘The final judgments of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution’. The role of the European Committee of Ministers has manifestly had an importance in the success and maintenance of the credibility of the European human rights system. The Committee is composed of government representatives of the 41 Council of Europe member states. Members of the Committee<sup>182</sup> meet four times a year while government representatives themselves, which are ministers of foreign affairs, meet only twice a year.

In accordance with article 46 of the Convention as amended by Protocol No. 11, the Committee of Ministers, among other functions, supervises the execution of judgments of the ECtHR. This work is carried out mainly at the four regular meetings held every year. Examination is based primarily on the information submitted by the respondent state although the Committee also considers communications made by the applicants concerning individual measures and by non-governmental organisations and national

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<sup>177</sup> See European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, entered into force 1953, art 34. The Convention has been ratified by 47 countries (31 December 2007).

<sup>178</sup> See European Convention, art 35.

<sup>179</sup> See Stone Sweet & Keller (n 175 above) 12 referring to the Court’s website as of January 2008.

<sup>180</sup> See European Convention, art 32.

<sup>181</sup> See European Convention, art 46(1).

<sup>182</sup> The Deputies, acting on behalf of the Ministers, conduct most of the day-to-day business of the Committee of Ministers. They hold separate meetings for Human rights (execution of judgments) and monitoring of commitments. Since September 1999 the Ministers’ Deputies meet each Wednesday. See Council of Europe Committee of Ministers ‘About the Committee of Ministers’ [http://www.coe.int/t/cm/aboutCM\\_en.asp#P25\\_338](http://www.coe.int/t/cm/aboutCM_en.asp#P25_338) (accessed 1 November 2011).

human rights institutions.<sup>183</sup> The Committee completes each case by adopting a final resolution. In some cases, interim resolutions may prove appropriate. Resolutions are made public. More specifically, the Committee of Ministers examines whether any just satisfaction awarded by the Court has been paid to the applicant. Where necessary, the Committee also considers whether other individual measures have been implemented to ensure that the violation has ceased and that the compensation has put aggrieved parties, as far as possible, in the same situation in which they were before the violation occurred. In addition, the Committee considers the adoption of general measures, with a view to preventing new violations similar to that or those found by the Court, or putting an end to continuing violations.<sup>184</sup>

The option of such a mechanism demonstrates an initial will of state parties to act collectively in supervising execution. This ‘fiduciary’<sup>185</sup> authority over the Convention has arguably endowed judgments of the Court with legitimacy-oriented compliance. In short, the example of the European system’s compliance-securing machinery seems to rest mainly on its political dimension. In effect, the success of the European compliance monitoring body is an association of a legal convergence with a constant political dialogue and community pressure.<sup>186</sup> A well-developed timing of supervision, high level involvement of respondent states and complainants, improved time limits for payment, orders for default interest, and diplomatic pressure account for some of the compliance-monitoring tools successfully developed and utilised by the Committee over the years.

In June 2010, these initiatives were reinforced by Protocol 14 which permits the Committee to seek interpretive rulings from the Court. Under the same protocol, the supervisory body may also bring ‘infringement proceedings’ before the Court in cases where states have failed to comply.<sup>187</sup> As Sundberg rightly suggested in his well-documented analysis, ‘the credibility of the European human rights Convention system

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<sup>183</sup> See Council of Europe Committee of Ministers ‘Supervision of the execution of judgments of the European Court of Human Rights: First annual report’ (2007) 17-18.

<sup>184</sup> As above.

<sup>185</sup> See A Stone Sweet & H Keller (n 175 above) 9.

<sup>186</sup> See Sundberg, FGE ‘Control of execution of decisions under the ECHR’ (2001) Alfredsson *et al* (eds) *International Human Rights Monitoring Mechanisms* 564-565.

<sup>187</sup> See OSJI (n 112 above) 45-49.

depends to a large extent on the Committee's capacity to maintain its compliance monitoring practices'.<sup>188</sup>

The overall rate of compliance in the European human rights system is said to be impressive when compared with other regional systems.<sup>189</sup> The ECtHR has confirmed that states have an obligation to comply with judgments finding a breach.<sup>190</sup>

Despite this, state compliance faces many challenges including partial and delayed enforcement and the pace of compliance has been slow in several instances. As a matter of fact, the Parliamentary Assembly has adopted six reports and resolutions and five recommendations to prompt state compliance with the ECtHR judgments.

Besides, the diplomatic approach of the Committee has not always worked against recalcitrant states as was the case for instance with Greece after the coup of 1967. Greece eventually had to leave the Council of Europe until the military dictatorship ended.<sup>191</sup> The effectiveness of the Committee has also been put to test in the recent years. For instance, the system faces huge non-compliance problems as illustrated by the poor records of Russia especially in relation to the political instability in Chechnya. In fact, Russia has been involved in the majority of the most serious human rights violations brought before the ECtHR such as torture and deliberate killing of civilians by the military in Chechnya.<sup>192</sup> Just as in Ukraine, difficulties in implementing ECtHR's judgments in Russia were concerned with the inability of domestic mechanisms to enforce judgments against the state. Even if reports reveal that Russia has paid compensation in most cases, much still needs to be done for the ECtHR's judgments to have full effect.<sup>193</sup> While Ukraine has passed new legislation to effectively enforce judgments against the Government, the problem remain chronic in Russia.<sup>194</sup>

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<sup>188</sup> Sundberg (n 186 above) 574.

<sup>189</sup> See OSJI (n 112 above) 52.

<sup>190</sup> See *Scozzari and Giunta v Italy* ECHR, App. Nos 39221/98 and 41963/98, 13 July 2000.

<sup>191</sup> See Sundberg (n 186 above) 565.

<sup>192</sup> A leading or pilot case, which has been the focus of the Committee's monitoring work is *Khashiyev v Russia* (no. 57942/00).

<sup>193</sup> For a comprehensive analysis on Russia's compliance with ECHR judgments see in general Human Rights Watch 'Who will tell me what happened to my son?' Russia's implementation of European Court of Human Rights judgments on Chechnya (2009).

<sup>194</sup> See Stone Sweet & Keller (n 175 above) 650-661.

Another major issue relates to compliance with the reasonable time criterion in article 6(1) of the Convention. In fact, human rights and rule of law standards fall short of the Convention minima in many countries across Europe. Apart from the chronic floods of ‘clone’ applications from countries such as Italy, massive failure from East and the Balkans to meet basic Convention standards constitutes a challenge for the system.<sup>195</sup> On another note, countries such as Russia, Turkey and Ukraine have failed to meet the most basic rule of law principles. There is a current concern that lack of domestic institutional capacities and systemic violations may jeopardise the Court’s primary function to achieve individual justice.<sup>196</sup>

This overview of state compliance experiences in international regimes was meant to examine different standards to which international adjudication mechanisms established in Africa may be compared. Recourse to judicial as opposed to quasi-judicial bodies, binding versus non-binding decisions, and human rights as opposed to non-human rights tribunals was purposive. While the ICJ rarely handles human rights disputes, it is the longest functioning UN judicial body which has shaped the development of international law and international relations over the past 60 years. On their part, UN human rights treaty bodies have constituted the most important forums for international human rights adjudication. Despite the challenges they have faced, the European and American human rights bodies have contributed greatly to the protection of human rights in regional systems with quite innovative and dynamic mechanisms.

As it will be observed in the following discussion, the African international adjudication landscape pertaining to human rights is made up of a mosaic of institutions. At the continental level, two of such bodies are granted explicit jurisdiction to handle human rights cases, one with binding decisions and the other with non-binding recommendations. Sub-regional organisations have also established international adjudication forums allowing individuals to initiate proceedings. One of these sub-regional courts has an express human rights mandate while others have implied such a mandate from the founding treaty and international law.

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<sup>195</sup> As above 13.

<sup>196</sup> As above.

The choice to discuss those bodies, continental or regional, is instructed by their interaction with states which are required, expressly or impliedly, to comply with their decisions. Actually, one of the aims of this choice is to find out whether the status and mandate of those bodies and the nature of their decisions make a difference as to state compliance.

### 5.3 Africa

#### 5.3.1 The African Commission

Until the establishment of the African Court on Human and Peoples' Rights (African Court) in 2006, the African Commission on Human and Peoples' Rights (African Commission) was the only adjudicatory body in the African human rights system, the youngest of the regional systems. Established by the African Charter on Human and Peoples' Rights (African Charter) in 1981, the African Commission began its operations in 1987. Its jurisdiction *ratione materiae* is based on the Charter. Mandated to 'promote human and peoples' rights and ensure their protection in Africa',<sup>197</sup> the African Commission may entertain individual human rights complaints under 'communications other than those of State Parties'.<sup>198</sup>

Functions of the African Commission also include interpretation of the African Charter at the request of state parties, institutions of the African Union or African organisation recognised by the African Union.<sup>199</sup> Since the Charter has been ratified by all African states, the Commission may receive human rights complaints under certain conditions,<sup>200</sup> the most important of which being exhaustion of local remedies.<sup>201</sup>

That the findings of the Commission are not legally binding, at least not expressly, cannot be denied.<sup>202</sup> However, positions have been defended for and against. State practice has

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<sup>197</sup> African Charter on Human and Peoples' Rights 1981, entered into force 1986, art 30.

<sup>198</sup> African Charter, art 55.

<sup>199</sup> See African Charter, art 45(3).

<sup>200</sup> See African Charter, art 56.

<sup>201</sup> See African Charter, art 56(5).

<sup>202</sup> See for instance R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 54-55; E Enochong 'The African Charter on Human and Peoples' Rights: Effective remedies in domestic law?' (2002) 46 *Journal of African Law* 197; Viljoen & Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law*; and F Viljoen *International human rights law in Africa* (2012) 339-342.

not been in strong favour of holding them binding. For instance, the African Charter does not provide that the Commission may make ‘recommendations’, let alone defines the status of such recommendations.<sup>203</sup> The recommendations may not even be publicised until the African Union Assembly of Heads of State and Government has adopted the report containing findings of the Commission.<sup>204</sup> These situations have caused acerbic criticism but also prompted useful contributions among observers, users and sponsors of the system. Some have suggested that it may be difficult for states to consider the findings of the Commission as mere non-binding recommendations once such findings are adopted as decisions by the African Union Conference.<sup>205</sup> The situation has not improved as, from 2010, the Assembly no longer approves decisions of the Commission but only adopts its activity reports, which contain a list of decisions made by the Commission and not the full decisions.

Besides the lack of express power to make binding decisions, an important related issue has to do with the fact that there is no express remedy<sup>206</sup> for violations found by the Commission except in cases of a massive violation and after the Assembly has requested in-depth study.<sup>207</sup> Individual cases are therefore provided no remedy either under the Commission or the Assembly’s mandates. An ordinary interpretation therefore suggests that the Commission should limit itself to finding violations while states retain discretion as to how to address such breaches of rights. While the wording of the monitoring mandate of the Assembly is open to interpretation, it is obvious that the consideration of a communication by the Commission has a remedial purpose in the first place.<sup>208</sup> The justiciability of African Charter rights and the customary law character of the right to reparation provide so.<sup>209</sup> Members of the Commission therefore submit that recognising

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<sup>203</sup> See GM Wachira & A Ayinla ‘Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples’ Rights: A possible remedy’ (2006) 6 *AHRLJ* 471.

<sup>204</sup> See African Charter, art 59.

<sup>205</sup> See Viljoen (n 202 above) 339; Wachira & Ayinla (n 203 above) 481-487.

<sup>206</sup> On the argument of self-evident remedies under the African Charter, see G Musila ‘The Right to an effective remedy under the African Charter’ (2006) 6 *AHRLJ* and G Naldi ‘Future trends in human rights in Africa: The increased role of the OAU?’ in M Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights: The system in practice 1986-2000* (2002) 1.

<sup>207</sup> See African Charter, art 58.

<sup>208</sup> See Viljoen (n 202 above) 355-356.

<sup>209</sup> See Bonneau (n 133 above) 2.



the African Charter rights as duties makes it an obligation for states to comply with its findings.<sup>210</sup>

Noteworthy, as at 2013, the Commission had not offered itself an opportunity yet to borrow from the indirect approach used by the Inter-American Commission to have its recommendations enforced by the Inter-American Court. One may argue that the African Court has only recently started its operation and a relationship is developing fastly between the two institutions of the African human rights system. As an early indication of that relationship the two bodies have revised and harmonised their Rules of procedure in 2010 and, within the following two years, the Commission has made use of the mechanism under which it can refer cases to the African Court. The same applies to the Court as discussed under the next section.

As far as cooperation initiated by the Commission is concerned, pursuant to article 2 of the African Court Protocol, the Court 'shall' complement the protective mandate of the Commission. Referral from the Commission to the Court may be either in the way of 'conversion' after a decision on the merits or from a 'request' to an 'order' for provisional measures. The other situation is when urgency is established as is the case in circumstances of grave and massive human rights violations, which has been termed as 'acceleration'.<sup>211</sup> Conditions for referral from the Commission to the Court are dealt with under Rule 118 of the Rules of procedure of the Commission. Rule 118 provides for at least three situations in which it may seize the Court. These are non-compliance with its recommendations,<sup>212</sup> non-compliance with a request for provisional measures,<sup>213</sup> and situations of 'serious or massive human rights violations'.<sup>214</sup>

The option of having decisions on the merits changed into binding judgments remained limited, at least in the first three years of the entry into force of the harmonised Rules of

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<sup>210</sup> See CD Atoki 'Enforcement of the recommendations of the African Commission' Colloquium of the African human rights and similar institutions (Arusha, 4-6 October 2010) 4-5 and R Alapini Gansou 'Keynote Address' Colloquium on application of the African Charter on Human and Peoples' Rights by South African courts (Cape Town, 8-9 November 2012).

<sup>211</sup> See F Viljoen 'The African Human Rights Court: A newcomer to the African judicial family' Paper presented at the iCourts Inaugural Conference University of Copenhagen (14-15 September 2012) 1-4.

<sup>212</sup> Rules of Procedure of the African Commission on Human and Peoples' Rights (2010), rule 118(1).

<sup>213</sup> African Commission's Rules of Procedure, rule 118(2).

<sup>214</sup> African Commission's Rules of Procedure, rule 118(3).

Procedure of the Commission and Court. The major reason for that limitation is that states involved in such cases decided by the Commission had not yet accepted the jurisdiction of the Court. The *Endorois* case decided in 2009 is one of the best candidates for such a referral<sup>215</sup> but the Commission seems to be stuck between an instable political will of national authorities and time pressure.<sup>216</sup> As discussed later in this section, the Commission has opted for compliance securing by monitoring implementation at its own level.

Conversely, the African Commission has made use of the second option, which is to utilise the powers of the Court to convert non-binding requests for interim measures into binding orders for provisional measures. In 2009, the Commission ordered interim measures in the case of *Centre for Minority Rights Development and Others (Ogiek) v Kenya*, concerned with the rights to land and development of the Ogiek indigenous community.<sup>217</sup> In 2012, non-compliance with the interim measures was referred to the African Court in the case of *African Commission (Ogiek) v Kenya*.<sup>218</sup> On 15 March 2013, the African Court ordered that

- (i) The Respondent State immediately reinstates the restrictions it had imposed on land transactions in the Mau Forest Complex and refrains from any act or thing that would or might irreparably prejudice the main application before the Court, until the final determination of the said application;
- (ii) The Respondent reports to the Court within a period of fifteen (15) days from the date of receipt hereof, on the measures taken to implement this Order.

In May 2013, the Government of Kenya suspended land transactions in the Mau Forest Complex, the effect being that restrictions already carried out will remain in place, and any restriction lifted should be reinstated. However, on 4 September 2013, the complainants reported to the Commission acts of the Government in contravention of

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<sup>215</sup> See *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

<sup>216</sup> See Viljoen (n 202 above) 2.

<sup>217</sup> See *Centre for Minority Rights Development, Minority Rights Group International and Ogiek Peoples Development Programme (on behalf of the Ogiek Community) v Kenya* Communication No 381/09.

<sup>218</sup> Application No. 006/2012 African Court on Human and Peoples' Rights.

the provisional measures. The Commission transmitted the information to the Court for follow-up.<sup>219</sup>

The problem in the *Ogiek* case was that it took the Commission almost three years to seek from the Court provisional measures which were supposed to ‘stop irreparable harm’ caused by a 30-day eviction notice in 2009. In the light of the experience in the *Ogiek* case, one would have legitimately expected a more pro-active approach from the Commission in its use of the Court’s complementary powers in subsequent cases. Unfortunately, the outcome in the *Libya Arab Spring* case discussed below does not seem to have been informed by the experience in the *Ogiek* case. Some procedural issues related to the application of the Court’s Rules have not helped the Commission either. For instance, after having granted an extension of time for the Commission to respond to objections raised by the respondent state, the Court indicated that pleadings were closed and a date set for hearing. The Commission had to request for a leave of Court to be able to submit on the merits of the case, while the Court rejected the request for an adjournment of the initial date.<sup>220</sup>

Another example of referral for non-compliance with interim measures is the case of *African Commission (Saif Gaddafi) v Libya* instituted on 31 January 2013, in which the Commission requested the Court to issue binding measures against that state.<sup>221</sup> The case was initially brought before the Commission in 2012 as *Saif Al-Islam Gaddafi (represented by Mishana Hosseinioun) v Libya*<sup>222</sup> in which the complainants alleged several fair trial rights violations. On 15 March 2013, the Court issued an order for provisional measures requesting the Respondent State to:

- (i) refrain from all judicial proceedings, investigations or detention, that could cause irreparable damage to Saif Al-Islam Gaddafi (the Detainee), in violation of the Charter or any other international instruments to which Libya is a party;

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<sup>219</sup> Information obtained through on-the-record consultation. The identity of related sources is redacted for the sake of confidentiality.

<sup>220</sup> Information obtained through on-the-record consultation. The identity of related sources is redacted for the sake of confidentiality.

<sup>221</sup> Application No. 002/2013 African Court on Human and Peoples’ Rights. The Commission had issued Provisional Measures on 18 April 2012.

<sup>222</sup> Communication 411/12.

- (ii) allow the Detainee access to a lawyer of his own choosing;
- (iii) allow the Detainee visits by family members;
- (iv) refrain from taking any action that may affect the Detainee's physical and mental integrity as well as his health;
- (v) report to the Court within fifteen (15) days from the date of receipt of this Order, on measures taken to implement this Order.

As at November 2013, there was no indication that these measures had been complied with. According to article 31 of the African Court Protocol, the Court submits a report to the AU Assembly of Heads of States and Government on its work during the previous years, including a specific indication of non-compliant states. In absence of compliance by the Government of Lybia, the Court submitted the aforementioned report to the AU Executive Council on 4 June 2013. The Court also requested the Commission to submit on the merits of the case by 28 February 2014. As discussed latter in this section, the responsiveness and success of the Commission as a litigant before the Court, including in this case, will mainly depend on how much attention is paid to issues related to the lack of capacity of the Commission in general, and particularly regarding referral of cases to the Court.<sup>223</sup>

The use of the third option, which is referral of massive violations instances to the Court, is illustrated by the case of *African Commission (Arab Spring) v Libya* instituted in 2011.<sup>224</sup> In February 2011, the Commission received several complaints consolidated in the case of *Egyptian Initiative for Personal Rights and Others (on behalf of the people of Libya) v Libya*.<sup>225</sup> Among others acts perpetrated by Libyan security forces in the wake of the Arab Spring, the complaints alleged violent suppression of peaceful demonstrations, excessive use of heavy weapons against the population, and killings of civilians. Having considered these complaints at the seizure stage, the Commission concluded that the actions complained of amount to 'serious and widespread violations' of rights enshrined in the African Charter. The Commission consequently instituted a case before the Court against

<sup>223</sup> Information obtained through on-the-record consultation. The identity of related sources is redacted for the sake of confidentiality.

<sup>224</sup> *African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Arab Jamahiriya Order for Provisional Measures* (25 March 2011).

<sup>225</sup> *Egyptian Initiative for Personal Rights, Human Rights Watch, Interights, and Libyan League for Human Rights (on behalf of the people of Libya) v Libya* Communication 394/11.

Libya. Interestingly, the Commission did not request provisional measures<sup>226</sup> which the Court moved *proprio motu*.<sup>227</sup>

The Court issued preliminary measures ordering Libya to ‘immediately refrain from any action that would result in loss of life or violation of physical integrity of persons’ or that was likely to breach the rights enshrined in the African Charter or other international instruments to which the state is party.<sup>228</sup> The Court further demanded that Libya reported to it on implementation within the 15 days of the order.<sup>229</sup> Apparently, Libya did not comply with the decision. At least, this case provided an opportunity to test whether and how the Commission could refer urgent cases of massive violations to the Court and how the latter would deal with the matter.

Compliance appeared to be illusory given the political context in Libya at the time of the case, which has somehow been overtaken by events, at least with regard to the implementation of the provisional measures. Despite these realities, the fact that Libya has ‘positively’ responded and filed submissions to defend the case was met with optimism in the Court.<sup>230</sup> Unfortunately, in March 2013 the Court decided to strike out the case at the merits stage, with the possibility of re-listing. When informed, the complainants requested an application for re-listing, copied the Court on the related correspondence and attached the materials initially submitted to the Commission. In response, the Court indicated that the matter was not before it any more.<sup>231</sup>

The matter was first referred to the Court on 2 March 2011 and the Commission was requested to submit evidence by 30 September 2011. The complainants having not responded to its request for evidence, the Commission requested a one-year

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<sup>226</sup> See *African Commission v Libya Order for Provisional Measures* (25 March 2011) para 9.

<sup>227</sup> As above para 10.

<sup>228</sup> *African Commission (Arab spring violence) v Libya Order for Provisional Measures* (25 March 2011) para 25(1).

<sup>229</sup> As above para 25(2).

<sup>230</sup> Presenting views on how litigation before international courts (the African Court) should be perceived, an African Court Judge Hon Justice Bernard Ngoepe, is of the view that one should not assess the effectiveness of the Court through the number of cases and condemnations issued but consider the true value of the Court as being a deterrence tool. See Law School University of Witwatersrand Roundtable Discussion on ‘30 Years of the African Charter on Human and Peoples’ Rights: Looking Back and Looking Forward to the next 20 Years’ Johannesburg 17 August 2011.

<sup>231</sup> Information obtained through on-the-record consultation. The identity of related sources is redacted for the sake of confidentiality.

adjournment to gather evidence. The official reason was the difficulty of ascertaining when the situation on the ground in Libya would have stabilised enough to allow the collection of the requisite evidence. The Court granted an extension till 31 August 2012, but the complainants responded only in November, which made it impossible for the Commission to process the evidence submitted.<sup>232</sup>

It is not very clear whether the materials were already in possession of the Commission, which was unable to process the same, at the time the Court requested them. It is surprising that civil society organisations involved in the initial complaints would have instituted communications of such a nature before the Commission without a minimum of investigation and evidence necessary to make a defensible case. Accordingly, a more plausible reason for the Court's decision in the lack of due diligence or capacity on the part of the Commission. As discussed later in this section, this point is connected to the practical ability of the Commission to take cases to the Court without putting in place the necessary procedures and mechanisms for referrals to benefit the system without weakening the authority of the Commission.

With regard to the timing for seizure, Rule 118(4) of its Rules of procedure provides that 'the Commission may seize the Court at "any stage" of the examination of "a communication" if it deems necessary'. However, Rule 118(4) seems to have gained a status in shaping complementarity that goes beyond merely setting the timing for referral. The Rule appears to have become the key to the referral policy of the Commission. Before February 2013, the position of the Commission was to read Rule 118(4) as directly linked and applicable only to cases of massive violations.<sup>233</sup> A plausible answer to such a construction is the proximity of the aforementioned rule with Rule 118(3) providing for massive violations as one of the situations allowing for referral.

However, an ordinary reading of Rule 118(4) suggests that it applies to at least any of the circumstances listed under Rule 118. Indeed, the cluster of words "any stage" is expressly stated to be "any stage" of "a communication" but not "the communication" or "such

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<sup>232</sup> Information obtained through on-the-record consultation. The identity of related sources is redacted for the sake of confidentiality.

<sup>233</sup> Information obtained through on-the-record consultation. The identity of related sources is redacted for the sake of confidentiality.



communications”, which would have referred exclusively to one of the categories of communications listed under Rule 118. A subsequent development that occurred in the Commission in early 2013 corroborates the latter construction of Rule 118(4) as applying to any case at any stage of its examination by the Commission. Such interpretation would cover not only the three situations expressly stated under sub rules 1, 2, and 3 or Rule 118 but also any other situation or consideration. The case of *African Commission (Saif Gaddafi) v Libya* mentioned earlier in this section is an illustration of that understanding of referral at “any stage”. In that case, the Commission referred the matter to the Court as early as at the seizure stage, while the case fell under none of the hypothesis listed by Rule 118.

Having said this, a number of issues remained unresolved in the early years of cooperation between the two institutions of the African human rights system. One critical of such issues is the discretion of the Commission, under Rule 118(4) of its Rules of Procedure, to refer cases ‘if it deems it necessary’. The possibility of reverting to this provision could be used by the Commission to entertain what is believed to be its traditional reluctance to transfer cases to a new and more attractive Court. Apparently, the sentiment within the Commission seems to be that the Court has captured much of the attention monopolised by the Commission prior to the operation of the judicial body.<sup>234</sup> One should also question the preparedness of the Commission to entertain litigation before the Court in terms of mobilising necessary financial resources, gathering or cross-checking evidence, drafting pleadings, developing judicial litigation expertise, and representing victims before the Court.

Another major issue about the African Commission’s potential to strengthen its work by using the Court is the current limited productivity of the Commission. Viljoen thus rightly observes that: ‘a factor limiting the pool of potential [referral] cases is the inability of the Commission to finalise more than a very small number of cases in [a particular] period’.<sup>235</sup> As a general illustration, of the 459 cases submitted to the African Commission since its

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<sup>234</sup> Information obtained through on-the-record consultation. The identity of related sources is redacted for the sake of confidentiality.

<sup>235</sup> Viljoen (n 202 above) 2.

inception in 1987, 83 were found inadmissible, 77 were decided on the merits, and 88 were pending – 21 on the merits and 67 on admissibility – as at November 2013.<sup>236</sup>

As far as productivity is concerned, on the basis a eight-year timeframe between 2004 and 2011, the Commission has decided on average five cases annually. The annual highest case output is of nine and the lowest is of two communications decided on both admissibility and merits. However, from 2013, significant efforts were made to enhance productivity. The most important initiative in that line is a three-year (2013-2015) project aimed at clearing the backlog of cases, improving the quality of decisions, and enhance the referral of cases to the Court. The outcome of the first year of the project includes the adoption of about 30 decisions, and three proposals for referral.<sup>237</sup>

In addition to the productivity issue, which encompasses staffing as well as capacity building and strengthening, an effective use of complementarity definitely involves an institutional and individual will to make use of the Court in the first place. In fact, the decisive factor is whether the Commission, and more specifically Commissioners, envisage the Court as the window to greater visibility as well as more authority, effectiveness, and even funding. To put it simply, if the Commission or Commissioners approach their use of the Court as beneficial to the Court rather than strengthening or complementing the work of the Commission, there is a very little chance for increased case movement from Banjul to Arusha. In a situation where the Commission would refuse to ‘give work to’ or to ‘feed’ the Court, the loss is much more likely to be incurred by the former, and ultimately by litigants and the entire system. It could therefore be a matter of concern that the position of the African Commission, at least that of the early years following the harmonisation of Rules of Procedure, appeared to be that the Commission should not serve as the postal office of the Court or justify its operation. However, as discussed earlier in this section and under the next section on the African

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<sup>236</sup> As above. Information obtained from the Registry of the Commission. It should be noted that many cases have been merged, which explains that the numbers do not add up. Several Communications have also been struck out due to withdrawal, lack of due diligence, loss of contact with the complainants, etc.

<sup>237</sup> See GFA Consulting Group ‘Terms of reference, technical cooperation with the African Commission on Human and Peoples’ Rights’ (2013) project document on file with author.

Court, an important hurdle for referral is the lack of capacity, particularly at the level of the Commission's Secretariat.

Presumably because states consider them as non-binding, recommendations of the African Commission have faced difficulties with regard to implementation.<sup>238</sup> Clearly, states did not intend to create a body with binding decisions in the first place.<sup>239</sup> Over the years, they have not shown eagerness to do so either.<sup>240</sup> Formally, no follow-up mechanism was provided and implementation has not been monitored.<sup>241</sup> It is arguable that an early independent compliance monitoring mechanism would have helped create awareness and pressure states to implement recommendations.<sup>242</sup> The fact is also that states or victims rarely report to the institution on compliance instances.<sup>243</sup>

In response, the African Commission has developed various channels of monitoring states' compliance with its recommendations.<sup>244</sup> These have included resolutions, activity reports, concluding observations, letters of appeal and press releases, fact finding and promotional missions. More importantly, the Commission has taken the position, in a resolution adopted on the situation in Eritrea, that non-compliance with its recommendations is a violation of states' obligation under both the African Charter and the AU Constitution.<sup>245</sup>

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<sup>238</sup> See F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *The American Journal of International Law*.

<sup>239</sup> See for instance G Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 10.

<sup>240</sup> See Wachira & Ayinla (n 203 above) 473 where the authors referred to submissions by the Federal Republic of Nigeria to the 2<sup>nd</sup> extraordinary session of the African Commission held 18-19 December 1995, Kampala, Uganda. Nigeria questioned the African Commission's assumption of quasi-judicial functions. See also RI Maikassoua 'Les effets des décisions de la Commission africaine des droits de l'homme et des peuples' Thèse de doctorat en droit public, Université Paris I Panthéon Sorbonne Prisme Université de Strasbourg (2011).

<sup>241</sup> See G Baricako 'La mise en œuvre des décisions de la Commission africaine des droits de l'homme et des peuples par les autorités nationales' in JF Flauss & E Lambert-Abdelgawad (dir) *L'application nationale de la Charte africaine des droits de l'homme et des peuples* Bruxelles: Bruylant (2004) 214.

<sup>242</sup> See GM Mugwanya *Human rights in Africa: Enhancing human rights through the African regional human rights system* Transnational Publishers Ardsley (2003) 274, 376.

<sup>243</sup> See Atoki (n 210 above) 6.

<sup>244</sup> See in general Atoki (n 210 above) and Viljoen & Louw (n 238 above).

<sup>245</sup> See Resolution on the human rights situation in Eritrea, 19<sup>th</sup> Activity Report, 21 November – 5 December 2005, para 2.

It is important at this juncture to stress that, as a position stating document, a resolution does not elaborate on legal issues. However, the preamble of resolutions always recalls the legal instruments that serve as basis for the resolution. The Commission's Resolution on Eritrea therefore stated its position on the human rights situation in that country and called on stakeholders, primarily the Government in this case, to take specific actions. Among other provisions of various African Union instruments, the Commission referred to article 1 of the African Charter which stipulates that 'the State parties recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt or other measures to give effect to them'.

A subsequent Resolution was adopted by the Commission on 'the importance of the implementation of its recommendations'<sup>246</sup> in which it set a six-month time frame for states to report on compliance progress. Here, the Commission first recalled that its protective mandate implies considering communications, finding violations and making recommendations as appropriate. The Commission then sourced states' 'acceptance of its authority and essential role in promoting and protecting human rights in Africa in their ratification without any reservation of the African Charter'.<sup>247</sup> These resolutions were endorsed by political bodies of the African Union.<sup>248</sup> In its recent practice, the Commission adopted a consistent use of the six-month compliance monitoring time frame.<sup>249</sup>

Though of recent use, the most commendable monitoring initiatives undertaken by the Commission have not improved the poor compliance status, at least not significantly. All existing studies concur that the African Commission has experienced low levels of implementation of its decisions. For instance, a 2005 study shows that of the 44

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<sup>246</sup> See Resolution on the importance of the implementation of the recommendations of the African Commission on Human and Peoples' Rights, Final Communiqué of the 40<sup>th</sup> session of the African Commission, November 2006.

<sup>247</sup> As above. The Resolution also referred to several other commitments made by states such as the Universal Declaration of Human Rights, the Constitutive Act of the African Union, the African Union Resolution on the need for member states to give full effect to the African Charter, as well as the Vienna Declaration and Programme of Action.

<sup>248</sup> Namely the Executive Council, AU Doc EX.CL/Dec.344(X).

<sup>249</sup> See for instance, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009); *Kevin Mgwanga Gunme and Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009); and *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005).

communications in which the Commission found violations of the provisions of the African Charter, full compliance has been recorded in only six instances where states have implemented all the recommendations contained in the decision.<sup>250</sup> In 14 cases, some of the recommendations have been complied with.<sup>251</sup> A subsequent study recorded a total of 60 decisions on violation, as of October 2010, of which seven have been complied with. Manifestly, this study did not account for latest compliance in the *Endorois* case<sup>252</sup> the partial implementation of which was reported to the Commission by the complainants.<sup>253</sup>

Decided in 2009, the *Endorois* case has received a lot of publicity and is probably the landmark decision of the African Commission in respect to indigenous peoples' rights. The Commission found that Kenya violated among others the rights to property, to participate in the cultural life of one's community, the right of the people to freely dispose of their wealth, and the right to economic and social development. A range of recommendations made included recognition of land ownership, restitution, access, as well as payment of compensation and royalties.<sup>254</sup>

At a follow-up hearing in April 2013, representatives of the Endorois community informed the Commission that very little had been done to implement the recommendations. On the contrary, the representative of the Government of Kenya reported that a number of steps had been taken since the adoption of the 2010 Constitution, including: A comprehensive recognition of communities' rights to ancestral lands, the enactment of a National Land Commission Act to implement provisions of the Constitution, and the

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<sup>250</sup> See Viljoen & Louw (n 238 above) 5.

<sup>251</sup> As above 6.

<sup>252</sup> *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

<sup>253</sup> See Atoki (n 210 above) 7.

<sup>254</sup> See *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009), Recommendations. The State should: (a) Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land; (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle; (c) Pay adequate compensation to the community for all the loss suffered; (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the reserve; (e) Grant registration to the Endorois Welfare Committee; (f) Engage in dialogue with the Complainants for the effective implementation of these recommendations; and (g) Report on the implementation of these recommendations within three months from the date of notification.

appointment of members of the Commission who will address recommendations of the African Commission.

In addition, the Government mentioned other measures including adoption of an Environment and Land Act, and a Registration Act. Consultations were also carried out with Endorois leaders to draw up a road map for implementation, which was said to have been delayed due to time constraints and the 2013 presidential election. The state consequently requested the African Commission to allow time for full implementation. The African Commission requested the state to submit an interim report in 90 days of the follow-up hearing, and a full report for the 54<sup>th</sup> Ordinary Session of the Commission to be held in October-November 2013.<sup>255</sup>

As far as compliance monitoring is concerned in respect of the African Commission, and from a comparative perspective, one would expect political organs of the African Union to play a role in ensuring state compliance. Such expectation has not been met as far as the African Union is concerned. As referred to earlier in this section, the African Commission is a quasi-judicial organ of the African Union whose highest political body is the Assembly of Heads of State and Government.

The subordination of the Commission to the African Union has also been alluded to earlier in this chapter. Since the African Charter did not provide for the Commission to make 'recommendations' or define the status of such recommendations in the first place, it becomes obvious that the Commission could do so only because states and political bodies of the African Union allowed it to. As a matter of fact, decisions of the Commission have remained in the shadow on every occasion the Assembly decided to defer their adoption, upon which recommendations would have been made public. The African Commission does not seem to dispute its subordination to the African Union and

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<sup>255</sup> While information supporting the current analysis was obtained through on-the-record consultation, the identity of related sources are redacted for the sake of confidentiality. As at November 2013, none of the mid-term and final reports had been submitted by the state.



its political bodies just as the Commission is much aware of the influence of its ‘umbrella organisation’ on states’ behaviour towards its decisions.<sup>256</sup>

It follows that while powers of the Commission and the Assembly proceed from two different instruments, namely the African Charter and the Constitutive Act respectively, the role of Addis-Abeba based institutions in ‘legalising’ decisions of the Commission is prime and exclusive. However, the level of implementation shows that the position and powers of those organs in the African Union hierarchy has not made them effective tools to secure states’ compliance with the findings of the African Commission. This is arguably attributable mainly to the reasons already referred to.<sup>257</sup>

### 5.3.2 The African Court

Particularly the lack of an express provision as to the binding nature of the African Commission’s recommendations has been identified as the major weakness of the African human rights system. Many have therefore placed great hopes in the advent of the African Court whose main function is to ‘complement the protective mandate of the African Commission’.<sup>258</sup> In addition to the interpretation and application of the African Charter, the Court’s material jurisdiction is extended to its Protocol and ‘any other relevant human rights instruments ratified by the states concerned’.<sup>259</sup>

While some of the hopes raised by the establishment of the African Court are overoptimistic,<sup>260</sup> others have legal grounds. For instance, one disappointment lies in the fact that direct access to the Court is open only to the Commission, states involved in a particular case, states whose nationals are concerned, African intergovernmental organisations, and intervening states.<sup>261</sup> Individuals and NGOs having observer status with the Commission may bring cases to the Court only when the state concerned has

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<sup>256</sup> The reader is reminded that Nigeria for instance has challenged the quasi-judicial functions of the African Commission; and the Commission was quick to refer to the decision of the African Union Executive Council endorsing its resolutions on state compliance.

<sup>257</sup> See also JD Boukongou ‘The appeal of the African human rights system’ (2006) 6 *AHRLJ* 288-292.

<sup>258</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights 1998, entered into force 2004, art 2.

<sup>259</sup> African Court Protocol, art 3(1).

<sup>260</sup> See for instance M Mubiala *Le système régional africain de protection des droits de l’homme* Bruylant (2005) 5-18 and Boukongou (n 247 above) 292-297.

<sup>261</sup> See African Court Protocol, arts 5(1) and 5(2) on access to the Court.

made the required declaration.<sup>262</sup> Besides the fact that only seven countries had lodged such a declaration as at November 2013,<sup>263</sup> the modest level of ratification of the Court Protocol is also a limiting factor for the continental body at present.<sup>264</sup>

Despite such limitations, advances brought by the establishment of the African Court cannot be overemphasised.<sup>265</sup> First of all, article 3(1) of the Court Protocol expands the scope of judicial protection in the African human rights system. Therefore, it creates an avenue for the development of other instruments of the system such as the African Women's Protocol<sup>266</sup> and the African Children's Charter.<sup>267</sup> There is no doubt that the Court will enforce those instruments through its contentious jurisdiction.<sup>268</sup> Such enforcement will obviously be possible under several conditions. The first one is for the 25 states that currently recognise the jurisdiction of the Court to also ratify the Women's Protocol and Children Charter.<sup>269</sup> The second one is that the Commission receives cases from the concerned states and cooperates effectively under the referral mechanisms. Finally, many more than the initial seven article 34(6) declarations are needed to allow the Court make the most profitable use of the expanded normative framework of the system.

The most important move brought by the establishment of the African Court is arguably on the nature of its decisions. Judgments of the African Court are final<sup>270</sup> and binding, and the Court may afford such remedies as are deemed appropriate including 'fair

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<sup>262</sup> See African Court Protocol, arts 5(3) and 34(6).

<sup>263</sup> These are Burkina Faso, Ghana, Malawi, Mali, Rwanda, Tanzania, and Côte d'Ivoire.

<sup>264</sup> As at November 2013, only 25 states had ratified the African Court Protocol.

<sup>265</sup> See for instance M Mubiala 'La Cour africaine des droits de l'homme et des peuples: Mimétisme institutionnel ou avancée judiciaire?' (1998) 102 *Revue Générale de Droit International Public* 779.

<sup>266</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, entered into force 2005.

<sup>267</sup> African Charter on the Rights and Welfare of the Child 1990, entered into force 1999.

<sup>268</sup> See F Viljoen 'The justiciability of socio-economic and cultural rights: Experience and problems' in Y Donders & V Volodin (eds) *Human rights in education, science, and culture: Legal developments and challenges* (2007) Unesco Publishing/Ashgate 24.

<sup>269</sup> African Union Commission 'List of countries, which have signed, ratified or acceded to the African Court Protocol' <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf> (accessed 29 October 2013).

<sup>270</sup> See African Court Protocol, art 28(2).

compensation and reparation'.<sup>271</sup> Moreover, state parties undertake to 'comply with the judgment (...) within the time stipulated by the Court and to guarantee its execution'.<sup>272</sup>

With regard to compliance monitoring, article 29(2) of the Court Protocol provides that 'the Executive Council shall also be notified the judgment and shall monitor its execution on behalf of the Assembly'. This time, states have decided to establish a compliance monitoring mechanism. Besides, there is a clear duty on states not only to comply but also to guarantee execution of judgments. In other words, individual commitment to comply has been enhanced with a collective guarantee. One may also consider that states have entrusted both the African Court and African Union Assembly with a name-shaming tool to secure compliance. Indeed, article 31 of the Court Protocol provides that the Court shall report annually to the Assembly 'the cases in which a state has not complied with the Court judgment'.<sup>273</sup>

Since the African Court heard its first case in 2009,<sup>274</sup> its activity has been growing as illustrated by a total of 27 cases received as at October 2013, of which one was filed in 2008, 14 in 2011, and seven in 2012, and five in 2013.<sup>275</sup> As at October 2013, the Court had finalised 19 cases, including rulings, judgments and orders for provisional measures. On the same date, eight cases remained before the Court.<sup>276</sup>

In its first decision ever, the Court declared a submission inadmissible for lack of jurisdiction as the defendant state, Senegal, had not made the necessary declaration.<sup>277</sup> The overwhelming majority of the subsequent decisions made by the Court found inadmissibility or lack of jurisdiction in cases involving Algeria, Cameroon, Côte d'Ivoire,

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<sup>271</sup> See African Court Protocol, art 27(1).

<sup>272</sup> See African Court Protocol, art 30.

<sup>273</sup> See African Court Protocol, art 31.

<sup>274</sup> *Michelot Yogogombaye v Senegal* African Court Judgment (15 December 2009).

<sup>275</sup> See African Court on Human and Peoples' Rights 'Cases' <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/pending-cases> (accessed 7 August 2013).

<sup>276</sup> *Alex Thomas v Tanzania* (Application 005/2013); *Lohé Issa Konaté v Burkina Faso* (Application 004/2013); *Rutabingwa Chrysanthe v Republic of Rwanda* (Application No 003/2013); *African Commission on Human and Peoples' Rights (Saif Gaddafi) v Libya* (Application 002/2013); *African Commission (Ogyek) v Kenya* (Application No 006/2012); *Peter Joseph Chacha v Tanzania* (Application No 003/2012); *Karata Ernest & Others v Attorney General of Tanzania* (Application No 001/2012); *Beneficiaries of the Late Norbert Zongo and Others v Burkina Faso* (Application 013/2011).

<sup>277</sup> See *Michelot Yogogombaye v Senegal* para 46(1).

Gabon, Mozambique, Morocco, Nigeria, South Africa, Sudan, and Tunisia.<sup>278</sup> One of these first decisions of the African Court that attracted interest is the *Falana* case where the Court had to deal with the interesting issue of whether the African Union has an international legal personality independently of its member states and is therefore subject to the jurisdiction of the African Court on Human and Peoples' Rights. The Court answered in the negative with extensive dissenting and minority opinions.<sup>279</sup>

The first substantive judgment of the Court was delivered in June 2013, in the *Reverend Mitikila (Independent Candidates)* case. The main question considered by the Court was whether the ban of independent candidature for presidential, parliamentary and local elections in the Constitution of Tanzania constitutes a violation of, among others, the right to free political participation enshrined in article 13 of the African Charter. In its judgment, the Court held that the fact that Tanzanian citizens can only seek public elective office by being members of and being sponsored by political parties constitutes a restriction of the right to political participation. According to the Court, the restriction thus provided in the Constitution of Tanzania is not proportionate to the alleged aim of fostering national unity and solidarity. In the view of the Court, such limitation is not permissible under article 27(2) of the African Charter.<sup>280</sup> It is important to mention that the Court primarily and extensively relied on the relevant jurisprudence of the African Commission to pronounce on central issues raised by the case, particularly restrictions that are permissible under article 27(2) of the African Charter.

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<sup>278</sup> *Soufiane Ababou v Algeria* (Application 002/2011) 16 June 2011; *Daniel Amare & Mulugeta Amare v Mozambique Airline & Mozambique* (Application 005/2011) 16 June 2011; *Femi Falana v African Union* (Application 001/2011) 26 June 2012; *Association Juristes d'Afrique pour la Bonne Gouvernance v Côte d'Ivoire* (Application 006/2011) 16 June 2011; *Youssef Ababou v Morocco* (Application 007/2011) 2 September 2011; *Ekollo Moundi Alexandre v Cameroon and Nigeria* (Application 008/2011) 23 September 2011; *National Convention of Teachers Trade Union v Gabon* (Application 012/2011) 15 December 2011; *Delta International Investments S.A., Mr and Mrs A.G.L. De Lange v South Africa* (Application 002/2012) 30 March 2012; *Emmanuel Joseph Uko and Others v South Africa* (Application 004/2012) 30 March 2012; *Amir Adam Timan v Sudan* (Application 005/2012) 30 March 2012; *Baghdadi Ali Mahmoudi v Tunisia* (Application 007/2012) 26 June 2012.

<sup>279</sup> See *Femi Falana v African Union* (Application 001/2011) African Court Judgment (26 June 2012); Dissenting Opinion of Sophia A.B. Akuffo, Bernard M. Ngoepe, Elsie N. Thompson; Separate Opinions of Jean Mutsinzi and Fatsah Ouguerouz <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases/2-home/196-dissenting-separate-opinions-femi-falana> (accessed 17 March 2013).

<sup>280</sup> See Consolidated matter of *Tanganyika Law Society and the Legal and Human Rights Centre v Tanzania* (Application 009/2011) and *Reverend Christopher R. Mtikila v Tanzania* (Application 014/2011) African Court Judgment (14 June 2013) paras 107.2-111.

In spite of these developments a number of important issues remain unsettled. On the compliance note, it would be interesting to see whether states would be more eager to comply with judgments of the African Court than they were with recommendations of the Commission. As at November 2013, at least three cases offered an opportunity for assessing the potential of African Court decisions attracting state compliance. In the case of *African Commission (Arab Spring) v Libya*, the Court ordered provisional measures that were not complied with mainly due to the continued instability in the country. In the *Ogiek* case involving Kenya an identical order was made on 15 March 2013. As at November 2013, there is a dispute between the parties as to whether initial compliance by the Government was upheld or contravened. Finally, in the case of *African Commission (Saif Gaddafi) v Libya*, provisional measures issued on 15 March 2013 had yet to be implemented as at November of the same year. It is to be seen whether report of non-compliance to the political organs of the AU will provide a first response to how effective compliance monitoring can prove in the Court era. Even if the binding orders of the African Court seem to have met no better fate than recommendations of the Commission at this stage of the life of the Court, any conclusion on compliance should be mixed due to the particular circumstances of those cases. Accordingly, a more objective standard setting should be the behaviour of the Government of Tanzania in the *Mitikila Independent Candidate* case. As at November 2013, an interview with Counsel for the complainant revealed that Tanzania had yet to implement the decision.

Another critical issue is whether an effective relationship between the Commission and the Court will enable a most beneficial use of the impressive normative and institutional armada of the system. Again, a fundamental question in that regard is whether and how best the Commission will use the teeth of the Court to abate violations caught by its recommendations or accelerate human rights proceedings in the interest of victims and the system. In line with this, voices within the Court confirm the quite positive trends of recent cooperation confirmed by the Commission's referrals to the Court in the Libyan and Kenyan cases as discussed earlier under the section dealing with the African

Commission.<sup>281</sup> There is equally evidence of the Court's eagerness to cooperate as illustrated by several 'transfers' to the Commission of cases over which it does not have jurisdiction. Those cases involved Algeria, Cameroon, Côte d'Ivoire, Mozambique, and Nigeria.

These positive trends of cooperation should not overshadow bones of contention between the African Court and Commission in the early years of complementarity, whether the issues concerned are actual or potential. Issues of transfer have been discussed earlier in this section. The best illustration is probably the question of the method of referrals, particularly from the Court to the Commission. The question is whether the Court has the power or should refer cases to the Commission by means of judgments or through a non-judicial channel, for instance by instructing its Registry to deal with such cases. It is worth noting that while Rules of Procedure of both bodies include a 'complementary' section, only Rules of the Commission provide expressly for specific details and conditions for referrals to the Court. In fact, the relevant section of the 2010 African Court Rules governing relations between the Court and the Commission is titled 'relations with the Commission' – not referral to the Commission, which is the wording used in the Rules of the Commission. Moreover, the Court Rules refer to 'transfer' and not 'referral' of cases. Finally, paragraph 5(a) of Rule 29 provides only that when the Court decides to transfer a case to the Commission pursuant to article 6(3) of the Protocol, it shall transmit a copy of the entire pleadings (...) together with a summary report. Paragraph 5(b) provides that the Registrar shall immediately notify parties of the transfer.

The lack of elaboration on situations of transfer in the Rules of the Court could be understandable from a reading of the relevant texts. Indeed, provisions of neither the African Charter nor the Court Protocol dealing with the jurisdiction of the Court and admissibility of cases make room for a plurality of situations for transfer. Article 3(1) of the Court Protocol deals with the material jurisdiction of the Court, while article 3(2)

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<sup>281</sup> See G Niyungeko 'Keynote Speech' at the Inaugural Colloquium of Legal Scholars on the African Human Rights System Arusha Tanzania 25-26 July 2011. For example, between July 2009 and October 2010, the two institutions met three times on separate occasions and harmonised their interim Rules thus paving the way for the Commission to seize the Court. A first meeting of the two Bureaus took place in March 2011 and the first meeting of the two institutions was planned for 2011.



provides that the Court is competent to decide whether it has jurisdiction. As far as admissibility is concerned, article 6(2) of the Protocol provides that the Court shall rule on admissibility taking into account the provisions of article 56 of the African Charter. Finally, article 6(3) of the Protocol directs that the Court may consider cases or transfer them to the Commission.

It appears from a reading of those provisions that the most obvious situation, which creates room for the Court to transfer cases to the Commission, is when the Court has found it does not have jurisdiction to entertain a complaint, particularly due to the absence of the declaration required under article 34(6) of the Court Protocol.<sup>282</sup> The same may apply to the lack of temporal jurisdiction, in case the alleged violations occurred prior to the entry into force of the Court Protocol.<sup>283</sup> It is understood that the Court may not consider the admissibility of a case if it has not ascertained that it has jurisdiction. Although that might not be in the most obvious situations, even after it has established its jurisdiction, the Court may transfer cases to the Commission. The latter hypothesis could become relevant for instance if and when the Court believes that the matter would be better adjudicated by the Commission, such as in cases where an amicable settlement is the best option. At the admissibility stage, the Court considers cases against the requirements of article 56 of the African Charter. It follows that once the Court has declared a case inadmissible such matter cannot be transferred to the Commission which uses the same standards for consideration of admissibility.

In any case, as indicated earlier in this discussion, the lack of an elaborated procedure and specific conditions of transfer from the Court to the Commission retains some potential for an adversarial complementarity relationship. The means of transfer is at stake at this point. The risk has materialised in the early practice of the Court, which as at late 2012, had consisted of transferring cases to the Commission by means of judgments. In the five transfers effected in the same period, involving Algeria, Cameroon, Côte d'Ivoire, Mozambique, and Nigeria, the Court had first made a decision of incompetence either for lack of observer status with the African Commission or lack of article 34(6) declaration. In

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<sup>282</sup> As was the case for instance in *See Michelot Yogogombaye v Senegal* para 46(1).

<sup>283</sup> An illustration is the case of *Beneficiaries of the Late Norbert Zongo and Others v Burkina Faso* (Application 013/2011) Judgment of 21 June 2013, para 69.

those judgments, the Court proceeded to ‘decide that the application be and is hereby transferred to the African Commission’.

While the reason for these referrals is perfectly in favour of complementarity, it is not understandable why the Court could impose on the Commission to take on cases that were unsuccessful before the Arusa-based body. It was therefore no surprise that the Commission protested against such methods of referrals by sending back the concerned cases to the Court, though indirectly. Arguments were made during the year 2013 for and against referral through judgments. Dissenting views suggested that, as a human rights body, the Commission should proceed with the cases already transferred in the interest of the complainants. In the later option, it was proposed that the Secretariat wrote to the complainants to determine whether they were willing to have their case considered by the Commission. A common view was eventually reached that the Court should rather, after it has made its decisions, inform the parties of such decision and advise them of the possibility of turning to the Commission with a fresh communication.

In the light of the position of the Commission, the subsequent practice would therefore consist of the Court ‘redirecting’ unsuccessful complainants to the Commission. This approach will ensure positive complementarity in the sense that not only the rights of complainants, but also institutional cooperation and the development of the system will gain. The bottom line is that any silence in the procedural law of the system should be interpreted in the light of positive complementarity until such a time relevant amendments are made to fill the legal gaps. In the framework of the cooperation between the two institutions of the African human rights system, the Court has agreed to a non-judicial transfer of cases to the Commission. This agreement was translated into practice as no further judicial transfer was made during the year 2013.

A final and critical issue is whether and how the Court will overcome the challenges of poor human rights records, weak rule of law and democracy standards in African countries. Because human rights in RECs proceed from a ‘fragmentation’ of the African human rights system,<sup>284</sup> the nature of the political regime in defendant states should

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<sup>284</sup> See KO Kufuor *The African human rights system: Origins and evolution* Palgrave MacMillan (2010) 99-120.

inform about prospects of compliance with African Court decisions. One should bear in mind developments that led to the demise of the SADC Tribunal.

## 6 Sub-regional experiences on compliance and enforcement

### 6.1 The imperative of strengthening enforcement and compliance rules in the SADC Tribunal

#### 6.1.1 Jurisdiction of the Tribunal, human rights and enforcement under the SADC Treaty

The SADC Tribunal was established in 2005 in implementation of the SADC Treaty. The jurisdiction of the Tribunal was provided as follows:

The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.<sup>285</sup>

The Treaty also stipulates that the Protocol establishing the Tribunal shall form an integral part of the treaty.<sup>286</sup> Accordingly, article 14(a) of the SADC Tribunal Protocol provides that the Tribunal ‘shall have jurisdiction over interpretation and application of treaty’ but also over ‘interpretation, application and validity of protocols and all subsidiary instruments of SADC’.<sup>287</sup> Personal jurisdiction of the Tribunal includes interstate disputes and disputes between individuals and states on the one hand and legal persons on the other.<sup>288</sup> Individuals and legal persons may act only after local remedies have been exhausted unless they were unable to proceed domestically.<sup>289</sup> Yet, in the *Zimbabwe Human Rights NGO Forum* case, the SADC Tribunal made it clear that only the aggrieved persons have standing thus ousting NGOs’ representation.<sup>290</sup>

Reading from both the SADC Treaty and Tribunal Protocol, the material jurisdiction of the Tribunal does not expressly encompass human rights. In fact, what may be considered as the main objective of the SADC is to

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<sup>285</sup> Treaty of the Southern African Development Community 1992, as amended in 2001, art 16(1).

<sup>286</sup> See SADC Treaty, art 16(2).

<sup>287</sup> Protocol on Tribunal in the Southern African Development Community 2000, art 14(b).

<sup>288</sup> See SADC Tribunal Protocol, art 15(1).

<sup>289</sup> See SADC Tribunal Protocol, art 15(2).

<sup>290</sup> See *Zimbabwe Human Rights NGO Forum v Zimbabwe* Unreported Case SADC (T) 05/2008 para 3.

promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.<sup>291</sup>

However, SADC member states pledged to achieve this objective by acting in accordance with a set of principles including ‘human rights, democracy and the rule of law’.<sup>292</sup> As seen in greater detail later in this section, reliance on those principles together with other norms to infer a human rights jurisdiction led the Tribunal to face serious defiance from SADC member states and eventually suspension. Circumstances that led to the suspension of the Tribunal mainly arose from its judgment in the famous *Campbell* case as discussed in the next sub-section on the judicial developments in the same case.<sup>293</sup>

With regard to the nature of decisions issued by the Tribunal, the SADC Treaty provides that they are final and binding.<sup>294</sup> Article 24(3) of the SADC Tribunal Protocol confirms that ‘decisions and rulings’ of the Tribunal are final and binding. The Protocol goes further to specify that such decisions are ‘binding upon parties in respect of that particular case and enforceable within the territories of the member states concerned’.<sup>295</sup> Procedure for enforcement by the state concerned is provided as follows:

The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the Member State in which the judgment is to be enforced shall govern enforcement.<sup>296</sup>

While there is no confusion about enforceability and related responsibility, the temporal enforcement forum does not seem to be clearly designated. Does the cluster of words ‘member states concerned’ refer to parties to the dispute or states in which enforcement is sought? That third states may assist in the execution of international decisions against a state is well accepted in international law.<sup>297</sup> For instance, the East African Community

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<sup>291</sup> SADC Treaty, art 5(1)(a).

<sup>292</sup> SADC Treaty, art 4(c).

<sup>293</sup> See *William Campbell and Another v The Republic of Zimbabwe* SADC (T) 3/2009.

<sup>294</sup> See SADC Treaty, art 16(5).

<sup>295</sup> SADC Tribunal Protocol, art 32(3).

<sup>296</sup> SADC Tribunal Protocol, art 32(1).

<sup>297</sup> See L Bartels ‘Review of the role, responsibilities and terms of reference of the SADC Tribunal – final report’ World Trade Institute Advisors (Report on file with author) (6 March 2011) 52-54.

Treaty refers to ‘the Partner State in which execution is to take place’.<sup>298</sup> Jurisprudence and doctrine support such treaty practice.<sup>299</sup> As seen later, South African courts ruled for the enforcement in South Africa of a cost order from the SADC Tribunal.

The SADC Tribunal Protocol also provides for a collective enforcement mechanism whereby ‘Member states and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal’.<sup>300</sup> Compliance securing is further supported by the provision that ‘Any failure by a Member State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned’.<sup>301</sup> By virtue of article 32(5) of the Protocol, ‘if the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action’. Even though SADC relevant texts include no specification of the type of action, article 33(1) of the SADC Treaty provides that ‘[s]anctions may be imposed against any Member State that persistently fails, without good reason, to fulfil obligations assumed under this Treaty’ and ‘[t]he Summit shall determine on a case-by-case basis sanctions to be imposed under subparagraphs a) and b) of paragraph 1 of this Article’.<sup>302</sup>

At a first glance, SADC laws include provisions that permit a smooth implementation of the SADC Tribunal decisions. However, there seems to be a problem with the status of such decisions within the domestic sphere of member states starting from the registration through execution. According to art 32(1) of the SADC Tribunal Protocol, the decisions of the Tribunal are foreign judgments as they are subject to the rules of civil procedure regarding registration and enforcement of foreign judgments of member states. In other words, the Protocol itself equates SADC Tribunal judgments with foreign judgments in the territory of SADC member states while states have a duty to attend to their execution. This is a different approach from the position adopted for instance in ECOWAS and EAC where the only formality for the regional courts’ decisions to be

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<sup>298</sup> Art 44 Treaty of the East African Community 1999, entered into force 2000.

<sup>299</sup> See for instance *Société Européenne d’Etudes et d’Entreprises en liquidité volontaire (SEEE) v Yugoslavia* Supreme Court of the Netherlands (1973) 65 ILR 356 (26 October 1973); Schachter (n 25 above).

<sup>300</sup> SADC Tribunal Protocol, art 32(2).

<sup>301</sup> SADC Tribunal Protocol, art 32(4).

<sup>302</sup> SADC Treaty, art 33(2).

executed domestically is to confirm that they originate from those tribunals. That is to say those decisions have to be treated like domestic ones. As discussed later in this section, the status thus afforded to decisions of the SADC Tribunal under its Protocol has become a controversial issue at the heart of the crisis that led to the demise of the Tribunal.

### 6.1.2 Judicial developments of the *Campbell* case

Delivered in 2008, the *Campbell* judgment may be qualified as the first human rights decision of the SADC Tribunal. In the matter, Zimbabwean white farmer Mike Campbell and others challenged the acquisition of their lands by the Zimbabwean authorities under section 16B of the Constitution of Zimbabwe.<sup>303</sup> The Tribunal found in favour of the applicant and directed the defendant state to ‘take all necessary measures ... to protect the possession, occupation and ownership of the lands of the applicants’. In response to its lack of explicit human rights mandate, the SADC Tribunal reverted to human rights as a fundamental principle of the SADC which it read together with its provision to ‘look elsewhere to find answers where the Treaty is silent’.<sup>304</sup>

Reading its personal jurisdiction in the light of member states’ obligation to act in accordance with human rights, the Tribunal inferred its competence to deal with individual human rights claims. Importantly, the Tribunal implied human rights jurisdiction mainly by relying on the SADC Treaty provisions on non-discrimination on the basis of race. In addition, the Tribunal heavily relied on other human rights instruments ratified by Zimbabwe and made an extensive use of international human rights law and jurisprudence to demonstrate SADC recognition of human rights.<sup>305</sup> Reliance on human rights treaties ratified by Zimbabwe can be regarded as in line with article 31(3) of the 1969 Vienna Convention on the Law of Treaties, which stipulates that in interpreting a

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<sup>303</sup> It later appeared that the controversial policy amounts to compulsory acquisition of land on racially-discriminatory grounds without granting access to court for determination of the validity of the acquisition and payment of compensation, which is clearly a violation of human rights under both SADC law and international human rights law.

<sup>304</sup> SADC Treaty, as above 23.

<sup>305</sup> The Tribunal also considered the jurisprudence of supervisory bodies of the three main regional human rights systems and general comments of UN treaty bodies. On a comprehensive discussion of this aspect see ST Ebobrah ‘Human Rights Developments in Sub-Regional Courts in Africa’ (2009) 9 *AHRLJ* 333.



treaty ‘there should taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’.

From its competence to interpret and apply the SADC Treaty, it is clear that the Tribunal could validly claim human rights jurisdiction.<sup>306</sup> Noteworthy, SADC member states did not challenge such implied jurisdiction at the time the Tribunal considered its first cases involving human rights, the best known being the *Campbell* case. Zimbabwe participated in the initial proceedings without ever challenging the legality of the SADC Tribunal or its jurisdiction to entertain the matter until interim judgment was rendered.

Challenges to the SADC Tribunal’s exercise of an implied human rights mandate arose when the time came for the defendant state to implement the judgment. Attempts to register the *Campbell* judgment for execution in Zimbabwe were met with refusal for being contrary to domestic public policy in the *Gramara* judgment by the High Court of Zimbabwe.<sup>307</sup> Interestingly, the High Court acknowledged the legitimate expectation that Zimbabwe should comply with the SADC Tribunal judgments to which the Government is obligated internationally. The Court however determined that ‘... there is an incomparably greater number of Zimbabweans who share the legitimate expectation that the Government will effectively implement the land reform programme and fulfil their aspirations thereunder. Given these countervailing expectations, public policy as informed by basic utilitarian precept would dictate that the greater public good must prevail’. As stressed earlier, that is what would have actually applied to foreign judgments which are those originating from national jurisdictions but not international judgments rendered by supranational or community courts.

Following their failure to have the SADC Tribunal’s decision enforced in the forum of the defendant state, the complainants initiated subsequent attempts to activate collective enforcement mechanisms, mainly by seeking enforcement in a third SADC member states as provided under the Tribunal Protocol. As an illustration, in 2009, one of the applicants in the *Campbell* case sought the enforcement of the cost order against

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<sup>306</sup> *Campbell* case paras 17-18.

<sup>307</sup> See *Gramara (Pvt) Ltd and Another v The Government of the Republic of Zimbabwe* HC33/09.

Zimbabwe in the High Court of South Africa in the *Fick* case.<sup>308</sup> In 2010, the High Court *Fick* decision was unsuccessfully challenged in the same court by the Government of Zimbabwe.<sup>309</sup> In 2012, the Supreme Court of Appeal of South Africa upheld the High Court decision,<sup>310</sup> among others on the consideration that Zimbabwe had waived its immunity from jurisdiction, through its ratification of the SADC Treaty and the SADC Tribunal Protocol. In June 2013, the Constitutional Court of South Africa dismissed an appeal lodged by the Government of Zimbabwe to challenge the Supreme Court of Appeal's ruling. Notably, the Constitutional Court found Zimbabwe in violation of article 32 of the SADC Tribunal Protocol which obliges all SADC member states to facilitate enforcement of judgments and orders of the Tribunal.<sup>311</sup>

As far as immunity from jurisdiction is concerned, it is important to note that, unsurprisingly, South African courts enforced the decision only as against property for commercial use. Indeed, Cape Town-based properties belonging to the Zimbabwean Government that were attached by the farmers were occupied by tenants, which made them commercial properties not protected by diplomatic immunity. Eventually, at the eve of the auction of the seized property, which was scheduled to take place on 15 September 2013, the Government of Zimbabwe acceded to the punitive order of the SADC Tribunal by paying the full amount into the trust account of the legal representatives of the complainants.<sup>312</sup>

While considering the *Fick* case, South African courts also resolved the central issue raised by Zimbabwe to support its refusal to comply with the *Campbell* judgment, which is the legality of the SADC Tribunal. The Supreme Court of Appeal of South Africa found that the SADC Tribunal was properly constituted and that Zimbabwe was subject to its

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<sup>308</sup> *Fick v Government of the Republic of Zimbabwe* Case No 77881/2009 (North Gauteng High Court of South Africa) 25 February 2010 in execution of *Louis Karel Fick & Others v Republic of Zimbabwe* SADC (T) 1/2010.

<sup>309</sup> *Government of the Republic of Zimbabwe v Fick & Others* Case No 47954/2010 High Court of South Africa North Gauteng.

<sup>310</sup> See *Government of the Republic of Zimbabwe v Fick & Others* (657/11) [2012] ZASCA 122 (20 September 2012).

<sup>311</sup> See *Government of the Republic of Zimbabwe v Louis Karel Fick & Others* (101/12) [2013] ZACC 22 (27 June 2013), paras 30, 31, 34 and 35.

<sup>312</sup> See AfriForum 'Zimbabwe pays punitive order; auction suspended' <https://www.afriforum.co.za/zimbabwe-pays-punitive-order-auction-suspended/> (accessed 29 October 2013).

jurisdiction.<sup>313</sup> The Court further concluded that decisions of the Tribunal are enforceable against Zimbabwe as its immunity had been waived by virtue of ratification.<sup>314</sup> The June 2013 decision of the Constitutional Court of South African upheld the Supreme Court of Appeal's position.

### 6.1.3 Political developments of the *Campbell* case: SADC practice of enforcement monitoring

Political developments around the *Campbell* case remain with no doubt the most important ones, especially because they eventually put an end to the enforcement crisis by shutting down the SADC Tribunal. Political bodies of SADC, namely the Summit, play an important role in the enforcement of decisions of the Tribunal, especially in case the defendant state fails to comply. As indicated earlier in this section, when the Tribunal establishes failure to comply with its decisions it cannot rule on such failure but only report to the Summit for appropriate action. The prospect of sanction is therefore real only through the Summit and on a case-by-case basis. The issue in the *Campbell* case is that, in trying to resist compliance, and contrary to the view of all other SADC Council of Ministers members, Zimbabwe considered that the Court Protocol had not entered into force because of an incomplete ratification process.<sup>315</sup>

In a bid to enforce its judgment, the Tribunal unsuccessfully reverted to the referral mechanism in several instances.<sup>316</sup> According to the relevant SADC Treaty and Tribunal Protocol provisions, the Summit should have taken appropriate action, namely sanctions. The dispute rather moved to Zimbabwe's contention that the SADC Tribunal had been illegally established as the related Protocol had never entered into force. In follow-up of referrals from the Tribunal in 2009, the Summit instructed the SADC Committee of

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<sup>313</sup> See *Zimbabwe v Fick & Others* (n 295 above) para 40.

<sup>314</sup> As above para 44.

<sup>315</sup> See Record of the Meeting of Ministers of Justice/Attorneys General, Kinshasa, DRC, 29-30 April 2010, paras 4.2.3 and 4.2.4. However, this contention has been rejected by the High Court of Zimbabwe in the *Gramara* case. Using SADC law and relevant international laws and jurisprudence, the Court clearly demonstrated that the 2001 Amendment Agreement (which makes the SADC Tribunal Protocol an integral part of the SADC Treaty) has entered into force and is binding on Zimbabwe.

<sup>316</sup> See SADC Tribunal's Interim Relief and Final Judgment in *William Campbell and Another v The Republic of Zimbabwe* SADC (T) 3/2009, and *Louis Karel Fick and Others v Republic of Zimbabwe* SADC (T) 1/2010.

Ministers of Justice to discuss legal issues and advise the Summit through a review of the role and responsibilities of the SADC Tribunal.<sup>317</sup>

In October 2010, the situation was stalled after the Summit deferred the consideration of non-compliance cases, as recommended by the Council, pending completion of the review.<sup>318</sup> The Summit further decided not to reappoint the three regular members and one non-regular member of the Tribunal whose term of office would expire on 31 August 2010; and ordered the Tribunal not to hear any new case. A March 2011 Report by SADC own recruited consultant<sup>319</sup> confirmed that ‘all SADC law is international law, and thus binds SADC member states regardless of their national laws, including their constitutions;<sup>320</sup> SADC Tribunal decisions are enforceable with the territories of all SADC member states<sup>321</sup> and non-compliance amounts to a violation of article 32(2) of the SADC Tribunal Protocol’.<sup>322</sup>

In a May 2011 Decision, despite the conclusions of the consultant the SADC Summit of Heads of State held as follows:<sup>323</sup>

- The non-reappointment of members of the Tribunal whose term of office expired on 31 August 2010;
- The non-replacement of members whose term would expire on 31 October 2011;
- The dissolution of the Tribunal in its present form which was expressly barred from hearing any new or pending cases; and
- The establishment of a new Tribunal, with a different jurisdiction and a new membership, after the Ministers of Justice had amended the relevant SADC legal instruments and submitted a progress report to Summit in August 2011 and the final report in August 2012.

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<sup>317</sup> See SADC Summit Meeting, Kinshasa, DRC, 7-8 September 2009.

<sup>318</sup> See SADC Tribunal ‘Experience with Enforcement of Judgments and Decisions’ Colloquium of the African Human Rights and Similar Institutions (Arusha, 4-6 October 2010) 7.

<sup>319</sup> See Bartels (n 297 above).

<sup>320</sup> As above 8.

<sup>321</sup> As above 55.

<sup>322</sup> As above 43.

<sup>323</sup> Communiqué of the Extraordinary Summit of Heads of State and Government of the Southern African Development Community (Windhoek, 20 May 2011) paras 6-8.

At its August 2012 meeting, the Summit ‘considered the Report of the Committee of Ministers of Justice/Attorneys General and the observations by the Council of Ministers and resolved that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between member states’.<sup>324</sup>

In all, the SADC Tribunal’s *Campbell* judgment demonstrated how human rights could be enforced through regional integration as the cost order was successfully implemented in South Africa. However, the experience ultimately proved painful leading to the demise of the Tribunal.<sup>325</sup>

## 6.2 Positive trends of compliance with EAC Court of Justice

In terms of article 5(1) of the new Treaty signed in 1999,<sup>326</sup> the main objectives of the East African Community (EAC) are ‘to develop policies and programmes aimed at widening and deepening cooperation (...) in political, economic, social and cultural fields, research, defence, security and legal and judicial affairs (...)’. Member states of the EAC pledged to achieve community objectives under the guidance of such principles as democracy, the rule of law, social justice and human rights.<sup>327</sup> Importantly, as provided under article 6(d) of the Treaty, one of the ‘fundamental principles’ of the Community is ‘the recognition of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.

Pursuant to the same Treaty, the EAC established the East African Community Court of Justice which has jurisdiction over the interpretation and application of the EAC Treaty.<sup>328</sup> Individuals have direct access to the Court in respect of the legality of

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<sup>324</sup> See Final Communiqué of the 32<sup>nd</sup> Summit of SADC Heads of State and Government, Maputo, Mozambique (18 August 2012) para. 24; and Justice Mkandawire Registrar of the SADC Tribunal ‘Keynote address’ Workshop on access to regional human rights mechanisms, Southern African Litigation Centre (Johannesburg, 27 September 2012).

<sup>325</sup> On a comprehensive account of the human rights jurisdiction and legality of the Tribunal, and enforcement of the *Campbell* judgment, see E de Wet ‘The rise and fall of the Tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa’ (2013) 28 *ICSID Review* 45-63.

<sup>326</sup> Treaty of the East African Community 1999, entered into force 2000.

<sup>327</sup> See EAC Treaty, art 3(3)(b).

<sup>328</sup> See EAC Treaty, art 27(1).

regulations or decisions made in application of community law.<sup>329</sup> Since 2006 when it delivered its first ever judgment in the case of *Callist Andrew Mwatela and Others v East African Community*,<sup>330</sup> judicial activity has been growing in the EAC Court of Justice.<sup>331</sup> However, the Court lacks both express mandate and a bill of rights as the basis to exercise its human rights jurisdiction. As the EAC Treaty contains no specific human rights provisions, the EAC Court should be expected to handle disputes relating to the application and interpretation of community law, namely economic and commercial matters.

Despite this limitation, the EAC Court of Justice has taken the opportunity of individual claims brought before it to address human rights issues by using its competence to interpret treaty provisions and sanction the legality of related decisions. The *Katabazi* decision could be referred to as the first of such cases.<sup>332</sup> Indeed, although human rights violations occurred,<sup>333</sup> the human rights nature of the case as determined by the

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<sup>329</sup> As art 30 of the EAC Treaty provides 'subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty'.

<sup>330</sup> *Callist Andrew Mwatela and Others v EAC* Reference No 1 of 2005, decided on 4 October 2006. The main issue in the case was whether the meeting and decision of the Sectoral Council on Legal and Judicial Affairs regarding Bills pending in the Legislative Assembly infringed on the provisions of the Treaty. The Court found the meeting was not constituted per Treaty and declared its decisions null though only prospectively in order not to cripple the activities of the Community. See JE Ruhangisa 'The East African Court of Justice: Ten years of operation, achievements and challenges' Paper presented during the sensitisation workshop on the role of the EACJ in the EAC integration (Kampala, 1-2 November 2011) 12. Other decisions of the Court under its mandate to interpret and ensure respect of community law and fundamental principles includes the cases of *Prof Peter Anyang' Nyong'o and Others v Attorney General of Kenya and Others*, Reference No 1 of 2006, decided on 30 March 2007, EALS Law Digest 173 (whether Kenyan Election of Members of the EAC Assembly Rules 2001 infringed the Treaty) and *Christopher Mtikila v Attorney General of Tanzania and the Secretary General of EAC*, Reference No 2 of 2007, decided on 5 April 2007, EALS Law Digest 12 (whether the EAC Court of Justice has jurisdiction to entertain applications seeking to annul the elections of members to the East African Legislative Assembly).

<sup>331</sup> As at September 2011, the Court has rendered 14 judgments, 29 rulings and one advisory opinion. See Ruhangisa as above 10 and The East African Law Society Law Digest 'Judgments and Rulings of the East African Court of Justice 2005-2011' 136.

<sup>332</sup> *James Katabazi & 21 Others v The Secretary General of the East African Community and the Attorney General of the Republic of Uganda*, Reference no 01/2007, decided on 1 November 2007, EALS Law Digest 29.

<sup>333</sup> The case was concerned with the intervention of state armed agents to prevent execution of Uganda High Court order to release the complainants who had been granted bail. Actually, the High Court was surrounded by security personell who interfered with the preparation of bail documents and the 14 were re-arrested and taken back to jail. Despite a decision of the Constitutional Court that



Community Court is controversial. Actually, as to whether it had human rights jurisdiction, the Court responded that ‘the quick answer is: No it does not have’.<sup>334</sup> At no point did the Court determine that it was considering the case as a human rights matter.<sup>335</sup>

However, the complainants based their claims on EAC Treaty provisions including African Charter human rights, democracy and rule of law as principles which shall govern the action of partner states in achieving community objectives.<sup>336</sup> After reflecting on such claim, the EAC Court pronounced itself, instructively, as follows: ‘While the Court will not assume jurisdiction to adjudicate on human rights dispute, it will not abdicate from exercising its jurisdiction of interpretation under article 27(1) [EAC Treaty] merely because the reference includes allegations of human rights violation’.<sup>337</sup> In other words, the EAC Court’s approach is one of indirectly enforcing human rights by reading them into EAC Treaty provisions. One could consider that, as was the case for the SADC Tribunal, such approach suggests that ‘increasingly, fundamental principles contained in founding treaties of African Regional Economic Communities are seen as sufficient basis for the enjoyment of rights (...) in the absence of specific human rights catalogues’.<sup>338</sup>

In comparison with the SADC Tribunal’s approach of ‘implying human rights jurisdiction’ from its competence to apply the specific SADC Treaty provision on non-discrimination, it appears that the EAC Court of Justice addressed human rights claims through its competence to sanction the conformity of state action with the EAC Treaty obligation that member states will ‘adhere to the rule of law and recognise, promote and protect human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’.<sup>339</sup> In addition, the EAC Court relied on domestic courts case law and the decision of the African Commission in the case of *Constitutional Rights*

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the interference was unconstitutional, Katabazi and his colleagues were not released hence their reference to the EAC Court of Justice.

<sup>334</sup> See BP Kubo ‘Overview of Human Rights Issues dealt with by the East African Court of Justice’ Colloquium of the African Human Rights and Similar Institutions (Arusha, 4-6 October 2010) 6.

<sup>335</sup> As above 2-3.

<sup>336</sup> See EAC Treaty, art 6(d).

<sup>337</sup> See *Katabazi* judgment, EALS Law Digest 37.

<sup>338</sup> Ebobrah (n 305 above) 316.

<sup>339</sup> EAC Treaty, art 6(d).

*Project and Civil Liberties v Nigeria*,<sup>340</sup> the facts of which it said to be on all fours with the *Katabazi* case.

The quest for an express human rights mandate in the EAC Court of Justice has gone a long way since the *Katabazi* judgment. While EAC member states have agreed that the EAC Court of Justice shall be granted human rights jurisdiction ‘at a suitable subsequent date’,<sup>341</sup> this has yet to occur. From 2004, there has been a mounting pressure from all quarters in East Africa for the ‘human rights’ jurisdiction of the EAC Court of Justice to be activated.<sup>342</sup> The issue has thus been discussed in several EAC meetings.<sup>343</sup> The Court has also contributed to the debate by responding to calls from its proponents to check the legality of the delays incurred by the process of expanding its mandate. Faced with growing human rights claims initiated in post *Katabazi* individual suits on community law and principles,<sup>344</sup> the EAC Court determined in the 2011 *Sitenda Sebalu* case that the six-year delay in completing the process of adopting a Protocol to extend the jurisdiction of the EAC Court contravened the fundamental principles of rule of law and human rights.<sup>345</sup> The Court consequently ordered that quick action should be taken by the EAC

<sup>340</sup> (2000) AHRLR 235 (ACHPR 1999).

<sup>341</sup> EAC Treaty, art 27(2).

<sup>342</sup> See JA Mwamu ‘Developments in the East African Community Court of Justice’ Conference paper Pan African Lawyers Union inaugural colloquium of legal scholars on the African human rights system (Arusha, 25-56 July 2011).

<sup>343</sup> See ST Ebobrah ‘Human rights development in African sub-Regional Economic Communities during 2009’ (2010) AHRLJ 240-242. Notably, a 2010 Report of the consultative session of the Deputy Attorneys General included a proposal that human rights jurisdiction remains with domestic courts for the time being. See Report of the consultative session of the Deputy Attorneys General, Solicitors General and Permanent Secretaries (19 March 2010).

<sup>344</sup> Following the *Katabazi* and *Sebalu* rulings, the EAC Court of Justice decided several human rights related cases, the most important of which include *Independent Medical Unit v Attorney General of Kenya and Others*, Reference No 3 of 2010, decided on 29 June 2011, EALS Law Digest 22 (referring to its precedent in the *Katabazi* case, the Court declined human rights jurisdiction in a matter concerned with allegations of torture and inhuman treatment), *Emmanuel Mwakisha Mjwasi and Others v Attorney General of Kenya*, Reference No 2 of 2010, decided on 29 September 2011, EALS Law Digest 204 (declining human rights jurisdiction, the Court drew a distinction between such matters and state failure to abide by Treaty obligations), *Mary Ariviza and Another v Attorney General of Kenya and Another*, Application No 3 of 2010, decided on 23 February 2011, EALS Law Digest 1 (in the case concerned with the constitutional review process in Kenya, the Court concluded it had no competence as the matter involved the review of domestic judicial decision), *Plaxeda-Rugumba v Secretary General of EAC and Another*, Reference No 8 of 2010, decided on 1 December 2011 (the matter related to arrest and detention by the government of Rwanda, and although the Court declined human rights jurisdiction, it embraced its interpretation mandate and decided that the claimant was seeking a declaration of rights rather than enforcement of human rights).

<sup>345</sup> *Hon. Sitenda Sebalu v Secretary General of EAC and Others*, Reference no 01 of 2010, decided on 30 June 2011, EALS Law Digest 110. The Court also held that good governance and human rights were

to conclude the Protocol and operationalise the extended jurisdiction of the EAC Court of Justice.<sup>346</sup>

In 2012, intensified efforts led to the adoption by the East African Legislative Assembly of a Bill of Rights.<sup>347</sup> In addition, the Sectoral Council also adopted a proposed EAC Protocol on Good Governance which was awaiting confirmation by the EAC Council of Ministers.<sup>348</sup> Noteworthy, human rights and equal opportunities constitute one of the seven key pillars on which the Governance Protocol stands thus 'providing a platform for actualising expanded jurisdiction for the EAC Court of Justice'.<sup>349</sup> However, as at November 2013, the Bill of Rights still had to be assented to by the EAC Summit of Heads of State before it had legal force. With regard to the Draft Protocol for extending the jurisdiction of the EAC Court of Justice, the EAC Sectoral Council on Legal and Judicial Affairs, at a March 2012 meeting, considered extending jurisdiction only to trade matters but not human rights and appellate matters.<sup>350</sup> The question then arises as to how, in terms of the Bill of Rights adopted, a human rights regime is established without specific jurisdiction being granted to the judicial organ of the system.

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central to regional integration and stated that it is a legitimate avenue for redress although all it may do is to make declarations of illegality of the impugned acts. See para 41.

<sup>346</sup> As above. The complainants were re-arrested outside the courtroom after being granted bail in a case concerned with accusation of treason. They were subsequently charged before a military court martial and remanded in prison. They were not released despite the Constitutional Court's decision that the interference was unconstitutional.

<sup>347</sup> See preamble to the East African Community Human and Peoples' Rights Bill the main purpose of which is to 'establish an East African Community human and peoples' rights regime ... in accordance with the provisions of the African Charter on Human and Peoples' Rights'.

<sup>348</sup> See East African Community 'Final Draft of EAC Protocol on Good Governance Up for Review' [http://news.eac.int/index.php?option=com\\_content&view=article&id=447:final-draft-of-eac-gg-protocol&catid=48:eac-latest&Itemid=69](http://news.eac.int/index.php?option=com_content&view=article&id=447:final-draft-of-eac-gg-protocol&catid=48:eac-latest&Itemid=69) (accessed 1 June 2012).

<sup>349</sup> S Eboerah 'Human rights developments in sub-Regional Economic Communities during 2011' (2012) *AHRLJ*. See also East African Community 'Development of the EAC good governance' [http://federation.eac.int/index.php?option=com\\_content&view=article&id=181&Itemid=144](http://federation.eac.int/index.php?option=com_content&view=article&id=181&Itemid=144) (accessed 29 October 2013).

<sup>350</sup> See A Possi 'Examining the role of human rights in African Regional Economic Communities: The case of the East African Community' LLD research proposal Centre for Human Rights University of Pretoria (April 2012). Referring to the revised background paper on the 13th meeting of the Sectoral Council on Legal and Judicial Affairs (Arusha, 12-16 March 2012), the author reports: 'The EAC Sectoral Council is of the view that human rights and appellate jurisdiction should wait until the establishment of political union; the EAC Partner States citizens already have access to the African Court on Human and Peoples' Rights; the EACJ should not have appellate jurisdiction as this would be contrary with [sic] constitutional provisions on court hierarchies of the EAC partner states and human rights matters should be left to be dealt with by national courts of member states'.

Judgments of the Court are final and binding.<sup>351</sup> With regard to implementation, article 38 (3) of the Treaty provides that ‘A Partner State or the Council [of Ministers] shall take, without delay, the measures required to implement a judgment of the Court’. Rules of enforcement are similar to those adopted in ECOWAS. Domestic rules of procedure apply and only upon verification of the authenticity of the judgment, the judgment creditor may proceed to execute the decision.<sup>352</sup>

Although EAC member states have developed ‘sovereignty syndromes’ against what they felt as threats from the Court,<sup>353</sup> there seems to be encouraging compliance trends within the East African Community. This could reflect the commitment of member states to the Community but also the binding and directly enforceable nature of the EACJ’s judgments. For instance, in cases to which they were parties,<sup>354</sup> the EAC Council of Ministers,<sup>355</sup> the Governments of Kenya<sup>356</sup> and Uganda<sup>357</sup> voluntarily complied with the rulings of the EAC Court of Justice. It is worth noting that in none of these cases referred

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<sup>351</sup> See EAC Treaty, art 35(1).

<sup>352</sup> See EAC Treaty, art 44 and EAC Court of Justice Rules of Procedure, rule 74(2).

<sup>353</sup> Ruhangisa suggests that in reaction to the EAC Court’s rulings and temporary injunction in the Nyong’o case, the EAC Heads of State amended the Treaty within a short time including a provision that judges of the Community Court, who also hold judicial or other public office in a Member state, may be removed *ipso facto* if removed or resign for whatever reasons from the office in the partner state. Legal action similar to the one initiated in ECOWAS was brought to the EAC Court of Justice by the East African Law Society. The Court held that the introduction of such rules of removal and suspension endangered the integrity of the Court as a regional Court. See *The East African Law Society and Others v Attorney General of Kenya and Others*, Reference No 3 of 2007, decided on 1 September 2008, EALS Law Digest 58.

<sup>354</sup> These are cases, which could be said to be individual rights claims.

<sup>355</sup> In *Calist Andrew Mwatela & 2 Others v East African Community*, Reference no 01/2005, the challenged Bill was amended as ordered by the Community Court. The applicants asked the EAC Court to declare null and void a meeting of EAC Sectoral Council on Legal and Judicial Affairs whose attendance included Attorneys General as well as all decisions, directives and actions contained in or based on it null and void for it was improperly composed. The Council of Ministers returned the Bill to the House and amended the Treaty to legalise the status of Attorneys General as members of the Council of Ministers whenever they attend the Sectoral Council meeting.

<sup>356</sup> In *Prof Peter Anyang’ Nyong’o & 10 Others v The Attorney General of the Republic of Kenya & 5 Others*, Reference no 01/2006, the challenged elections were conducted afresh by following Treaty provisions as ordered by the Community Court. The EAC Court declared that the Rules of election applied by Kenya National Assembly infringed article 50 of the EAC Treaty and the National Assembly did not undertake an election within the meaning of the said provision. The Government of Kenya (National Assembly) complied by conducting the elections as required under the Treaty.

<sup>357</sup> In *James Katabazi & 21 Others v The Secretary General of the East African Community and the Attorney General of the Republic of Uganda*, Reference no 01/2007. The complainants were eventually released and therefore not tried by Court Martial as the Uganda High Court and Appeal Court had both directed.

to earlier in this section were pecuniary obligations imposed on respondent states.<sup>358</sup> However, the Registrar of the EAC Court of Justice confirms that, for judgments imposing pecuniary obligations, the Court has been sending necessary documentation to the competent High Court in the relevant countries and has received no complaint from any party so far.<sup>359</sup>

## 7 Conclusion

This chapter sought to interrogate the duty to comply with the orders of international bodies as an obligation for states under international law and principles. As has been shown, the duty to comply is constituted only where states have agreed to establish a body with powers to render binding decisions. As a general principle, decisions are binding on the parties solely and in the considered matter. There have been attempts to grant binding force to decisions of so called quasi-judicial bodies by using the binding-nature of judicial ones.

As well observed, however, from agreement to be bound to actual compliance, experience has revealed several variances in states' behaviour. ICJ judgments have received a better level of compliance mainly due to the flexible recognition of jurisdiction rules, and political negotiations towards implementation. Some states implemented decisions of the African Commission and UN treaty bodies despite their non-binding character. The general trend remains that the decisions of these quasi-judicial bodies are not legally binding and they have received a fairly low level of compliance. In the Inter-American system, the Court has contributed a great deal to the improvement of human rights in the region but some states have challenged the regime. The most positive trends have been recorded in the European system. However, newcomers and other European countries with poor rule of law records represent a threat to the sustainability of the European success.

In Africa, both the Commission and the newly established Court have set channels for cooperation and dialogue. Referral of cases between the two institutions has been

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<sup>358</sup> See JE Ruhangisa 'Experiences with enforcement of EACJ Decisions' Colloquium of the African Human Rights and similar institutions (Arusha, 4-6 October 2010) 6.

<sup>359</sup> As above.



tested and it is believed that, if cooperation is sustained, the system will meet the promises of the African Charter. At the sub-regional level, the human rights regime implied by the SADC Tribunal is put to a standstill by the political organs of the Community. In light of the developments subsequent to the *Campbell* judgment, it appears that only a dramatic change in leadership and profound political moves in the region are able to reverse the current trends.

The East African Community has also faced individual and civil society demands to awaken the dormant human rights jurisdiction of the Community Court of Justice. After the EAC Court had determined human rights issues by reading them into treaty provisions, the political organs adopted a Bill of Rights but surprisingly retained the reclaimed jurisdiction. Although the picture in Europe and the Americas is more positive than in Africa, all systems are faced with more or less similar issues when it comes to state compliance.<sup>360</sup> Compliance, if states ever truly comply, is plagued with long delays, partial and superficial compliance strategies. While some American states have simply withdrawn from the instruments to avoid complying, the problem in Europe is states' inability to uphold the basics of the treaty. The major issue in Africa seems the lack of institutional powers and cooperation, and the lack of political will.

Coming to the focus of the study, the main question was whether ECOWAS rules relating to compliance and enforcement are appropriate to afford effectiveness to the ECCJ's judgments. ECOWAS law has the merit of describing a well-articulated compliance obligation and enforcement procedure. The Treaty and Court Protocols make decisions of the Court directly enforceable in member states. While doubts remained under the sole operation of the Treaty and Protocols as to how non-compliance would be dealt with, the 2012 Supplementary Act provides not only for a detailed monitoring mechanism but also for specific sanctions applicable in case of non-compliance with the decisions of the ECOWAS Court.

However, treaty obligations consented by states have little meaning until the municipal framework is made conducive for their realisation. Besides, as discussed earlier, whether

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<sup>360</sup> Compliance monitoring is said to be political in Europe and judicial in the Americas. See Burgorgue-Larsen & de Torres (n 142 above) 65.



states respect treaty commitments and obey decisions of domestic courts greatly inform state compliance with orders from international bodies. In many instances, national systems, especially domestic courts, assist international systems to secure compliance by acting as proxy enforcers. It is therefore a preliminary necessity to examine the extent to which the legal and institutional environment of study countries is amenable to the principles discussed earlier and may facilitate a smooth execution of ECCJ judgments. In the same vein, it gives an opportunity to find out the extent to which national authorities are keen to enforce decisions of their domestic courts against the state.

## Chapter III: State compliance from a domestic perspective: Law and experience of study countries

### 1. Introduction

The present chapter builds on the previous which was concerned with the duty of states to comply with decisions of adjudicatory bodies established under international law. It is generally admitted that compliance with orders made by international bodies are rendered possible by a voluntary sovereignty limitation on the part of the compliant state.<sup>1</sup> This explains why it is left with states to organise the reception of foreign judgments in the municipal sphere. Even where states have signed to relinquish part of their enforcement powers to a Community in the framework of regional experiences, the lack of clear mechanisms has given room to contestation as demonstrated in the SADC Tribunal experience discussed earlier. Moreover, the relationship between national and international law – including decisions of international bodies – is governed by monistic and dualistic theories, which apply with legal intricacies in practice.

Therefore, examining state compliance from an international perspective inevitably entails a survey of measures that have been taken nationally to facilitate the enforcement of non-national judgments. This chapter therefore showcases examples from the study countries' compliance records to prepare a basis for comparison with the findings of the empirical study dealt with in the next chapter. In fact, the examination seeks to interrogate an African culture of compliance. Compliance experiences of study countries with international bodies' decisions are thus visited to point out issues that might be of help in understanding how the same states would behave towards ECCJ judgments. The examination proceeds to investigate state's respect for the rule of law namely through compliance with domestic courts' orders especially in judgments against

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<sup>1</sup> See LJ Brinkhorst '50 years of personal experience in Europe' <http://hum.leiden.edu/history/eu-studies/news1/euseminar-brinkhorst-2011.html> (accessed 25 March 2011); WR Duncan *et al* *World politics in the 21<sup>st</sup> century* (2009) 28; D Held *et al* *Global transformations: Politics, economics and culture* (1999) 74 and JL Atangana 'La négociation dans l'exécution des arrêts de la Cour internationale de justice' (2006) 7-8 *La Voix de l'Intégration Juridique et Judiciaire Africaine* 26-27.

the state. For methodological reasons stated earlier, national examination covers The Gambia, Niger, Nigeria, Senegal, and Togo.

The purpose is not to ignore that the ECCJ's decisions enjoy 'direct enforcement' in the domestic order, which is that they are exempted from traditional rules governing the reception and enforcement of foreign judgments.<sup>2</sup> The following examination is done under the presumption that a good knowledge of enforcement regulations and compliance experiences on a domestic level will help the understanding of trends in compliance with ECCJ's decisions as will be discussed in the next chapter. Actually, since the ECCJ's judgments are to be enforced as if they were domestic judgments, trends of state compliance with the decisions of domestic courts will presumably also apply to the ECCJ's ones as discussed below. While concluding this chapter the question is answered whether the current framework and compliance experience of study countries provides a terrain that is conducive for ECCJ decisions to become reality. Whether the response is valid in fact or only in law is left for the next chapter to confirm.

As this chapter deals in part with giving effect in the municipal order to rules coming from 'abroad', some clarification is deemed necessary. Domestic validity or applicability of rules of foreign origin ultimately depends on their status in national law. As far as international law is concerned its direct application depends on both its clear incorporation in municipal law and its application by domestic courts.<sup>3</sup> Direct applicability is therefore the rule while direct effect or direct application is the result of the actual use of such rules by domestic organs, mainly courts.<sup>4</sup> The result mostly depends on how suitable or compatible the incoming rule is with corresponding municipal rules.<sup>5</sup> In the context of European Union community law for instance, 'direct effect' or 'direct

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<sup>2</sup> See analysis of state's obligation to comply with ECCJ's decisions in the previous chapter and further in section two of the present chapter.

<sup>3</sup> For a general discussion of this question see WN Ferdinandusse *Direct application of international criminal law in national courts* (2006) 6-9, 40-49, 269-273.

<sup>4</sup> See Ferdinandusse as above 8.

<sup>5</sup> Application of the principle of 'direct application' remains unclear. For instance, while Senegalese courts have accepted before rejecting direct application of universal jurisdiction in the *Habré* case, Belgian courts seem to have adopted an open-ended approach to the question. In the *Pinochet* case (1998), the Brussels Tribunal of First Instance embraced direct applicability of the customary criminalisation of crimes against humanity. However, another investigating judge of the same tribunal rejected arguments on direct application of customary law and *jus cogens* in the *Sharon and Yaron* case (2002).

applicability’ is generally understood as ‘enabling a provision of community law to become an integral part of national law of a Member State without the need for further legislative enactment within that Member State’.<sup>6</sup>

As discussed in the previous chapter, giving effect to foreign judgments in the municipal sphere is rather referred to as enforcement. By drawing a parallel with the direct application of international law, this chapter refers to direct effect of ECCJ’s decisions as their ability to enter the domestic order of ECOWAS member states and enjoy enforcement therein without any further measure than ascertaining that they originate from the Community Court.<sup>7</sup> As the ECCJ’s decisions are directly enforceable domestically as if they were national decisions, further discussions will refer to their domestic effect as ‘direct enforcement or enforceability’.

## 2. Understanding ECOWAS philosophy of reception and execution

Conditions set under national or international rules on the acceptance and execution of foreign judgments at the domestic level share some features. The main ones include the competence of the court issuing the judgment; the relevance of the law and procedures applied; the binding nature of the decision; respect of fair trial principles; and conformity with the municipal order and final domestic judgments. As examined below, such rules are generally common to study countries irrespective of the legal system. In the civil law system, the procedure of registration and execution of judgments originating from non-national bodies is known as *exequatur*. The corresponding term in common law countries is the domestic registration of foreign judgments for their execution within the municipal sphere.

As is generally the case in other regional integration experiences, the law of enforcement of foreign judgments in Africa lacks harmonisation.<sup>8</sup> Even within major harmonisation

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<sup>6</sup> G Tovey ‘Lecture notes 2010-2011, European Union law’ <http://www.topnotes.org/EU-3-1-Direct%20Effect-2010-2011.pdf> (accessed 16 May 2012).

<sup>7</sup> Legal effects and conditions of enforcement of decisions made by the ECOWAS Court have been discussed in the previous chapter.

<sup>8</sup> See P Meyer ‘La circulation des jugements en Afrique de l’Ouest francophone’ OHADA D-05-53 <http://www.ohada.com/bibliographie/titre/237/La-circulation-des-jugements-en-Afrique-de-l-ouest-francophone.html> (accessed 18 April 2011) 2-3.

initiatives like OHADA<sup>9</sup> states have failed to provide their domestic courts with the competence to execute pronouncements made by their counterparts in application of OHADA law.<sup>10</sup> In other words, while judgments of the OHADA Community Court of Justice and Arbitration are granted supranational status<sup>11</sup> and may circulate freely, a large part of OHADA jurisprudence produced in domestic courts cannot penetrate the municipal order of member states without domestication judgments.<sup>12</sup> In ECOWAS, few countries have national legislation on *exequatur*<sup>13</sup> and only two multilateral conventions include some countries in the region.<sup>14</sup>

At this stage, it may be relevant to recall that the effect in the domestic sphere of decisions made by international bodies has inherent connections with the applicability of international norms. While it would be spoken of ‘direct applicability’ of the law, giving effect to decisions should be referred to as ‘direct or immediate enforcement’. Traditionally, monism and dualism govern the relationships between national and international norms. Essentially, monism purports that international and national law belong to the same order, and an international norm penetrates the municipal order ‘directly’, without the need for any domestic measure. On the contrary, dualism suggests

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<sup>9</sup> *Organisation pour l’Harmonisation en Afrique du Droit des Affaires* (Organisation for the Harmonisation of Business Law in Africa). Created by the Port-Louis Treaty of 17 October 1993, OHADA has the largest membership as an intergovernmental organisation in the pursuit of legal and judicial integration in Africa. Its 16 members spread across West and Central Africa and include Mauritius. Half of the 16 OHADA member states are West African, which are all eight Francophone West Africa countries of ECOWAS. Based in Abidjan (Côte d’Ivoire), the OHADA Community Court of Justice and Arbitration has operated as both first instance and appellate court for more than ten years. Its judgments are directly enforced on the territory of member states and domestic courts share competence with the supra-national court as far as application of OHADA law is concerned.

<sup>10</sup> See P Meyer ‘La sécurité juridique et judiciaire dans l’espace OHADA’ Colloque de Niamey sur la sécurité juridique et judiciaire dans l’espace UEMOA (17-24 March 2006) 13-14.

<sup>11</sup> According the OHADA law, judgments of the OHADA Court are immediately applicable and have precedence over domestic court judgments in the same matters notwithstanding any prior or contrary domestic decision.

<sup>12</sup> Meyer (n 10 above) 13-14.

<sup>13</sup> These are Senegal (arts 787 & 788, Code of Civil Procedure), Cote d’Ivoire (arts 345 & 346, Code of Civil, Commercial and Administrative Procedure), Guinea (art 585 & 586, Code of Civil, Commercial and Administrative Procedure) and Burkina Faso (arts 993 & 994, Family Code and 668 & 669, Code of Civil Procedure).

<sup>14</sup> The first one is the General Convention on Judicial Cooperation of 12 September 1961 signed between OCAM countries (Benin, Burkina Faso, Cameroon, Central African Republic, Congo, Cote d’Ivoire, Gabon, Madagascar, Mauritania, Niger, Senegal and Chad). The second one is the Non Aggression and Defense Assistance Agreement of 21 April 1987 between Benin, Côte d’Ivoire, Mali, Mauritania, Niger, Senegal and Togo.

that the international norm must seek an enabling legislation – mostly an act of Parliament – before it can enjoy full effects with the municipal realm.<sup>15</sup>

It is right that the distinction has become blurring in practice, and states from both traditions have adopted the other approach.<sup>16</sup> However, legal regimes established under RIGOs seems to increasingly adopt monism either in full – both primary legislation (for example, the founding treaty) and derivatives (for example, a decision or directive) – or partly (only derivatives). For instance, under the doctrines of ‘supremacy’ and ‘direct effect’, developed by the ECJ, even dualist countries of the European Union have to accept primacy and direct applicability of European law.<sup>17</sup>

As far as the law is concerned, ECOWAS seems to have adopted the direct applicability and supremacy of Community law in member states, although in a progressive and alternative trend. As such, ECOWAS primary legislation (founding treaty, protocols) should enjoy ‘mediate’ applicability, which is upon ratification subsequent to constitutional amendments. In turn, secondary legislation or derivatives (directives, acts, decisions) enjoy direct and immediate applicability, which is that they enter the municipal order without the intervention of any subsequent measure. However, this distinction was made irrelevant, at least in theory, from 2001 when ECOWAS member states introduced immediate provisional entry into force of Community law (namely primary legislation, which include Protocols) upon signature pending subsequent ratification.<sup>18</sup> Two major instruments effectively came into force on that basis, which are the 2001 Protocol on Good Governance and Democracy, and the 2005 Supplementary Protocol granting human rights jurisdiction to the ECCJ. This legislative innovation was arguably reinforced by states’ practice not to oppose the enforcement of the Supplementary Court Protocol for lack of ratification on the occasions of litigation before the ECCJ.

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<sup>15</sup> See M Killander & H Adjolahoun ‘International law and domestic human rights litigation in Africa: An introduction’ (2010) M Killander (ed) *International law and domestic human rights litigation in Africa* 3-21.

<sup>16</sup> As above.

<sup>17</sup> A Stone Sweet ‘The European Court of Justice and the judicialisation of EU governance’ (2010) 5 *Living Reviews in European Governance* 10-15, 29-38.

<sup>18</sup> An in-depth discussion of related issues is provided under the section on ‘compliance obligation in ECOWAS law’ under chapter II of this study. It must also be noted that the reform is not retroactive.



Finally, in 2006, ECOWAS introduced a reform that authorised the Authority to adopt Supplementary Acts. These Acts are equivalent to Protocols with the important difference that they are binding on member states and institutions of the Community without the need for country-by-country ratification.<sup>19</sup> It would be interesting to investigate to extent to which these instruments actually receive direct enforcement at the domestic level and therefore how effective is the supremacy thereby afforded to ECOWAS rules.

On the side of the enforcement of the ECCJ's decisions nationally, the same rules would apply as for decisions originating from 'supra-national' judicial bodies. In fact, difficulties relating to the reception of 'foreign judgments' as defined earlier appear to be less if not relevant to decisions of community courts. Mostly, as described earlier, judgments of regional courts are granted an exemption from registration rules under the founding treaty or relevant protocol. As discussed in the previous chapter, ECOWAS adopts one of the most elaborated examples of such derogation. Moreover, their involvement in proceedings before the ECCJ is evidence that all study countries have ratified both the 1993 ECOWAS Revised Treaty and 2005 Supplementary Court Protocol or accept the immediate direct applicability of the same instruments. Notably, article 11(1) of the 2005 Supplementary Court Protocol reads that it 'enters into force provisionally upon signature' by which 'member states and ECOWAS undertake to start implementing all its provisions'. These provisions include member states' obligation to comply with judgments of the ECCJ.

As a general obligation, irrespective of which legal system applies, study countries must therefore receive and give effect to the Treaty and Supplementary Protocol in their domestic systems.<sup>20</sup> The obligation rests with them to put their national enforcement

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<sup>19</sup> See ECOWAS 'New regime for Community Acts' *ECOWAS Newsletter* Issue 1 (October 2006) 2.

<sup>20</sup> There are diverging views on the issue. For instance, Nwauche disagrees and argues that ECOWAS treaties are not directly applicable in ECOWAS countries. This is because, he contends, dualist countries need to domesticate the instruments while monist countries still need to take them through constitutionality check and undertake necessary amendments to their constitutions before community instruments may apply. However, he argues that derivatives such as decisions of the Authority of Heads of State and Government as well as those of the Council of Ministers may apply directly. See ES Nwauche 'Enforcing ECOWAS law in West African national courts' 55 (2011) *Journal*

systems in conformity with their international obligations under ECOWAS laws. Particularly with regard to the execution of ECCJ judgments, the main obligation entails that once the writ of execution from ECCJ Registrar is served on the respondent state, it must receive the same treatment as a domestic judgment upon only the confirmation that the judgment is one of the ECCJ.

ECOWAS member states cleared all doubt about the nature and force of decisions of the Community Court in the 2012 Supplementary Act. As the Preamble to the Act states:

ECOWAS has established supranational institutions whose decisions are binding and therefore enforceable integrally and directly applicable in the organs of the Community as well as in member states, in a view to strengthen its effectiveness.<sup>21</sup>

The same rules apply for other sub-regional courts established under the three main regional integration regimes to which West African states are parties.<sup>22</sup> As mentioned earlier, such rules are different from ‘traditional’ rules for enforcement of foreign judgments *per se*, which are judgments originating from third countries or other international courts. It is understood that the rules referred to apply only to third

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of African Law 189-194. Such argument is not of absolute accuracy as, from 2001, ECOWAS has adopted a provisional – immediate – entry into force of community instruments upon signature. In addition, 12 in 15 ECOWAS member states which have been party to the ECCJ’s proceedings would have certainly raised the inapplicability of the Revised Treaty, as well as that of the Court Protocol or other protocols.

<sup>21</sup> ECOWAS 2012 Supplementary Act A/SA13/02/12, Preamble, para 2. This version is a translation by the author of the French text which reads: “*Rappelant que la CEDEAO a créé des organes supranationaux dont les décisions sont obligatoires et en conséquence, exécutoires dans leur intégralité et directement applicables, aussi bien dans les institutions de la Communauté que dans les Etats membres, dans le but de renforcer son efficacité*”.

<sup>22</sup> Namely ECOWAS, UEMOA *Union Economique et Monétaire Ouest Africaine* (West African Economic and Monetary Union) and OHADA. For an introduction to OHADA, see n 9 above. UEMOA was created on 10 January 1994 in Dakar, Senegal, with the objectives of achieving economic and monetary integration through harmonisation of related policies, and customs union. Its membership includes seven Francophone West Africa countries which are Benin, Burkina Faso, Cote d’Ivoire, Mali, Niger, Senegal and Togo, and one Lusophone country, Guinea Bissau. The UEMOA Court of Justice was established on 27 January 1995 with its seat in Ouagadougou, Burkina Faso. As of 6 April 2010, the Court of Justice had handed down 44 cases of which 18 judgments carried binding force. Seven cases were pending before the Court in 2010. While only domestic appeal courts and the UEMOA Commission may activate proceedings before the Court, the Union pledges to ‘respect UDHR and African Charter rights in its action’ (art 3 of the 2003 Treaty). The Court is composed of eight judges representing each member states and a Registrar. Its subject matter is made up of the 1973 and 1994 Treaties together with the national laws of member states.

countries with whom the enforcement forum country does not have a reception agreement and international courts to which the same country is not a party.<sup>23</sup> While the domestic *formule exécutoire* or writ of execution is granted to community courts' judgments upon only verifying that the title is authentic,<sup>24</sup> other foreign judgments request a full *exequatur* judgment as exemplified by country case studies. Thus, within community schemes, more clearly in ECOWAS, the competence of national courts to bring foreign judgments home is transferred to the community court so to say.

Evident reasons support the fact that rules determining the enforcement of 'foreign judgments' in ECOWAS countries should not apply to ECCJ judgments. The exemption may be explained by the fact that general *exequatur* conditions are irrelevant to ECCJ judgments.<sup>25</sup> First, as examined earlier, the jurisdiction of the Court is exclusive and applicable law is indicated in relevant ECOWAS instruments. Second, ECCJ judgments do not emanate from a third state and fair trial rights are guaranteed under both the 2005 Supplementary Court Protocol<sup>26</sup> and ECCJ Rules of Procedure.<sup>27</sup> Finally, both the exclusive competence of the Community Court and direct applicability of ECOWAS law at domestic level should make the condition of 'conformity with domestic order and policy' irrelevant in the case of ECCJ judgments. It is more so where the African Charter, which mainly supports the material human rights jurisdiction of the ECCJ, has been ratified by all ECOWAS member states.

In all, the direct effect of the ECCJ's judgments in member states is based on several legal elements. Such judgments are directly and immediately enforceable by virtue of conventions with autonomous effects, which are the Treaty and Court Protocols. They

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<sup>23</sup> For instance, decisions of the International Court of Justice, the International Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda are enforced in the territories of all United Nations member states in accordance with chapter 7 of the UN Charter, article 27 of the Hague Tribunal Statute and article 26 of the Arusha Tribunal.

<sup>24</sup> Judgments of the Court of Justice of the West African Economic and Monetary Union (UEMOA) and the Court of Justice and Arbitration of the Organisation for Harmonisation of Business Law in Africa (OHADA) are executed in member states as domestic court judgments solely upon the verification that they originate from the considered regional courts.

<sup>25</sup> This view is supported by L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal – final report' World Trade Institute Advisors (Report on file with author) (6 March 2011) 52-54.

<sup>26</sup> Protocol A/P1/7/91 on the ECOWAS Court of Justice, 6 July 1991, arts 12, 13 and 17.

<sup>27</sup> See Rules of Procedure of the ECOWAS Court of Justice, 3 June 2002, section 2.

are so too by virtue of being ECOWAS law through provisions of the 2012 Supplementary Act. In addition, decisions of the Abuja Court are delivered on the basis of ECOWAS law, whether ‘original’ – adopted within the framework of the Community – or ‘borrowed’ (‘imported’) – the African human rights Charter – and eventually incorporated.<sup>28</sup> Finally, the African Charter was ratified by all ECOWAS member states, and decisions of the ECCJ fulfill all traditional conditions of *exequatur*.

Notwithstanding the consequent presumption that ECCJ judgments may not be barred from direct enforcement by domestic rules, experience has shown that a number of issues may surround enforcement including the political context and legal intricacies. As seen in the *Campbell* case, domestic public policy in conformity with the constitution may bar an international decision from direct enforceability. Even the experience in the ECCJ shows that applicability of established rules can be problematic. As an illustration, defendant states still oppose admissibility of individual complainants for non exhaustion of local remedies while that rule is now firmly established in the regime.<sup>29</sup> Another example is the assumption of some stakeholders that seeking the registration of ECCJ’s decisions in the highest national courts or initiating enforcement suits in the same courts of the defendant state could facilitate implementation.<sup>30</sup> Hence, the following section investigates how favourably study countries have behaved towards the rule of law and whether they generally make it a matter of principle to abide by domestic courts’ rulings against Government or the state. The investigation first provides a brief examination of the laws of enforcement of judgments in study countries for the purpose of singling out any legal peculiarities.

Considering the main focus of this study, human rights decisions, domestic or international, are mostly used for discussion, whether they involved monetary or non-monetary orders. Given the difficulty of tracing cases due to poor domestic case law reporting, the analysis focuses on case study, is non-exhaustive and depends on the availability of cases in some instances. The poor or lack of case reporting is mostly

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<sup>28</sup> See 1993 ECOWAS Revised Treaty, art 4(g) and 2012 Supplementary Act, arts 1 and 2(2) iv.

<sup>29</sup> Such was the case at least in *Koraou v Niger* and *Manneh v The Gambia*.

<sup>30</sup> See related analysis under the ‘compliance narrative’ for the SERAP Education judgment in chapter IV, and ‘the nature of the right violated’ under chapter VI.

relevant to domestic decisions which included matters relating to disputes between state organs, administrative and business law, and international criminal law obligations of the state. Criteria and factors may therefore differ from country to country depending on specific situations. However, the overwhelming majority of international decisions reviewed concerned human rights complaints and were not legally binding, mainly decided by the African Commission and UN treaty bodies. Cases attracting positive trends of compliance were mostly decided by the ICJ and the majority were concerned with territorial boundary disputes.

### **3. National enforcement framework and compliance experiences**

#### **3.1 The Gambia**

##### **3.1.1 The law**

Foreign courts' orders are enforceable in The Gambia in accordance with the Foreign Judgments Reciprocal Enforcement Act 6 of 1936. This Act provides for the registration and execution of judgments of superior courts of foreign countries under the condition that 'substantial reciprocity of treatment will be assured as regards the enforcement in that foreign country of judgments given in the superior courts of The Gambia'.<sup>31</sup> The main conditions for accepting foreign judgments as enforceable in The Gambia include that: The judgment shall be final and conclusive between the parties, notwithstanding that an appeal may be pending against it.<sup>32</sup> Interestingly, when the judgment seeking registration is expressed in a currency other than the currency of The Gambia, the judgment shall be registered as if it were a judgment for the same sum in the currency of The Gambia at the exchange rate prevailing in the country of origin by the date of the judgment.<sup>33</sup>

Foreign judgments seeking enforcement in The Gambia must have become enforceable and final in their jurisdiction of origin in the same manner as a judgment given by a domestic court. Once foreign judgments have acquired municipal status, they are

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<sup>31</sup> Foreign Judgments Reciprocal Enforcement Act, Chapter 8:06, 31 March 1936, section 3(1).

<sup>32</sup> As above section 4.

<sup>33</sup> As above section 4(3).

enforced as those originating from domestic courts. In practice,<sup>34</sup> plaintiffs would hire a lawyer to represent them in the enforcement phase. A court bailiff or sheriff shall be approached to obtain an enforcement order which is attached to the judgment. The plaintiff then identifies defendant's assets to be attached and report of such is forwarded to the judge. A public auction is organised for sale of movable property following which the court issues an order for the proceeds of the auction to be delivered to the plaintiff. Non-pecuniary orders are self-executory by the judgment itself. Consider an order for a detainee to be released. Once the order has been made, it shall be caused to be registered with the Registrar of the High Court, and thereafter be exhibited before the relevant authority in whose hands the detainee is.

The Gambia is reported to have effective mechanisms of enforcing property and contractual rights. The same report reveals that though they are said to be frequent, government attempts to interfere with courts have faced resistance from judges and domestic courts which accept and enforce foreign judgments.<sup>35</sup> According to the same source, the government has also accepted binding international arbitration of investment disputes against foreign investors and awards of such proceedings are recognised and enforced by local courts.<sup>36</sup> Finally, in 2011, The Gambia has introduced new legislation or expanded the scope of specialised courts under existing regulations. The country has modified its procedural rules and adopted new ones making enforcement of judgments more efficient.<sup>37</sup> Finally, it is worth noting that while enforcement procedures are not written, section 5(2) of the Constitution of The Gambia makes it an offence to fail to carry out or obey a court order. The same section further provides that failure on the part of the President or Vice-President could constitute a ground for impeachment.

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<sup>34</sup> The World Bank *Doing Business 2011* 'Enforcing contracts in the Gambia' <http://www.doingbusiness.org/data/exploreeconomies/gambia/enforcing-contracts> (accessed 19 August 2011).

<sup>35</sup> See S Djankov *et al Doing Business 2007: How to reform* (2006) 49.

<sup>36</sup> See US Department of State '2011 Investment climate statement - Gambia' <http://www.state.gov/e/eeb/ifd/2008/101017.htm> (accessed 18 April 2011).

<sup>37</sup> See Djankov (n 27 above) and World Bank *et al* 'Ease of doing business in The Gambia' in *Doing business 2011: Measuring business regulations* <http://www.doingbusiness.org/data/exploreconomies/gambia?topic=enforcing-contracts> (accessed 18 April 2011).



### 3.1.2 International decisions

The Gambia has not implemented a recommendation to bring its laws in conformity with the African Charter<sup>38</sup> as decided by the African Commission in the *Jawara* case.<sup>39</sup> Following a coup in which former Gambian President Sir Daouda Kairaba Jawara was overthrown the new government had, among others, suspended the bill of rights, banned political parties, and ousted *habeas corpus* by military decree. In the landmark case of *Purohit v The Gambia*,<sup>40</sup> concerned with health conditions in a Mental Health Unit of a public hospital in The Gambia, the respondent state did not implement any of the Commission's recommendations either, about ten years after the decision.<sup>41</sup> Although recent moves leading to a change of health law in The Gambia have been recorded, such developments were not triggered by the *Purohit* case. They were rather spearheaded by the World Health Organisation as part of its Gambia programme.<sup>42</sup>

The leading state compliance with the African Commission study by Viljoen and Louw found that democracy, the rule of law and governance-related factors were the most important determinants of compliance. Among factors related to The Gambia, corruption perceptions indices were reported to be 2.5,<sup>43</sup> the government being classified as 'not free'<sup>44</sup> but 'stable'.<sup>45</sup> Other communications brought to the African Commission against

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<sup>38</sup> See L Louw An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights LLD Thesis University of Pretoria (2005) 38.

<sup>39</sup> *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

<sup>40</sup> (2003) AHRLR 96 (ACHPR 2003).

<sup>41</sup> See F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights' *The American Society of International Law* (ed) reprinted from (2007) 1 *American Journal of International Law* 5. The study covers 1993-2004.

<sup>42</sup> Interview with Gaye Sowe, Senior Legal Officer, Institute for Human Rights and Development in Africa (Banjul, 26 January 2012).

<sup>43</sup> Transparency International, 2006. According to Transparency International, the Corruption Perceptions Index ranks countries and territories based on how corrupt their public sector is perceived to be. A country or territory's score indicates the perceived level of public sector corruption on a scale of 0 - 100, where 0 means that a country is perceived as highly corrupt and 100 means it is perceived as very clean. A country's rank indicates its position relative to the other countries and territories included in the index.

<sup>44</sup> According to Freedom House's 'Freedom in the World Report' on the degree of democratic freedoms in nations and territories around the world, by which Freedom House seeks to assess the current state of civil and political rights on a scale from 1 (most free) to 7 (least free). Until 2003 states where the average for political and civil liberties differed from 1.0 to 2.5 were considered "free". States with values from 3.0 to 5.5 were considered "partly free" and those with values between 5.5 and 7.0 as "not free". Since 2003 the scope of the "partly free" ranges from 3.0 to 5.0, "not free" from 5.5 to 7.0.

The Gambia were either rejected for not having exhausted local remedies or the case having reached an amicable resolution.

### 3.1.3 Domestic decisions

Field investigations show that The Gambia's response to orders of its own domestic courts does not depart significantly from its compliance with decisions of international bodies. Before litigants could seek compliance, a court judgment ought to have been handed down which implies that justice was freely accessed and judicial process fairly conducted in the first place. The issue seems to be that free access to justice and fair judicial process are not the rule in The Gambia, where a climate of fear and victimisation of complainants is commonly experienced.<sup>46</sup> One of the most striking examples include the 2012 case of *Dr Amadou Scatered Janneh v Attorney-General* in which Dr Janneh, a former minister of information and communications, was convicted and sentenced to life imprisonment with hard labour for distributing materials, namely tee-shirts, demanding an end to the rule of the incumbent President of The Gambia.<sup>47</sup> According to the prosecution which had demanded the death penalty, Dr Janneh and others 'conspired to overthrow the government by unlawful means'. While such sentence is outrageously unjust, the general rule of law and judicial environment in The Gambia suggests a trend of deterring litigation against the state, or involving the executive, through disproportionate and fear-raising sentences. Several cases from The Gambia reported on a daily basis attest to such.<sup>48</sup>

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<sup>45</sup> According to Economic Intelligence Unit, The Political Instability Index shows the level of threat posed to governments by social protest. The index scores are derived by combining measures of economic distress and underlying vulnerability to unrest.

<sup>46</sup> Interviews with Gaye Sowe (n 34 above), and Advocate Ousainu Darbo, Counsel for complainants in several cases against the state and opposition leader in The Gambia (Banjul, 27 January 2012). See also, Amnesty International (2011) 'Gambia: Stop climate of fear. Take action!' <http://www.amnesty.org/en/library/info/AFR27/003/2011/en> (accessed 16 February 2012); and World Organisation Against Torture (2011) 'Gambia: Climate of fear amongst the community of human rights defenders - International fact-finding mission report' <http://www.omct.org/human-rights-defenders/reports-and-publications/gambia/2011/07/d21336/> (accessed 16 February 2012).

<sup>47</sup> See Media Foundation for West Africa 'The Gambia Update: Former minister jailed for life for demanding an end to dictatorship' Alert of 18 January 2012.

<sup>48</sup> Media Foundation for West Africa has developed a systematic judicial proceedings follow-up alerts mechanism providing detailed information on cases decided by domestic courts throughout West Africa, including from The Gambia. See MFWA 'Alerts' [http://www.mediafound.org/index.php?option=com\\_content&task=blogcategory&id=27&Itemid=46](http://www.mediafound.org/index.php?option=com_content&task=blogcategory&id=27&Itemid=46).

Even under the assumption that a decision is obtained from a fairly conducted legal process, the state has not demonstrated a culture of obedience and enforcement has been prevented by the government through the most sophisticated pretences. This was illustrated in *Ousman Sabally v Inspector General of Police and Others* in which the Supreme Court of The Gambia unanimously held that ‘the application of the [Indemnity] Act to terminate the legal proceedings instituted by the plaintiff at the time constituted a contravention of the provisions against retroactive deprivation of a vested right as provided for by section 100(2)(c) [of the Constitution] and exceeds the competence of the National Assembly’.<sup>49</sup> In other words, the President of the Republic had sought an amendment of the Compensation Act to annihilate prospective claims for damages while the plaintiff was still proving his case in courts. The amended Act ousted the jurisdiction of regular courts in favour of the Claims Commission established to receive and hear claims and make recommendations to the President as to which of the claimants deserved compensation. The Supreme Court decision had not been complied with for ten years as at January 2012. Another case exemplifying The Gambia’s unfriendliness with the rule of law is *Jammeh v Attorney-General*<sup>50</sup> in which the Supreme Court of The Gambia held that

the purported amendment of section 1(1) of the Constitution, 1997 contained in the Schedule to the Constitution of the Republic of The Gambia, 1997 (Amendment) Act, 2001 (No 6 of 2001), purporting to substitute for that section, a new section, namely, that ‘The Gambia is a sovereign secular Republic’, was a nullity and of no effect because of non-compliance with the provisions of section 226(4) of the Constitution.

In section 1 of *The Gambian Constitution* case, the government went ahead and had the provision amended despite its unconstitutionality. Cases of the state refusing to release applicants despite several court orders include *Kanyiba Kanyi v Director General of NIA and Attorney-General*,<sup>51</sup> in which Justice Sanji Monageng ordered that the applicant be

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<sup>49</sup> *Sabally v Inspector General of Police and Others* (2002) AHRLR 87 (GaSC 2001).

<sup>50</sup> *Jammeh v Attorney-General* (2002) AHRLR 72 (GaSC 2001).

<sup>51</sup> High Court of The Gambia, MISC.APP.NO.HC/312/06/C5/086/CO of 17 October 2006.

released from unlawful detention unconditionally. As at January 2012, the applicant was still in detention, six years after several courts' orders.<sup>52</sup>

The case of *The State v Moses Richards* similarly attracts interest for depicting The Gambia's disrespect for the rule of law and domestic courts' proceedings. Here, Mr Moses Richards, a lawyer and former judge, was charged with sedition for providing false information to a public officer [the Office of the President] while he was merely trying to help a client enforce a judgment. He was subsequently sentenced to two years and six months imprisonment solely for legal representation in the course of which he was said to have mentioned the Office of the President. Sentenced on 19 September 2011, Mr Moses Richards was released following a presidential pardon issued 14 October 2011.<sup>53</sup> One must at least note that The Gambia does not show much eagerness to defend its own citizens against infringements from third parties. In the African Commission case of *Esmaila Connateh and 13 Others v Angola*, The Gambia refused to respond to civil society efforts, namely calls to use diplomatic means, to seek enforcement on the part of Angola although the decision was in favour of Gambian nationals.<sup>54</sup>

Other practices experienced by lawyers include the state pretending that the person to be released as per court order is no longer in its custody, or re-arresting a person who has just been granted bail, or, mostly, resorting to negotiation or amicable settlement to avoid implementing courts' decisions fully in commercial cases.<sup>55</sup> Field investigations and interviews in The Gambia have, however, revealed that money judgments have been satisfied in some cases where the state had no particular interest as opposed to non-monetary judgments, criminal or politically related cases that are closely monitored by the state.<sup>56</sup> In the case of *Abdul Aziz Jeng v Commander of Armed Forces*, for instance, the

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<sup>52</sup> Interview with Advocate Darbo, counsel for the applicant in the *Kanyi* and other cases decided against the state (Banjul, 27 January 2012). The same applies to the case of *Abdul Aziz Jeng v The State*.

<sup>53</sup> See *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh and 13 Others) v Angola* Communication 292/04 (ACHPR) 24<sup>th</sup> Activity Report. Federation Internationale des Droits de l'Homme 'Release of Mr. Moses Richards, a lawyer and former High Court Judge at the Special Criminal Division - GMB 002 / 0911 / OBS 113.1' (19 October 2011).

<sup>54</sup> Interview with Gaye Sowe (n 34 above).

<sup>55</sup> Interviews with Advocate Darbo and Justice Emmanuel Nkea, Judge President, Special Criminal Court of The Gambia (Banjul, 27 January 2012).

<sup>56</sup> Interview with Advocate Darbo and Justice Nkea.

Attorney-General is said to have expressed the will to pay but for budgetary constraints.<sup>57</sup>

## 3.2 Niger

### 3.2.1 The law

Niger is a civil law country. As such its legal rules for enforcement of foreign judgments are organised under the *exequatur* procedure. Niger applies the OCAM<sup>58</sup> Convention on judicial cooperation referred to above to receive and execute foreign judgments on its territory. Prior to their execution in Niger, foreign judgments must be declared enforceable by a domestic court. Reciprocity afforded to Nigerien judgments in the considered foreign country is a general condition.

Two exceptions apply to *exequatur*. Firstly, automatic provisional execution applies when the foreign judgment is related to the status of persons, for instance in the case of divorce.<sup>59</sup> Secondly, where there is no need for enforcement, foreign judgments apply without *exequatur*.<sup>60</sup> In any event, foreign judgments are brought home and enforced in Niger through more or less the same rules applied for domestic judgments. Generally, domestic judgments are enforceable on condition that they are final and have received a writ of execution.<sup>61</sup> The writ of execution or '*formule exécutoire*' equates to direct requisition of public force and imposes on the state to give a hand to execution. The state's failure to do so involves its responsibility.<sup>62</sup>

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<sup>57</sup> Interview with Advocate Darbo.

<sup>58</sup> *Organisation Commune Africaine et Malgache* (African and Malagasy Common Union). OCAM was created in 1965 with objectives of economic, social, technical, and cultural cooperation. Its membership comprised 15 countries from all regions of Africa and Madagascar. The organisation is known for having developed a number of joint services the most successful of which was the multinational airline *Air Afrique*.

<sup>59</sup> See Supreme Court of Niger 'Exécution des décisions de justice: Cour Suprême du Niger' in AA-HJF (ed) *Les Cahiers de l'AA-HJF* 9e Publication *L'exécution des décisions de justice dans l'espace AA-HJF* Colloque de N'djamena (11-13 November 2008) 126.

<sup>60</sup> As above 127.

<sup>61</sup> Legislation on execution may vary according to the matter decided (civil, criminal, administrative) and the law applied by the judgment.

<sup>62</sup> See Niger Code of Civil Procedure, art 502.

### 3.2.2 International decisions

Niger has not been found in violation of human rights either by the African Commission or a UN treaty body. One of the very few cases of the country having to comply with the decision of an international body was in the islands and frontier dispute against the Republic of Benin.<sup>63</sup> Media reports reveal that Niger has shown no resistance or opposed Benin officials taking possession of the islands attributed to Benin during a ceremony organised on 13 August 2007, two years after judgment was delivered.<sup>64</sup> At the time of submitting the dispute to the International Court of Justice, the two countries had entered a prior agreement to accept any outcome.<sup>65</sup>

### 3.2.3 Domestic decisions

While the state has no specific derogations against complying with courts' orders, non-execution is said to be a reality in Niger where a number of institutional factors render execution difficult in practice.<sup>66</sup> Domestic judgments are said to face a multiplicity of actors throughout the judicial process.<sup>67</sup> The most important issues include rampant corruption in and the lack of independence of the judiciary. In Niger, additional hurdles are recorded as political interferences, cumbersome administrative procedures and budgetary issues especially when the state is the debtor. It has been observed that, in Niger, administrative judgments mostly suffer from the state's resistance to complying or its tendency to negotiate the amount of compensation with the creditor. This confirms the hurdles referred to above. Although constitutional and statutory means exist to

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<sup>63</sup> See *Fontier Dispute Benin v Niger*, ICJ Judgment of 12 July 2005. On the 25 islands under dispute, the ICJ decided that 9 should go to Benin and 16 to Niger. Benin got the largest part of the share (1, 118sq km out of a total of 1, 156) but the main island under dispute was the Lete Island, reported to be the most fertile, which the ICJ has decided belongs to the Republic of Niger.

<sup>64</sup> See *L'Autre Quotidien* 'Suite à la décision de la cour internationale de justice: Le Bénin prend possession des îles qui lui sont attribuées' [http://www.sonangnon.net/actualites/2007/aout/intautrequotidien1308\\_3.php](http://www.sonangnon.net/actualites/2007/aout/intautrequotidien1308_3.php) (accessed 21 March 2011); AllAfrica 'Benin: L'Etat prend possession des îles qui lui sont attribuées' <http://fr.allafrica.com/stories/200708130407.html> (accessed 21 March 2011).

<sup>65</sup> See ICJ Press Release 2004/29 of 13 July 2004.

<sup>66</sup> See Supreme Court of Niger (n 59 above) 129-130.

<sup>67</sup> As above 131.



constrain the public administration to comply, the state's willingness to obey remains the most effective way of ensuring execution.<sup>68</sup>

For dearth of reported cases, information obtained by interview shows that, in the recent years, the implementation of money judgments of less than ten million CFA face no challenge<sup>69</sup> while the state is less, if not compliant at all with other positive obligations, including the release of detained persons or the enactment of legislation to curb political or socially sensitive practices.<sup>70</sup> As Niger has adequately complied with the judgment of the ECOWAS Court of Justice in the *Slavery* case, the findings in chapter three will enlighten as to what differentiating factors have commended such course of action.

### 3.3 Nigeria

#### 3.3.1 The law

Under the Foreign Judgments (Reciprocal Enforcement) Act,<sup>71</sup> the Minister of Justice, by means of an order, shall direct that a foreign judgment be enforced in Nigeria. Upon such direction, the judgment creditor may take the judgment to the High Court of any state in which he or she may reside, for registration.<sup>72</sup> Upon registration, the judgment becomes that of the relevant High Court and is enforced accordingly.<sup>73</sup> The law also includes a condition that reciprocity be afforded to Nigerian judgments abroad.<sup>74</sup> Besides, enforcement may be hindered by instances of conflicts of law and absence of legislation in Nigeria. One could refer for example to the inconsistency of the Public Order Act and Shari'a Law with the African Charter or the gender-based discrimination permitted by most customary laws in Nigeria.<sup>75</sup>

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<sup>68</sup> As above 132-137.

<sup>69</sup> Approximately \$20 000.

<sup>70</sup> Email consultation with Maître Abdourahmane Chaibou, Advocate of the Appeal Court of Niamey (11 February 2012).

<sup>71</sup> CAP F35 Laws of the Federation of Nigeria 2004.

<sup>72</sup> As above section 3.

<sup>73</sup> See African Court Coalition *et al* 'Harmonizing National Laws and the African Court on Human and Peoples' Rights' Country report on Senegal (January 2008) 33.

<sup>74</sup> See section 3 of the Act.

<sup>75</sup> See African Court Coalition *et al* (n 73 above) 26-27.

At the domestic level, the power of Nigerian courts to enforce their orders is derived from section 6(6)(a) of the 1999 Constitution (as amended) which directs that the judicial powers of the court ‘shall extend notwithstanding anything to the contrary in this constitution to all inherent powers and sanctions of a court of law’. Besides, enforcement is governed by the Sheriffs and Civil Process Act, the Sheriffs and Civil Process Laws of the States and the Judgments (Enforcement) Rules made thereunder. Itemisation of the various methods of enforcement, depending on the type of judgment, is provided under the said laws and buttressed by jurisprudence.<sup>76</sup>

When it comes to execution against the government, Federal or State, the modes of execution referred to earlier do not apply.<sup>77</sup> Judgments of domestic courts can, however, still be executed against the government. A copy of the judgment is sent to the Attorney-General of the Federation or the concerned State. In cases where the judgment is for payment of money the Attorney-General, by warrant under his hand, directs that amount be paid and, in the case of any other judgment, takes such necessary measures for the same to be given effect.<sup>78</sup> Those measures would include ‘quick consultation’ with finance departments for provision of funds to satisfy judgment debtors.<sup>79</sup>

### 3.3.2 International decisions

Arguably due to the fact that Nigeria was mostly under military rule between the establishment of international human rights litigation forums and the late 1990s, the country has been caught in violation of human rights in a number of instances. The African Commission has decided on tens of communications in individual cases involving Nigeria.<sup>80</sup> Full compliance was recorded in only two cases.<sup>81</sup> In *Centre for Free Speech v*

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<sup>76</sup> See for instance *Okoya v Santili* and *Tukur v Governor of Gongola State* Supreme Court of Nigeria.

<sup>77</sup> See O Ogun ‘An Enforcement of Judgment and Court Order in the Nigeria Legal System’ June 7, 2011 <http://topeadebayollp.wordpress.com/2011/06/07/an-enforcement-of-judgement-court-order-in-the-nigeria-legal-system/> (accessed 1 September 2011).

<sup>78</sup> For an extended analysis on enforcement of courts’ orders in Nigeria see Ogun as above.

<sup>79</sup> See for instance *Jallo v Military Governor*, Kano State Court of Appeal.

<sup>80</sup> See Louw (n 38 above) 25-51.

<sup>81</sup> Nigerian civil society organisations have been at the forefront of most cases brought before the African Commission and before the African Court against Nigeria. See in general Viljoen & Louw (n 41 above); and OC Okafor *The African human rights system: Activist forces and international institutions* (2007).

Nigeria,<sup>82</sup> the illegally detained journalists were eventually released. In *Constitutional Rights Project v Nigeria*,<sup>83</sup> ordered by the African Commission to ‘charge detainees or release them’, Nigeria chose to charge them.<sup>84</sup> By the time of compliance in both cases, state respondent factors presented as follows:<sup>85</sup> corruption was 1.6,<sup>86</sup> government was partly free,<sup>87</sup> a change of government had occurred between the findings and compliance, and Nigeria was classified as relatively stable.<sup>88</sup> Nigeria was involved in several cases before the African Commission after 2004, many of which were declared inadmissible.<sup>89</sup>

Nigeria was also involved in a territorial dispute with Cameroon, known as the *Bakassi* case.<sup>90</sup> Media reported that Nigeria’s President at the time first rejected the ICJ judgment as null before declaring he was ready to negotiate political terms of implementation.<sup>91</sup> In December 2003, a year after the case was decided, an important step was reported to have been taken towards implementation. Indeed, the withdrawal of civilian administration, military and police forces, and the transfer of authority in the Lake Chad area were completed.<sup>92</sup> However, it took much longer for Nigeria to hand over the potentially oil rich Bakassi peninsula.<sup>93</sup> Nigeria is reported to have eventually relinquished total control over the peninsula to Cameroon on 14 August 2008, six years

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<sup>82</sup> *Centre for Free Speech v Nigeria* (2000) AHRLR 250 (ACHPR 1999).

<sup>83</sup> *Constitutional Rights Project v Nigeria* (2000) AHRLR 248 (ACHPR 1999).

<sup>84</sup> See Viljoen and Louw (n 41 above) 10.

<sup>85</sup> See Viljoen & Louw as above 24.

<sup>86</sup> See definition and criteria by Transparency International under the sub-section above on The Gambia.

<sup>87</sup> See definition and criteria by Freedom House under the sub-section above on The Gambia.

<sup>88</sup> See definition and criteria by Economic Intelligence Unit under the sub-section above on The Gambia.

<sup>89</sup> In 2005, the communication was declared inadmissible in *Ilesanmi v Nigeria* (2005) 48 (ACHPR 2005) and the files were closed in *Interights (on behalf of Husaini & Others) v Nigeria* (2005) AHRLR 56 (ACHPR 2005) and *Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare v Nigeria* (2005) AHRLR 62 (ACHPR 2005). In 2008, a communication was declared inadmissible in the case of *Socio-Economic Rights and Accountability Project v Nigeria* (2008) AHRLR 108 (ACHPR 2008).

<sup>90</sup> *Cameroon v Nigeria: Equatorial Guinea intervening*, Land and Maritime Boundary between Cameroon and Nigeria, ICJ, Judgment of 10 October 2002.

<sup>91</sup> See for instance, AfrolNews ‘Nigeria will not give up Bakassi’ [http://www.afrol.com/News2002/nigo46\\_cam\\_bakassi4.htm](http://www.afrol.com/News2002/nigo46_cam_bakassi4.htm) (accessed 23 March 2011).

<sup>92</sup> See United Nations ‘Bakassi peninsula: Recourse to the law to prevent conflict’ <http://www.un.org/events/tenstories/06/story.asp?storyID=900> (accessed 24 March 2011).

<sup>93</sup> See HighBeam Research ‘Cameroon set to regain oil-rich peninsula; Peaceful transfer by Nigeria seen as model’ (accessed 24 March 2011) and SocialistWorld ‘Cameroun Bakassi peninsula - No war for oil’ <http://www.socialistworld.net/doc/403> (accessed 24 March 2011).

after the judgment.<sup>94</sup> In quite an exemplary move, Cameroon and Nigeria have even agreed jointly to exploit oil fields found within the disputed territory.<sup>95</sup>

### 3.3.3 Domestic decisions

The fate of orders made by Nigerian courts against the state has depended significantly on the political dispensation of the day. It is common knowledge that domestic judgments were ignored by the government under the Abacha anti-democratic and military regime, which had systematically transformed Nigeria into a state without fundamental legal rights. While the state's respect for the rule of law improved significantly in the Obasanjo era, some politically sensitive cases have demonstrated the limits of state compliance. For instance, in the case of *Attorney-General of Lagos State v Attorney-General of the Federation*,<sup>96</sup> the Supreme Court held that the 'Federal Government of Nigeria has no power to withhold the statutory allocation due and payable to Lagos State Government' and consequently ordered to 'pay immediately all outstanding allocation'. The Obasanjo government, however, refused to comply with the order, which was complied with only following the change of government that inaugurated President Yar'Adua's regime.<sup>97</sup>

Despite the post-1999 democratic dispensation in Nigeria, one should apprehend the situation with caution. In the fight against terrorism, President Jonathan's Nigeria has faced the challenge of striking a balance between abiding with court orders and the interest of victims. For example, in the matter concerning the detention and subsequent execution in 2009 of Boko Haram leader Fugu Mohammed, then in the custody of the Federal Government of Nigeria, the Borno State High Court ordered the state to pay

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<sup>94</sup> See BBCNews 'Nigeria cedes Bakassi to Cameroon' <http://news.bbc.co.uk/2/hi/africa/7559895.stm> (accessed 24 March 2011) and Nigerian Best Forum 'Camerounians celebrate as Nigeria cedes Bakassi' <http://www.nigerianbestforum.com/index.php?topic=7991.0;wap2> (accessed 24 March 2011).

<sup>95</sup> See AfricaFiles 'Cameroon and Nigeria plan joint oil exploration in Bakassi peninsula' <http://www.africafiles.org/article.asp?ID=25116> (accessed 24 March 2011).

<sup>96</sup> *Attorney-General of Lagos State v Attorney-General of the Federation* S.C. 70/2004 Supreme Court of Nigeria, 10 December 2004.

<sup>97</sup> Elombah 'President Obasanjo's regime is "the worst when it comes to the rule of law"' <http://elombah.com/index.php/reports/15510-president-obasanjo-s-regime-is-the-worst-when-it-comes-to-the-rule-of-law-tambuwal> (accessed 27 October 2013).

N100 million to the family of the deceased for extra-judicial killing.<sup>98</sup> While the Federal Government was still challenging the lower court decision in the Appeal Court, the Borno State Government settled the complainant under an out of court agreement. Subsequently, the Federal Government was faced with a flow of complaints from families of victims of Boko Haram terrorist acts, claiming that the Government ought to compensate them similarly since damages had been paid to terrorists who killed their relatives. While the situation is peculiar to Nigeria,<sup>99</sup> the case illustrates the variety of factors which are likely to influence state compliance with courts' orders, affording the benefit of good faith to the state.

Terrorism related dilemmas and challenges faced by Nigeria do not absolve its authorities from compliance in ordinary life situations in the country. Some cases are worth mentioning. Although indirectly, the Federal Government was involved in the popular case of *Uzoma Okere v Admiral Harry Arogundade and the Nigeria Navy*. In 2009, a Lagos High Court ordered Admiral Arogundade and the Nigeria Navy to pay N100 million (\$630,000) as damages, and make a public apology in at least four prints and television outlets within one month of the decision, for assaulting, stripping and descending Ms Uzoma Okere, a young university graduate, on her way from work. Ms Okere was subjected to such treatment for having obstructed the admiral's convoy. Despite their unsuccessful challenge of the decision in the Appeal Court of Lagos in 2010, the defendants had yet to obey the order as at June 2013.<sup>100</sup>

Apparently, the culture of disobeying court orders under the military rule has not seen any significant change in the era of Nigeria's nascent democracy.<sup>101</sup> The practice seems to be current at both state and federal levels. For instance, on 20 November 1999, the

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<sup>98</sup> Judgment of 13 April 2010.

<sup>99</sup> This is only to some extent as terrorism is also current in some other ECOWAS countries like Niger and Mali; and piracy rages in the Gulf of Guinea.

<sup>100</sup> See Nairaland 'Assault: Arogundade, Navy lose appeal in Miss Uzoma Okere assault case' (22 June 2010) <http://www.nairaland.com/468031/assault-arogundade-navy-lose-appeal> (accessed 18 May 2012).

<sup>101</sup> See ON Ogbu 'Judicial Independence and Nigeria's Nascent Democracy' Open Trial Gazette unpublished paper on file with author (27 January 2011) <http://gazette.opentrial.org/nigeria/judicial-independence/judicial-independence-nigerias-nascent-democracy/> (accessed 18 May 2012). At the time of the writing, the author was Senior Lecturer and Acting Head of the Law Department at Anambra State University, Nigeria.

Federal High Court, Abuja, scheduled a contempt hearing against the National Drug Law Enforcement Agency (NDLEA) Chairman, and the Director of Prosecutions, for persistent flouting and abuse of its order to produce a popular Lagos auto dealer, Lanre Shittu and others, before it. The Court instructed the Inspector General of the Police to arrest the two contenders and produce them before it but the order was never carried out.

In similar situations, state authorities rely on the pretext of there being appeals to disobey court orders even when there is no stay of execution, as illustrated in the case of the Ibadan High Court nullifying appointments made by the Governor.<sup>102</sup> The same is exemplified by the Oyo State government's disobedience in 2002<sup>103</sup> and the subsequent refusal by the NDLEA to pay popular comedian Baba Suwe N50 million (\$315,000) as ordered by the Ikeja High Court in November 2011 for detaining the complainant in custody despite a bail order.<sup>104</sup> In some instances, the Federal Government was directly involved.<sup>105</sup>

### 3.4 Senegal

#### 3.4.1 The law

As a civil law country, Senegal receives and enforces foreign judgments through the *exequatur* according to the rules provided in the Code of Civil Procedure.<sup>106</sup> The President of the competent Regional Tribunal has jurisdiction *rationae loci*.<sup>107</sup> The *exequatur* is generally granted under conditions that: The judgment was handed down by a competent court in accordance with rules of conflicts of competence in force in Senegal;

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<sup>102</sup> See Ogbu as above. The author refers to a wealth of similar cases, one of them being when the order of the Abuja High Court that General Bamaiyi be produced in court in 1999 was disobeyed by the Federal Government.

<sup>103</sup> Ogbu's analysis included the matter in which the state government 'disobeyed the order of the High Court asking the local government caretaker committees to vacate their offices. An Ibadan High Court had ruled that the appointment of the local government caretaker committees in place of elected local government officials was unconstitutional and ordered members of the caretaker committees to vacate their offices'.

<sup>104</sup> See OMG 'NDLEA goes to court and refuses to pay Baba Suwe N25million compensation fine' (10 February 2012) <http://www.omg.com.ng/2012/02/ndlea-goes-to-court-refuses-to-pay-baba-suwe-n25-million-compensation-fine/> (accessed 18 May 2012).

<sup>105</sup> As quoted in Ogbu (n 101 above), 'The Federal Government also announced that it will not obey the order of an Abuja High Court presided over by Justice Wilson Egbo-Egbo which restrained Dr. Chris Ngige from parading himself as the Governor of Anambra State'.

<sup>106</sup> See Code of Civil Procedure of Senegal, 2003, art 787.

<sup>107</sup> See art 789.



the judgment referred to the applicable law; the judgment is final and enforceable according to the law of the issuing state; parties to the case were accordingly summoned, represented or declared defaulting; and the judgment is not contrary to the municipal public order or a domestic final judgment which has precedence to the foreign judgment seeking *exequatur*.

### 3.4.2 International decisions

Many praise Senegal for its remarkable adherence to international law. The country is said to have ratified most human rights and international humanitarian law treaties without substantial reservations.<sup>108</sup> It enjoys the same status regarding African human rights instruments.<sup>109</sup> The fact that the jurisprudence of the continental human rights bodies in Africa includes very few cases against Senegal<sup>110</sup> at the time of this study might find an explanation in the country's level of adherence to international human rights law. The same cannot be said of litigation before United Nations bodies.

In case of *Guinea Bissau v Senegal*,<sup>111</sup> the ICJ found that the parties had an obligation to apply its award delimiting a maritime boundary between the two countries. Senegal really had least to do in terms of implementation as the judgment was in its favour. In any event, an implementation treaty was signed between the two countries only in 1993.<sup>112</sup>

Conversely, the case of *Famara Kone v Senegal*<sup>113</sup> is illustrative enough of how Senegal has received and complied with the findings of an international body. The initial complaint was filed with the UN Human Rights Committee on 5 December 1989. Finding an abuse of power on the part of Senegal for having detained the complainant for four years before

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<sup>108</sup> See Open Society Institute *Senegal: Le secteur de la justice et de l'Etat de droit* (2008) 4 and Rule of Law in Armed Conflicts Project 'Senegal, international treaties adherence' [http://www.adh-geneva.ch/RULAC/international\\_treaties.php?id\\_state=186](http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=186) (accessed 24 March 2011).

<sup>109</sup> See C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 478, 840 and 482.

<sup>110</sup> Such cases are also mostly inconclusive, among others for inadmissibility on the grounds of non-exhaustion of local remedies as was the case in *FIDH and Others v Senegal* (2006) AHRLR 119 (ACHPR 2006) and *Mouvement des Réfugiés Mauritanien au Sénégal v Senegal* (2003) AHRLR 131 (ACHPR 2003).

<sup>111</sup> *Guinea Bissau v Senegal*, ICJ, Arbitral Award of 31 July 1989.

<sup>112</sup> United Nations, Management and Cooperation Agreement Guinea-Bissau – Senegal, 14 October 1993 <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SEN.htm> (24 March 2011).

<sup>113</sup> UN Human Rights Committee, Communication no 386/1989, 27 October 1994.

the commencement of his trial, the UN Human Rights Committee recommended that compensation should be awarded to the author of the communication.<sup>114</sup>

Pursuant to the UN Human Rights Committee's decision, the Prime minister of Senegal requested the *Comité sénégalais des droits de l'homme*, the national human rights institution, to examine the case for an amicable settlement. On 15 October 1997, Mr Kone signed an agreement with Senegal under which the Principal Inspector of Judicial Services proposed an amount of money and medical insurance which the victim reportedly rejected as inadequate.<sup>115</sup> Mr Kone subsequently filed a complaint with the Senegalese Human Rights Committee.<sup>116</sup> After the Senegalese Human Rights Committee found the compensation was not 'derisory',<sup>117</sup> reliable sources confirm that Mr Kone eventually collected his due including a piece of land, an amount of CFA 500, 000 (approximately \$1,000) and the state approved free treatment by a medical professional until Mr Kone fully recovers from a mental illness caused by his prolonged detention. Later, the relevant provisions of the Criminal Code were amended for detained persons who have not been tried within two years to be released.<sup>118</sup>

The *Habré* case is well known as one that attracted high media coverage and international attention on Senegal. Various substantive aspects of the case are discussed in greater details under chapters III to VII of the present study. In brief, a Senegalese judge indicted former Chadian President Hissene Habré for crimes allegedly committed during his rule between 1982 and 1990.<sup>119</sup> Mr Habré appealed against such recognition of jurisdiction by Senegalese courts to try him. The Appeal Court of Dakar subsequently annulled the indictment procedure on the basis that Senegalese courts lacked jurisdiction and that article 669 of the Senegalese Code of Criminal Procedure did not include

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<sup>114</sup> See para 10 of the Communication.

<sup>115</sup> Rejection communicated to the UN Human Rights Committee by letter dated 29 April 1997. See Louw (n 38 above) 71.

<sup>116</sup> On the implementation process, see African Court Coalition (n 73 above) 45-46.

<sup>117</sup> See *Rapport annuel du Comité sénégalais des droits de l'homme* (2003-2004) 88-89.

<sup>118</sup> Information obtained by electronic consultation with Fatou Kama, Vice President of the Senegalese NGO RADDHO (19 August 2011) and Advocate Ibrahima Kane, former member of the Senegalese Human Rights Committee in charge of the *Famara Kone* case (21 August 2011).

<sup>119</sup> Tribunal Regional Hors Classe of Dakar Senegalese Judge Demba Kandji indicted Mr Habré on 3 February 2000.

universal jurisdiction.<sup>120</sup> On 20 March 2001, the Court of Cassation of Senegal confirmed the appeal judgment<sup>121</sup> on the main argument that Senegal had not incorporated CAT in its domestic law. Alleged victims subsequently filed a complaint against Senegal before the CAT Committee alleging a violation of the Convention.<sup>122</sup> The Committee called on Senegal to respect its international commitments by taking all necessary measures to try Mr Habré.<sup>123</sup>

Following a different procedure prompted by the victims to trigger universal jurisdiction, a Belgian judge had indicted Habré for crimes against humanity, torture and other violations in September 2005 and issued a warrant of arrest and extradition request.<sup>124</sup> On 17 March 2006, the European Parliament demanded that Senegal turn over Habré to Belgium to be tried.<sup>125</sup> Senegal rejected extradition demands from both the European Parliament and the African Union right after Belgium exercised universal jurisdiction to try Habré.

Through a resolution it passed in 2006, the African Union eventually mandated Senegal to try Habré on behalf of Africa.<sup>126</sup> The country subsequently undertook an extensive reform including amending national law and setting up committees of experts to prepare the technical part of the trial. Meanwhile, in 2009, the newly operational African Court unanimously dismissed for lack of jurisdiction a case by a Chadian national asking the regional court to annul the African Union mandate for Senegal to try Habré.<sup>127</sup>

The subsequent international act of the Habré judicial ‘saga’ is a 2010 judgment by the ECOWAS Court of Justice finding that legislative reforms undertaken by Senegal to try Hissene Habré violated his rights and the principle of non-retroactivity of criminal law. The Court declared that Senegal must respect the *res judicata* of its domestic courts and

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<sup>120</sup> See Court of Appeal of Dakar, Arrêt no 135 du 04-07-2000/Accusation.

<sup>121</sup> See *Guengueng & Others v Habré* (2002) AHRLR 183 (SeCC 2001).

<sup>122</sup> See CAT/C/36/D/181/2001.

<sup>123</sup> See CAT Decision of 19 May 2006.

<sup>124</sup> Tribunal of First of Brussels, 29 September 2005.

<sup>125</sup> See Human Rights Watch ‘The Chronology of the Habré Case’ (9 March 2012) <http://www.hrw.org/news/2012/03/09/chronology-habr-case> (accessed 17 April 2013).

<sup>126</sup> See African Union Assembly, AU/3 (VII), 2 July 2006, art 5.

<sup>127</sup> See *Michelot Yogogombaye v Republic of Senegal*, App. No. 001/2008, Judgment of 15 December 2009.

organise a process of international character to try former Chadian President.<sup>128</sup> Whether and how Senegal complied with the ECCJ judgment is examined as part of chapter five and chapter six focusing on empirical compliance. For now, it can be concluded that although it has rejected several extradition requests from Belgium and referred the ECCJ's judgment back to the African Union, one could give Senegal credit for good faith against its high international law adherence background.

The Senegalese Government was actually offered an opportunity to prove its commitment as the ICJ decided in July 2012 that Senegal had an obligation to prosecute or extradite immediately.<sup>129</sup> Following his election in early 2012, Senegalese President Macky Sall repeatedly pledged that Senegal would prosecute Habré.<sup>130</sup> The pledges were followed with action as four-day negotiations in Dakar between the Government of Senegal and the African Union led to an agreement to establish a special court in the Senegalese justice system with African judges appointed by the African Union presiding over his trial. The agreement was signed on 22 August 2012 creating 'Extraordinary African Chambers' to be operational by the end of 2012. On 19 December 2012, the National Assembly of Senegal adopted the law establishing those chambers. The Chambers were inaugurated in Dakar on 8 February 2013.<sup>131</sup>

### 3.4.3 Domestic decisions

The general view is that Senegal has a culture of the state complying with decisions made by domestic courts. However, investigation shows that while money judgments are generally paid with little difficulty, non-pecuniary obligations face greater challenges. The latter situation is illustrated in the *Communauté Rurale de Mbane* case,<sup>132</sup> in which the Supreme Court of Senegal, confirming a Dakar Appeal Court decision, found in favour of

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<sup>128</sup> See Arrêt Avant Dire Droit, ADD no ECW/CCJ/APP/02/10 of 14 May 2010 and Arrêt no ECW/CCJ/JUD/06/10 (18 November 2010) 61.

<sup>129</sup> See Questions relating to the obligation to prosecute or extradite (*Belgium v Senegal*), Judgment, 20 July 2012.

<sup>130</sup> See Jeune Afrique 'Tchad: Hissène Habré, un "Sénégalais" pas comme les autres' (13 September 2012) <http://www.jeuneafrique.com/Article/JA2695p032-033.xml> (accessed 17 November 2012).

<sup>131</sup> See Human Rights Watch 'The Chronology of the Habré Case' (n 116 above).

<sup>132</sup> *Aliou Diack & Sophie Mbodj v Mamadou Ciré Diallo & Ministre chargé de l'intérieur*, Arrêt no 27 of 11 August 2009, Supreme Court of Senegal, Administrative Chamber.

an opposition party to the disadvantage of the incumbent party's candidates in local elections.

While it was expected to let local representatives-elect assume office in obedience with the ruling of the Supreme Court, the government issued a decree to confirm the earlier swearing in of representatives of the presidential party. Local legal practitioners, however, suggest that such cases are not numerous, the principle being that the state respects courts' rulings and effective referral mechanisms exist to challenge state's refusal to comply.<sup>133</sup>

## 3.5 Togo

### 3.5.1 The law

Togo is party to an international agreement signed between seven countries of West and North Africa.<sup>134</sup> By virtue of the convention, Togo may receive and execute foreign judgments under conditions similar to those referred to in the case of Senegal.

At the domestic level, relevant rules define the state's obligation to give assistance to and not interfere with the enforcement of courts' orders in civil law practice applied in Togo. The formulation of writs of execution for enforcement of domestic judgments clearly reads that: 'the state enjoins all bailiffs or legally empowered agents to execute the present decision; the prosecutor to give assistance to enforcement; and all commanders and law enforcement officers to use force when they are legally so required'.<sup>135</sup>

### 3.5.2 International decisions

An examination of UN treaty bodies' 'jurisprudence' shows that Togo has been called on several occasions to account for non-respect of its obligations under international human

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<sup>133</sup> Interview with Maître Ndiaye.

<sup>134</sup> Non Aggression and Defense Assistance Agreement of 21 April 1987 between Benin, Côte d'Ivoire, Mali, Mauritania, Niger, Senegal and Togo.

<sup>135</sup> See Dictionnaire du droit privé de Serge Braudo 'Définition de formule exécutoire' 1996-2011.

rights instruments. In the case of *Randolph v Togo*,<sup>136</sup> the Human Rights Committee did not find any violation. However, in *Aduayom and Others v Togo*,<sup>137</sup> the Committee was of the view that the respondent state had violated the complainants' rights to be reinstated after they were unfairly dismissed for exercising their political rights. The Committee thus recommended that Togo should afford an appropriate remedy to the complainants including compensation determined on the basis of a sum equivalent to the salary which they would have received during the period of non-reinstatement. There is no indication that Togo has implemented the views of the Committee in the case.

In the case of *Kéténguéré Ackla v Togo*<sup>138</sup> before the same Committee, Togo had to respond to the arbitrary dismissal and detention without charge. In the treaty body's opinion, Togo was expected to restore the complainant's freedom of movement and residence and as well as afford him appropriate compensation. The government has complied with the recommendations of the Committee in full.<sup>139</sup>

### 3.5.3 Domestic decisions

Enforcement in Togo of domestic courts' judgments against the state seems to depend mostly on whether the particular case attracts interest from the government of the day. To start with, the possibility of entertaining individual contentious cases against the state in Togolese courts is quite small. An explanation for this state of affairs may be sought firstly in the fact that no court has a mandate to deal with individual human rights cases. With regard to 'administrative' litigation, which generally provides a forum for individuals to sue the state for breaching civil rights, public freedoms, and dysfunctions in public administration, Togo has never had operational administrative tribunals from independence in 1960 to 2010.<sup>140</sup> The Constitutional Court has a mandate to guarantee human rights and freedoms<sup>141</sup> but individuals have no access to the Court when they

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<sup>136</sup> *Ati Antoine Randolph v Togo* (2003) AHRLR 15 (HRC 2003).

<sup>137</sup> Communication No 422/1990: Togo, 1996/08/19 CCPR/C/57/D/422/1990 (Jurisprudence).

<sup>138</sup> *Kéténguéré Ackla v Togo* Communication No 505/1992: Togo, 1996/04/10 CCPR/C/56/D/505/1992 (Jurisprudence).

<sup>139</sup> Interview with Maître Zeus Ajavon, Advocate of the Appeal Court of Lome (Lome, 18 January 2012).

<sup>140</sup> See AC Aquereburu 'L'Etat Justiciable de Droit Commun dans le Traité OHADA' in no 000 *Revue de Droit Uniforme Africain* (09/08/2010) 4. A programme has been launched in 2010 to modernise Togo's judicial system and includes the operation of administrative courts.

<sup>141</sup> See Constitution of Togo 1992, art 99.



rights have been infringed. Individual ‘human rights’ infringements may proceed to the Constitutional Court only via electoral complaints, which in most cases are dismissed or not decided against the state.<sup>142</sup> International human rights organisations report that, in general, remedy for human rights violations in Togo is compromised by the lack of independence of the Judiciary vis-à-vis the Executive.<sup>143</sup>

Commercial cases brought by individuals or private companies against the state in Togo are also illustrative of state behaviour towards the outcome of domestic proceedings. For instance, the relevant rules in OHADA law provide for an absolute state immunity from enforcement.<sup>144</sup> Prior to the adoption of the OHADA Act, Togo had passed in 1990 a domestic legislation subjecting public companies and parastatals to the same rules as private companies, purportedly to make the former more competitive.<sup>145</sup> As a consequence, public companies lost the immunity from execution they enjoyed as state affiliated persons. However, in the case of *Aziablévi and Others v Togo Telecom* decided in 2005, the OHADA Court of Justice determined that Togolese Telecommunications’ Company was immune from enforcements.<sup>146</sup> OHADA judges thus reversed a domestic Appeal Court’s findings that the state company forfeited its immunity since the Legislature decided to make public companies more competitive.<sup>147</sup> As a consequence of the OHADA Court’s decision, assets of the state, its agencies and companies may not be attached even when individuals hold a court pecuniary judgment.

In the view of national legal practitioners in Togo, the position of OHADA Court is no surprise as is it consistent with state practice as regards compliance with domestic

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<sup>142</sup> For an overview of the decisions of the Constitutional Court of Togo, visit <http://www.courconstitutionnelle.tg/>.

<sup>143</sup> See in general, Organisation Mondiale Contre la Torture ‘Violations des droits de l’homme au Togo’ Rapport alternatif au Comité des Nations Unies contre la torture, 37<sup>e</sup> Session May 2006.

<sup>144</sup> See Acte Uniforme portant Organisation des Procédures Simplifiées de Recouvrement et Voies d’Exécution (10 April 1998), art 31(1).

<sup>145</sup> See Loi no 090/26 of 4 December 1990 portant réforme du cadre institutionnel et juridique des entreprises publiques, art 2.

<sup>146</sup> See *Aziablévi & Others v Togo Telecom*, Arrêt no 043/2005/CCJA of 7 July 2005.

<sup>147</sup> See *Aziablévi Yovo & Others v Société Togo Telecom*, Arrêt n°186/2003 of 26 September 2003 Appeal Court of Lome.

courts' pecuniary judgments.<sup>148</sup> In one such case the state social security company had retained about 4 billion CFA<sup>149</sup> representing contributions of several employees. In response to enforcement measures, the company refused to comply with a court order to pay on the pretext that its assets might not be attached as it was a public company.<sup>150</sup>

The interest of the state in the matter also plays an important role as criminal cases seem to illustrate well. Such interest is served by the practice of domestic courts to turn a blind eye on inconsistencies of domestic criminal law with international norms. For example, in *Kokou Innocent Assima v The State* and *da Silvera and Others v The State*, seven years pre-trial detention was declared reasonable by the Supreme Court of Togo which rejected accepted international norms and authorities cited by the counsel. This particularly case tends to show that, the inability of courts to invalidate inconsistent domestic law does not present individual litigants with opportunities to test state compliance.<sup>151</sup>

#### 4. Conclusion

The overview undertaken under this chapter was two-fold. On the one hand the chapter was intended to examine the rules and practice of reception and execution of foreign judgments on the domestic level in study countries. As was indicated in a preliminary observation, the hypothesis was not to overlook the legal reality that the ECCJ's judgments enjoy direct enforceability in ECOWAS member states. The rationale was to learn from experience and still undertake a review of national judgment enforcement rules to be prepared to understand technicalities that generally apply when states are in the factual situation of enforcing international decisions. Actually, because of the nature of the ECCJ's decisions, it also appeared relevant to review practices of enforcement of domestic courts judgments against the state.

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<sup>148</sup> See Aquereburu (n 140 above) and interview with Maître Zeus Ajavon, Advocate of the Appeal Court of Lome (Lome, 18 January 2012).

<sup>149</sup> Approximately \$9 million.

<sup>150</sup> Interview with Maître Zeus Ajavon, Advocate of the Appeal Court of Lome, representing the complaints in the case (Lome, 18 January 2012). The lawyer confirms that similar cases are common.

<sup>151</sup> Interview Maître Ajavon. The counsel cited Benin Supreme Court and ICCPR jurisprudence, which heard that pre-trial detention of more than four years is unreasonable.

The examination revealed that even though there are no harmonised rules for enforcement of foreign judgments between ECOWAS countries, some conditions are common to the laws used in the different jurisdictions. Upon assessment of those conditions, none of them applies to judgments originating from the ECCJ, which confirms their 'direct effect' expressly provided under implementation rules laid down in the 2005 ECCJ Protocol and the subsequent 2012 Supplementary Act.

In so far as enforcement of domestic courts' decisions against the state is concerned, there is no legal hindrance to the execution of court orders against the Government or any other organ of the state. In practice, however, it appears that the extent to which such judgments receive enforcement depends on how friendly the Government of the day is to the rule of law and how much interest the case considered attracts on the part of the state. The effectiveness of public administration and political issues involved in the judgment also significantly affect an effective enforcement process. It is therefore no surprise that factors vary from one state to another, even if the political motivation and dispensation seem to be a common factor.

On the other hand, an overview of study countries' behavioural experiences towards international bodies' decisions has not revealed much of a significant trend towards voluntary compliance. Although to different extents, all study countries have been involved in international litigation. Countries like Niger and Senegal may be said to have had less litigation experience and hold good compliance records while The Gambia, Nigeria and Togo have shown far less or no eagerness to abide systematically or voluntarily by the decisions made in cases to which they were parties. In most of the same cases, the states concerned agreed in advance to resort to the ICJ and to accept the outcome of the case, whatever it was. It comes as no surprise, that compliance was equally reached following long political negotiations which usually ended in a common interest agreement or sharing of any resources involved.

With regard to compliance-securing mechanisms, it is obvious that states cannot use force against themselves to execute orders made by their domestic courts. It follows that such orders would be obeyed only where the state involved is willing to comply with

them or where domestic checks and balances give no alternative to the Government than obedience.

Findings of this chapter seem to confirm Guzman's argument that 'whatever the impact of international courts on state compliance, it is the product of the payoffs generated by the decision itself rather than by associated enforcement mechanisms'.<sup>152</sup> Cases examined are evidence that state compliance is not a final, static and irreversible behaviour. This conclusion applies to both domestic and international decisions. A more comprehensive discussion of similar arguments in previous chapters of this study has highlighted the need to confront mere theoretical assumptions with more empirical investigations on whether and why states comply with ECCJ judgments.

Chapter five and chapter six are devoted to doing so and consequently answering the question whether an empirical study reveals otherwise than the findings of the current chapter, namely as far as the ECOWAS regime is concerned. As a preliminary to an analysis of compliance factors, the next chapter first introduces the categorisation of compliance and compliance narrative for each case studied.

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<sup>152</sup> See AT Guzman *How international law works: A rational choice theory* Oxford (2008) 51.

## Chapter IV: Categorisation of compliance and compliance narrative of study cases

### 1. Introduction

As a preliminary to the case analysis of compliance factors dealt with in chapter five and chapter six of this study, the present chapter proposes a categorisation of compliance and its application to the cases discussed. In the next section, it is first briefly recalled what compliance means and involves. Empirical approaches are then used to categorise compliance. The following section pursues to survey implementation of specific orders made by the ECCJ in the operative part of its pronouncements relating to violations of human rights of the African Charter. On a case-by-case basis, a brief introduction to the facts of the case is followed by a compliance story or narrative.

Categorisation is mainly borrowed from a study by Viljoen and Louw on state compliance with the African Commission's recommendations, also referred to later as 'the reference study'.<sup>1</sup> The reference study also mainly informs compliance factors used in chapter five and chapter six of the present study. Reasons for such a choice are multiple. Firstly, all member states of ECOWAS are members of the African Union, parties to the African Charter and subject to the jurisdiction of the African Commission, the international body that mainly supervised state compliance with the African Charter for 22 years from 1987 until the African Court decided its first case in 2009. Secondly, the human rights jurisdiction of the ECOWAS Court is based on the African Charter. Finally, the non-binding nature of the African Commission's findings offers an extra advantage of testing whether the immediately binding and directly enforceable orders of ECCJ make a difference.

### 2. Categorisation of compliance

Before laying down reasons for classifying state compliance under specific categories, it is important to recall what should be termed as compliance generally and in the framework of this study.

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<sup>1</sup> The authors themselves borrow both categorisation of compliance and compliance-related factors from various studies. See F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *The American Journal of International Law* 1-34.

## 2.1 Conceptual understanding of compliance

Compliance may be defined as the attitude whereby one obeys the order of entities in authority.<sup>2</sup> In the context of this study, compliance relates to instances where states obey orders made by the ECCJ, as the body legally endowed with authority to make binding decisions and in a particular case to which they are parties.<sup>3</sup> More specifically, the 2005 Supplementary ECCJ Protocol provides that states have an individual duty to receive the ECOWAS Court judgments in their municipal order and give effect to them according to domestic rules of procedure.<sup>4</sup>

States have a duty to designate a national authority to receive and execute ECCJ judgments.<sup>5</sup> It is important to stress that the duty to enforce the ECCJ's decisions in accordance with domestic rules entails no further measure but for the competent national authority to verify that the writ of execution is one from the Community Court's Registry.<sup>6</sup> The duty to comply is supported by a detailed implementation procedure and enforcement rules. All ECOWAS member states and institutions must immediately take all necessary measures to give effects to the ECCJ's judgments.<sup>7</sup> According to general international law practice, this last provision obligates even states that are not party to the dispute to register any judgment and have it enforced domestically.<sup>8</sup>

Finally, the ECOWAS Treaty provides that 'where a Member State fails to fulfil its obligations to the Community, the Authority may decide to impose sanctions on that

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<sup>2</sup> Oxford Advanced Learner's Dictionary (2007). On compliance-related concepts and determining factors see A Chayes & AH Chayes *The new sovereignty: compliance with international regulatory agreements* (1995) 15, 32; HH Koh 'How Is International Human Rights Law Enforced?' (1999) 74 *Indiana Law Journal* 1400; HH Koh 'Why Do Nations Obey International Law?' (1997) 106 *The Yale Law Journal* 2611; and BA Simmons 'Compliance with international agreement' (1998) 1 *Annual Review of Political Science* 89.

<sup>3</sup> See ECOWAS Revised Treaty, art 15; 1991 ECOWAS Court Protocol, art 25(5); and 2005 ECOWAS Supplementary Court Protocol, arts 24 and 33(3).

<sup>4</sup> 2005 ECOWAS Supplementary Court Protocol, art 24.

<sup>5</sup> See 2005 ECOWAS Supplementary Court Protocol, art 24(3).

<sup>6</sup> The verification procedure provided under sub-regional regimes in Francophone Africa is different from the 'traditional' *exequatur* process required to bring foreign judgments 'home' through an *exequatur* judgment.

<sup>7</sup> See 2005 ECOWAS Supplementary Court Protocol, art 33(3).

<sup>8</sup> See L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal – final report' World Trade Institute Advisors (Report on file with author) (6 March 2011) 52-54.



member state'.<sup>9</sup> Although none of the Treaty or Court Protocols provide for an established follow-up mechanism, various provisions allow for implied monitoring mechanisms. With the entry into force of the 2012 Supplementary Act, states' non-compliance with ECCJ's decisions constitutes a violation of the ECOWAS Treaty article 77 obligation. The Act further provides the procedure to secure compliance and a detailed list of sanctions in case the defendant state persists in non-compliance.

That said, compliance is not only an occurrence, it is also a process and only the circumstances of the case may help determine whether liable states intend to comply but are faced with impossibility or real difficulties in doing so.<sup>10</sup> Of course, express rejection of the outcome would be a clear indication that the state is not ready to comply, at least not without conditions.

While the following categorisation is mainly inspired by Viljoen and Louw's study referred to in the introduction to this chapter, the reference study is put in the legal and institutional context of ECOWAS to meet the needs of the present study. To provide the reader with a quick observation of the compliance analysis and data, the study made use of tables which are appended at the end of the document for the sake of presentation. However, the information therein is incorporated in the text as the analysis and discussion unfold.

## 2.2 Categories of compliance

The reference study determines five broad categories of compliance: full compliance, non-compliance, partial compliance, situational compliance and unclear cases. For the purpose of the present study the categories of partial and 'unclear cases' are not used because none of the cases falls under the first of these and sufficient information was obtained for all the cases discussed. However, a definition is provided for partial compliance given that the concept is used to discuss compliance in other international regimes. Conversely, a category of 'in-progress' is added because, in several instances, it

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<sup>9</sup> See 1993 ECOWAS Revised Treaty, art 77(1). The same article provides for gradual imposition of sanctions ranging from mere naming and shaming, to withdrawal of voting rights, to economic quarantine and finally to suspension.

<sup>10</sup> See C Schulte *Compliance with decisions of the International Court of Justice* (2004) 29-30.

would be too categorical to term states' behaviour as 'clear' or 'express' non-compliance without providing reasons for such status. In the tables appearing at the end of the text, one more column is added for 'application for review' which was relevant to explaining why compliance had yet to occur.

It is important to note that both 'in-progress' and 'application for review' categories appear independently only in the tables but not in the compliance narrative below. Under the compliance narrative these two categories are discussed within the text as they come under the overall category of non-compliance. Besides, 'application for review' cases could have as well been termed as 'in-progress' at the time of the review. However, at the time of writing, review cases had all been completed and final judgments had been delivered by the Court.

As a consequence, the reason for an independent categorisation of review instances in the tables is to highlight states' increasing use of review and the response of the Court. The ECCJ's Protocol allows parties to a case to apply for review of its decisions under the main condition that a new fact has been discovered which was unknown to the Court and the complainant at the time of the judgment and has a decisive influence on the decision. The Court may, however, order a provisional implementation of its decisions before it declares an application for review admissible.

### 2.2.1 Full compliance

Borrowing from the reference study, this category refers to the situation in which a state party 'has implemented all the orders in the operative part of the decision or has unequivocally expressed the political will to comply with their substance and has already taken significant steps in this process'.<sup>11</sup> The authors acknowledge the difficulty of assessing states' political will and thus leave the category open to revision. At least, in the presence of evidence that the state has implemented all the orders one may conclude that full compliance has been achieved.

With regard to measuring express political will to comply, the functions of heads of state in constitutional and international law prejudice the decisive weight their words may

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<sup>11</sup> Viljoen & Louw (n 1 above) 5.

carry. In almost all constitutions in the world, heads of state or government appoint in highest political positions nationally and are empowered to commit their countries internationally. As part of the functioning of states, heads of state delegate part of the representation functions and pass on privileges to diplomats and some members of their government, mostly foreign affairs ministers.<sup>12</sup> These senior officials may thus commit their states by delegation or as instructed by their head of state or government.

In the context of ECOWAS, the presumption that such practice is established has certainly led the ECCJ, the ECOWAS Commission and civil society organisations to call upon heads of state to expressly welcome ECCJ judgments and pledge to implement orders made therein.<sup>13</sup> Arguably due to their role in practical aspects of implementation, ministries of justice and foreign affairs and state treasury agents have become increasingly involved in state representation, especially for international human rights litigation.<sup>14</sup> Particularly for countries where the two functions are merged, such as in The Gambia and Nigeria, attorneys-general and ministers of justice become key players in interacting with regional courts.

Of the three ECOWAS countries that have, as at November 2013, designated the national authority to receive and execute ECCJ judgments, Nigeria has designated the Attorney-General and Minister of Justice of the Federation and Niger has designated the *Directeur du Contentieux d'Etat*, a directorate within the ministry of justice.<sup>15</sup> In any case, as compliance narrative shows, prior to and after such designations, the ECCJ's practice to serve a copy of the judgment and writ of execution on the state through Foreign Affairs or Justice Ministers has constantly been condoned by all study countries. As a consequence, there would be a little doubt about the validity of an express statement by

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<sup>12</sup> See for instance, United Nations, Vienna Convention on Diplomatic Relations, 1961, arts 29 and 31; and United Nations, Convention on the Privileges and Immunities of the United Nations, 1946, art 4, Sec 11.

<sup>13</sup> AllAfrica 'President Gbeho urges speedy compliance with decisions of ECOWAS' (5 July 2011) <http://allafrica.com/stories/201107051050.html> (accessed 15 September 2011).

<sup>14</sup> For instance, state representation in human rights cases before the African Commission, and the ECOWAS Court of Justice, except in the *Manneh* case where The Gambia decided not to participate, has been assured by highest officials including from secretariats of government, diplomatic representations or ministries of foreign affairs and finance.

<sup>15</sup> Directorate of State Litigation. Accurate information could not be obtained on Guinea, which is the third country to have designated its national authority.

any of such officials in relation to state compliance.<sup>16</sup> The same will certainly apply for any other compliance situations.

### **2.2.2 Non-compliance**

Under this category fall all those cases in which the state did not implement any of the orders made by the Court. Express rejection of the judgment on legal or factual grounds and an official statement not to comply would come under the same category. While mentioning that ‘challenging the decision on legal or factual grounds’ will be termed as non-compliance, the authors of the reference study did not expressly discuss the right of states to apply for review of judgments.

In any case, the Court may request prior compliance before it admits proceedings in revision.<sup>17</sup> In other words, application for review would not be suspensive of the defendant state’s obligation to comply. It follows that an on-going review process does not change the compliance status of the concerned judgment. Besides review, situations in which, in good faith or otherwise, the liable state argues of the lack of clarity of the order and consequently calls upon the court for elaboration must also be taken into account. In such instances, one would consider relying on the behaviour of the state involved and its officials as well as on criteria laid down to determine compliance. Consider a situation where the state publicly accepts the judgment, declares its intention to implement it but reverts to the Court because the orders made are vague. According to the definition of compliance adopted in the present study, it would be too imperative to term this hypothetical case as non-compliance, without providing further explanation.

### **2.2.3 Partial compliance**

Although none of the cases discussed in this study fall within this category, a definition is provided to allow a proper understanding of discussion on compliance in other international regimes. In cases of partial compliance, there must be evidence that the state has implemented some, or at least one, but not all orders. This category also covers

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<sup>16</sup> For instance, pledges by Human Rights Minister of Niger that the country will comply have been followed with effect in the *Koraou Slavery* case.

<sup>17</sup> This is the case of the ECOWAS Court, see 1991 ECOWAS Court Protocol, art 25(3).

circumstances where the state did not give full effect to the order, for instance when implementation is still on-going.

#### **2.2.4 Situational compliance**

In some instances, a change of government explains or is of overriding importance in justifying state compliance. This is when implementation is the result of, for example' dramatic moves from an autocratic to a democratic government or vice-versa. In such cases, non-compliance is clearly justified by predominantly political motives or calculations leading even to ignoring decisions of domestic courts concurring with outcomes of international adjudication. Following military *coups*, civil war or post electoral crisis many African countries have resorted to political transitions between 1990 and 2012.

Since the ECCJ delivered its first human rights judgment in 2005, only one of the four study countries, Niger, has experienced any of these situations, namely a military *coup* in which former President Mamadou Tandja was overthrown on 18 February 2010. Niger's compliance with ECCJ judgment in the *Tandja* case is discussed under the compliance narrative in this chapter, and further under the section dealing with factors relating to the duty imposed on the state in chapter five, and the domestic environment in chapter six. However, in the context of this study, 'situational compliance' eventually falls within full compliance as it is relevant only in discussing reasons for compliance. As data displayed in table A show, full or situational compliance both account for compliance.

#### **2.2.5 In-progress and application for review**

In such circumstances, the respondent state has not rejected the judgment and has remained in constant dialogue with the Court or complainants. Also falling in this category are instances where the state has applied for review of the judgment or when the judgment is too recent to have allowed the state to implement. The category also includes cases in which a new government has come in, has taken steps and informally pledged to implement.

As explained earlier in this section, these two categories fall under the non-compliance instances discussed in the narrative below. They appear as stand-alone categories only in

the end of text tables for the purpose of lisibility and presentation. The main categories appearing in the headings of the following narrative are therefore full compliance, non-compliance, and situational compliance.

### **3. Compliance narrative of study cases**

#### **3.1 Hon. Dr. Jerry Ugokwe v Nigeria<sup>18</sup>**

##### **3.1.1 Facts of the case**

In April 2003 the applicant, Dr Jerry Ugokwe, was declared elected a Member of the House of Representatives by the Independent National Electoral Commission of Nigeria. Dr Christian Okeke contested this declaration before the Electoral Tribunal, which, on 30 November 2004, annulled Dr Ugokwe’s election. The Appeal Court, by a judgment of 5 May 2005, dismissed Dr. Ugokwe’s appeal and confirmed the Electoral Tribunal’s decision.

On 9 May 2005, Dr. Ugokwe thus brought the case before the ECCJ, arguing that his right to a fair hearing had been infringed upon by the National Electoral Commission and the tribunal. By a second application lodged on the same date, the applicant asked for a special interim order. The order sought to restrain the Independent National Electoral Commission from invalidating his election or validating the election of another person pending the determination of the case by the ECCJ. The Community Court granted the special interim order.

##### **3.1.2 Compliance narrative and status – Full compliance**

In implementation of the ECOWAS Court’s interim order, the Attorney-General of Nigeria addressed a letter to the Speaker of the House of Representatives with an express indication not to swear the beneficiary of the Appeal Court decision in until the ECCJ had decided the case on the merits.<sup>19</sup> No one was sworn in until the ECCJ decided that it

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<sup>18</sup> ECW/CCJ/JUD/03/05, 7 October 2005.

<sup>19</sup> See *Ugokwe v Nigeria*, para 10.



lacked jurisdiction to hear the matter on the merits.<sup>20</sup> Going by the benchmarks adopted by this study, the defendant state fully complied with the judgment.

### **3.2 Chief Ebrimah Manneh v The Gambia<sup>21</sup>**

#### **3.2.1 Facts of the case**

The plaintiff, a national of The Gambia and a journalist with the *Daily Observer* newspaper, was arrested on 11 July 2006 and taken into custody by two men alleged to be officials of the National Intelligence Agency of The Gambia, without a warrant of arrest. The reason for his arrest was not disclosed by the government, and Mr. Manneh was never charged with any offence. He was detained, tortured and kept under inhuman living conditions. He was not allowed access to medical care and all efforts to contact him by relatives and friends proved fruitless. Witnesses testified before the ECCJ that they had last seen the plaintiff in December 2006 in a police station. Counsel for the plaintiff wrote a letter to the government of The Gambia in 2007 demanding for his release but was ignored.

In the case before the ECCJ, The Gambia failed to lodge a defence despite the fact that the state was duly served processes of the Court which adjourned hearings on several occasions to afford necessary time for defence. The Court proceeded to hear the case and, in a judgment dated 5 June 2008, found The Gambia in violation of the rights to personal liberty and security and fair trial rights, ordered The Gambia to release the complainant, restore his right to free movement and pay him \$100,000 damages.

#### **3.2.2 Compliance narrative and status – Non-compliance**

In accordance with the Court Protocol and Rules of procedure, the ECCJ's Registrar transmitted a copy of the judgment and a writ of execution to The Gambia's Attorney-General on 14 August 2009.<sup>22</sup> On 15 October 2009, the Attorney-General responded to the

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<sup>20</sup> See *Ugokwe v Nigeria*, para 10 and interview with leading human rights activist and Senior Advocate of Nigeria, Femi Falana (Abuja, 10 May 2011). See also Biafra Nigeria World News & Archives 'ECOWAS Court stops swearing in of Anambra Rep - Olujinmi backs ruling' [http://news.biafranigeriaworld.com/archive/guardian/2005/06/03/ecowas\\_court\\_stops\\_swearing\\_in\\_of\\_anambra\\_rep\\_olujinmi\\_backs\\_ruling.php](http://news.biafranigeriaworld.com/archive/guardian/2005/06/03/ecowas_court_stops_swearing_in_of_anambra_rep_olujinmi_backs_ruling.php) (accessed 16 September 2011).

<sup>21</sup> ECW/CCJ/JUD/03/08, 5 June 2008.

<sup>22</sup> See ECOWAS Community Court Registry, Letter Ref. ECW/CR/01/01/F1, 14 August 2009. It took one year for the judgment to be served on The Gambia. Such delay is probably due to the fact that the

ECCJ that the state ‘has taken steps to execute the orders’ but could not comply because whereabouts of the complainant were unknown as the latter ‘is not in the custody of the state’ nor was he in any prison in the Gambia.<sup>23</sup>

In June 2010, Media Foundation for West Africa (MFWA), the NGO that led the case on behalf of the plaintiff, filed a new suit seeking a declaration that the disappearance of Mr. Manneh is a violation of the right to life and an order directing the defendant state to pay US\$10 million to the family of the plaintiff.<sup>24</sup> In response, The Gambia argued that such application was premature in terms of The Gambia’s Evidence Act<sup>25</sup> which provides that a person might be presumed to be dead only if he had not been heard of for seven years. Set to be heard on 26 September 2011,<sup>26</sup> the case was adjourned.<sup>27</sup> The ECCJ eventually agreed with The Gambia and determined that the case was premature and that the MFWA could not ask for compensation on behalf of Manneh’s family.<sup>28</sup>

However, as at November 2013, which is five years after the judgment, the defendant state had yet to comply with the order to pay \$100 000 in the main judgment. On the other hand, it is still to be seen whether Manneh’s relatives will reactivate the disappearance suit when the seven-year rule applies which will be in 2015. Under the criteria set out by the present study, this case falls within non-compliance.

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Government of The Gambia refused to enter an appearance and has engaged in quashing the human rights jurisdiction of the Court.

<sup>23</sup> See Ministry of justice of The Gambia, Letter ref. LD440/491/PART1/(13), 15 October 2009. Meanwhile, there have been allegations that the complainant had been located in the US. See interview with the Attorney General of The Gambia (Dakar, 13 October 2011).

<sup>24</sup> See Media Foundation for West Africa, Submission of June 2010 and *Media Foundation for West Africa (on behalf of Manneh’s family) v The Gambia*, Application ECW/CCJ/APP/15/10, 23 December 2010.

<sup>25</sup> Art 150(1).

<sup>26</sup> See electronic consultation with Media Foundation for West Africa, 12 September 2011.

<sup>27</sup> Media Foundation for West Africa Alert ‘ECOWAS Court adjourns hearing on Gambian Government request for review of two landmark judgements’, 28 September 2011.

<sup>28</sup> See ECOWAS Court of Justice, judgment of 6 February 2012.

### 3.3 Hadijatou Mani Koraou v Niger<sup>29</sup>

#### 3.3.1 Facts of the case

This case is arguably one of the most complex brought before the ECCJ but also one that led to a landmark judgment.<sup>30</sup> In 1996, Koraou, aged 12, was sold to Naroua, aged 46, for the sum of CFA 240 000 (\$500). For about nine years, Koraou served in the home of Naroua both as a slave, carrying out all sorts of domestic tasks, and as Naroua's forced concubine. Freed on 18 August 2005 she decided to leave the home of her former master who refused on the grounds that she was and remained his wife.

On 14 February 2006, Koraou instituted a case before the Customary Court of Konni claiming her rights to total freedom.<sup>31</sup> The Court decided that there had never been a valid marriage and concluded that Koraou remained free to live her life with the person of her choice. Naroua appealed the decision before the *Tribunal de Grande Instance* of Konni, which reversed the decision. Koraou appealed against this decision to the Supreme Court of Niger. Squashing the decision of the *Tribunal de Grande Instance*, the Supreme Court referred the matter to the Konni Court with a different bench.

Meanwhile, Koraou had married Ladan Rabo. Following a complaint by Naroua, the Criminal Court of Konni sentenced Koraou, her brother and her new husband to six months' imprisonment and a fine of CFA 50 000 (\$100) each for bigamy. Koraou appealed the criminal court decision before the Court of Appeal of Niamey while her counsel filed a complaint for the crime of slavery against Naroua with the Prosecutor in Konni. The Court of Appeal of Niamey ordered that Naroua and her relatives be released. In a parallel process, Naroua appealed to the Court of Cassation against the Tribunal of Instance of Konni's decision which allowed the divorce of Koraou.

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<sup>29</sup> ECW/CCJ/JUD/06/08, 27 October 2008.

<sup>30</sup> See H Duffy 'Implementation of an ECOWAS Court judgment: Hadijatou Mani Koraou v The Republic of Niger' (2010) 6 *Interights Bulletin* 66. See also Le Monde 'Le juge africain est entré dans l'histoire' <http://combatsdroitshomme.blog.lemonde.fr/2009/05/10/le-juge-africain-est-entre-dans-lhistoire-cour-de-justice-de-la-cedeao-par-delphine-dallivy-kelly/> (accessed 2 March 2011).

<sup>31</sup> Situated 420 kilometres South East of Niamey, the capital city of Niger, Konni is the town where Koraou lived with her master.

On 14 September 2007, Koraou brought a claim against Niger to the ECCJ for discrimination, slavery and unlawful detention. On 27 October 2008, the ECOWAS Court found in her favour and against Niger for failing to protect Koraou from slavery by a third party and ordered Niger to pay damages in the amount of CFA 10 000 000 (\$20 000).

### 3.3.2 Compliance narrative and status – Full compliance

Government sources assure that Niger complied with the order without any external request. A few days following ECCJ's verdict, Niger's Minister for Communication is reported to have said that 'there is no reason why the state should not comply'. He further indicated that 'the Government's agreement for the hearings to take place in the country and acceptance of the verdict are additional demonstration of the maturity of democracy and the rule of law in Niger'.<sup>32</sup> According to the interviewee, who was Director of State Litigation, no contacts occurred between the ECCJ Registry and Nigerien authorities.<sup>33</sup>

Counsel for Koraou notified the ECCJ judgment to the Secretary General of Government who transmitted it to the Director of the *Contentieux d'Etat*, the state agent.<sup>34</sup> The Director sent a *Lettre de mandatement*, a letter of state liability, to the Finance Minister requesting that the National Treasury pay within 3 weeks.<sup>35</sup> After the Finance Minister issued an order to pay on 17 March 2009, Koraou's counsel cashed a cheque on the same

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<sup>32</sup> Inter Press Service 'Droits-Niger, Hadijatou Koraou enfin libre comme son maître' (3 November 2008) <http://www.ips.org/fr/droits-niger-hadijatou-koraou-enfin-libre-comme-son-maitre/> (accessed 2 March 2011). The original texte of the article reads: "Il n'y a aucune raison que l'Etat refuse d'exécuter la décision de la Cour de justice de la CEDEAO qui est, du reste, sans appel", a indiqué Ben Omar, qui est également ministre nigérien de la Communication, dès le lendemain de l'annonce du verdict. "A travers la tenue de ce procès au Niger et l'acceptation du verdict, nous donnons une preuve supplémentaire de la maturité de la démocratie et de l'Etat de droit au Niger", a-t-il ajouté.

<sup>33</sup> Interview with Mr. Abdou Hamani, Magistrate, Director of the *Contentieux d'Etat* between 2007-2010 (Niamey, 16 May 2011). The *Direction du Contentieux d'Etat* is the Department within the Secretariat of the Government in charge of representing and advising the state in national and international proceedings. It also advises public administration on the same issues.

<sup>34</sup> Interview with Advocate Abdourahaman Chaibou, Counsel for Hadijatou (Niamey, 18 May 2011). Notification of judgment was done in early December 2008.

<sup>35</sup> The request was filed on 12 December 2008, see interview Advocate Chaibou.

date.<sup>36</sup> Counsel wrote a cheque to Koraou on 21 March 2009. Going by the criteria of this study, the case is termed as full compliance.

### **3.4 Djotbayi Talbia and 9 Others v Nigeria<sup>37</sup>**

#### **3.4.1 Facts of the case**

On 17 July 2003, a foreign vessel was rendering assistance to another vessel in distress at 16 nautical miles off the coast of Nigeria when it was seized by a Nigerian Navy ship on the allegation that the foreign vessel was taking Nigerian crude oil on board. A dispute ensued between the two parties on the nature of the substance in the cargo of the foreign vessel. The staff on board (the applicants) were arrested and detained throughout the investigation during which time the substance was analysed. The investigation revealed that the cargo was actually fuel oil and not crude oil.

Despite the documents produced and the result of the analysis of the substance in the vessel, the applicants were detained and paraded before the national and world press as thieves of Nigerian crude oil. As a consequence, they were taken to the Federal High Court of Nigeria on 27 July 2004. The judgment of the High Court observed that the arrest of the applicants took place 16 nautical miles off the territorial waters of Nigeria and that the Court lacked jurisdiction. The High Court consequently ordered that the applicants be released but Nigerian authorities initially failed to implement the order, which they eventually carried out when the case was already pending before the ECCJ.

On 30 November 2006, the applicants brought individual cases to the ECCJ to claim reparation for the prejudice suffered in violation of their human rights due to their arrest and detention and for the infringement of their dignity by parading them as thieves. In a judgment issued on 28 January 2009, the Community Court found a violation of the right not to be detained illegally and awarded \$42 750 damages to each of the 10 applicants.

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<sup>36</sup> Payment occurred towards the end of the financial year while implementation of state budget was almost completed, see interview Advocate Chaibou.

<sup>37</sup> ECW/CCJ/JUD/01/09, 28 January 2009.

### 3.4.2 Compliance narrative and status – Non-compliance

The ECCJ transmitted a request to Nigeria’s Minister of Foreign Affairs for the judgment to be enforced.<sup>38</sup> Meanwhile, Nigeria applied for review of the judgment on the ground that new facts had been discovered but the Court rejected the application.<sup>39</sup> Nigeria, which had not done so at the time, subsequently designated the Attorney-General of the Federation as the competent national authority to receive and execute ECCJ judgments.<sup>40</sup> Although it did not refuse to comply, Nigeria had yet to do so as at November 2013.

Individual human rights advocates and organisations wrote to the President and Attorney-General of Nigeria to request compliance and report the state’s willingness to comply.<sup>41</sup> To have the judgment implemented, SERAP executives have seemingly decided to initiate a new suit in Nigerian courts, seeking to obtain a domestic version of the ECOWAS Court judgment by the Supreme Court of Nigeria.<sup>42</sup> According to the benchmarks adopted by this study, Nigeria has not complied with the judgment.

## 3.5 Mr Mamadou Tandja v Niger<sup>43</sup>

### 3.5.1 Facts of the case

On 4 August 2009, after he had ruled Niger for the two five-year terms allowed by the Constitution, the country’s then President, Mr Mamadou Tandja, initiated a referendum aimed at amending the Constitution, in order to allow him to run for a third term.<sup>44</sup> The

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<sup>38</sup> According to the Court, all previous requests relating to decisions of the Court, which had become final were equally transmitted to Nigeria’s Ministry of Foreign Affairs.

<sup>39</sup> See ECOWAS Court ‘List of applications for review of judgments’ as of June 2010.

<sup>40</sup> See ECOWAS Court of Justice ‘The Republic of Nigeria designates the competent national authority responsible for implementing decisions of the Court’ [http://www.courtecowas.org/site/index.php?option=com\\_content&view=article&id=105%3Arepublicnigeria&lang=en](http://www.courtecowas.org/site/index.php?option=com_content&view=article&id=105%3Arepublicnigeria&lang=en) (accessed 11 September 2011).

<sup>41</sup> See Interview Advocate Falana. Following his engagement with the Attorney General and President of Federation, Advocate Falana asserts that authorities have expressed Nigeria’s willingness to comply.

<sup>42</sup> See Interview with Mr. Adetokumbo Mumuni, Executive Director of SERAP (Dakar, 11 October 2011). SERAP is a leading NGO in Nigeria and a prominent litigant in the ECOWAS Court.

<sup>43</sup> ECW/CCJ/JUD/05/10, 8 November 2010.

<sup>44</sup> Faced with the refusal of the Constitutional Court and the Parliament to endorse such amendment, President Tandja dissolved both institutions. He proceeded to organise the referendum and obtain a three-year extension of his second five-year term until the new presidential election took place in which he could run again.



President's move was condemned by a wide section of political organisations in Niger but also fiercely denounced by ECOWAS and international actors.<sup>45</sup>

While talks were still on-going under the auspices of ECOWAS to reach an agreement between Nigerien stakeholders, the army intervened on 18 February 2010 overthrowing President Tandja, who was placed under house arrest. His freedom of movement was restrained as well as his contact with the outside world especially members of his close family. He was thus still detained when he instituted a case before the ECCJ on 14 July 2010 praying the Court to declare his arrest and detention in violation of his human rights under the African Charter. It is noteworthy that the President was initially given no reason for his arrest and detention.

Finding that Niger and the military junta failed to prove the legal basis for the arrest and detention of Mr Tandja, the ECCJ, in a judgment dated 8 November 2010, ordered the immediate release of former President Tandja.

### 3.5.2 Compliance narrative and status – Situational/Full compliance

The military refused to release former President Tandja and in fact, arguably circumvented ECCJ's order by requesting the *Cour d'Etat*<sup>46</sup> to waive his immunity so that he could be charged and tried with embezzlement of public funds.<sup>47</sup> The President was eventually released on 10 May 2011 by the new civilian government in implementation of an order by the Appeal Court of Niamey which annulled previous proceedings instituted against him.<sup>48</sup> Going by the standards of this study, such release is termed as a 'situational' compliance as it was not carried out in execution of the ECCJ's judgment but due to a dramatic change in the government of the country.

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<sup>45</sup> President Tandja's insistence even led ECOWAS to expel Niger while the European Union froze its budgetary and development aid to the country.

<sup>46</sup> The highest court under the military regime.

<sup>47</sup> Former President Tandja's immunity was actually waived by the *Cour d'Etat* in its Arrêt no 10-01 CE of 14 December 2010.

<sup>48</sup> See *Prosecutor v Tandja Mamadou*, Arrêt no 111, Indictment Division, Appeal Court of Niamey, 3 May 2011.

### 3.6 Mr Hissein Habré v Senegal<sup>49</sup>

#### 3.6.1 Facts of the case

Although the *Habré* case is now well known as one of the longest judicial saga of the first decade of the 21<sup>st</sup> century, a reminder of the facts of the case is necessary to understand the proceedings before the ECCJ.

Mr Hissein Habré was President of the Republic of Chad from 1982 until 1990 when he was overthrown in a military coup led by Mr Idriss Deby Itno, who was still in power as at April 2013. After his overthrow Mr Habré was offered political asylum by the government of Senegal he left for that country. Former President Habré's judicial saga begun on 3 February 2000 when a Senegalese lower court judge indicted him for 'crimes against humanity and torture'.<sup>50</sup> On 4 July 2000, the Appeal Court of Dakar annulled the indictment and on-going proceedings against Mr Habré on the grounds that the Senegalese judicial system lacked the legal framework to try him. The Court of Cassation of Senegal confirmed the appeal decision on 20 March 2001, stressing that Senegal must undertake legislative reforms before it could give effect to relevant international instruments and try Mr Habré.<sup>51</sup>

Acting on parallel proceedings initiated by victims in October 2000, a Belgian judge had on 20 September 2005 issued an arrest warrant against former President Habré. On 25 November 2005, the Appeal Court of Dakar decided it was incompetent to grant an order for extradition as requested by Belgium.<sup>52</sup>

It is in such circumstances that Senegal decided to refer the case to the African Union which, on 2 July 2006, granted a mandate to Senegal to try former President Habré 'on behalf of Africa by a competent tribunal with the guarantee of a fair process'.<sup>53</sup> Senegal

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<sup>49</sup> ECW/CCJ/JUD/06/10, 18 November 2010.

<sup>50</sup> Decision 7/48, Tribunal Régional Hors Classe of Dakar, 3 February 2000 (Indictment and Placing under House Arrest of Mr. H. Habré by the Senior Investigating Judge).

<sup>51</sup> See *Guengueng & Others v Habré* (2002) AHRLR 183 (SeCC 2001).

<sup>52</sup> Belgium subsequently referred Senegal's refusal to grant extradition to the International Court of Justice. See Questions relating to the obligation to prosecute or extradite (*Belgium v Senegal*) Application 19 February 2009.

<sup>53</sup> See African Union, Decision on the Hissène Habré case and the African Union, Doc.Assembley/AU/Dec.111(VII), 1-2 July 2006, art. 5(ii).

thus embarked on legislative and constitutional reforms so as to empower itself with a legal and institutional framework conducive for the trial of Mr Habré.

However, on 1 October 2008, former President Habré lodged an application to the Registry of the ECCJ complaining that arrangements thus undertaken by Senegal had the potential to infringe the principle of non-retroactivity and thus violate his human rights to a fair trial. On 18 November 2010, the ECCJ decided in his favour and declared there was evidence of potential human rights violations. The Court consequently ‘declared’ that Senegal must respect the *res judicata*<sup>54</sup> of its domestic courts, ‘ordered’ the state to respect the principle of non-retroactivity and ‘declared’ that the AU’s mandate is instead for Senegal to have Mr Habré tried by an ad hoc international tribunal.

### 3.6.2 Compliance narrative and status – Situational/Full compliance

The present study suggests that three orders stem from the operative part of the *Habré* judgment although the word ‘order’ is not used in all the instances. The use of the word ‘must’ in the declaration that Senegal ‘must’ respect its courts’ decisions clearly makes the declaration an order. There is no doubt that the requirement to respect the principle of non-retroactivity is an order. Conversely, the declaration interpreting the African Union (AU)’s mandate to Senegal includes no imperative word or verb suggesting an order, e.g., ‘order’, ‘must’, or even ‘should’. However, being a declaration in the operative part of a binding judgment, one may interpret the declaration as a ‘binding prescription’. This assumption may mainly be supported by the nature of the case and the idea that the ECCJ felt the moral obligation not to undermine efforts for the trial of Habré, which had already been delayed for years. All three declarations will therefore be considered as orders for the purpose of subsequent analysis.

The fact that Senegal stopped domestic arrangements and referred the matter again to the AU Assembly of Head of States and Government (AHSG) constitutes compliance in respect of the first two orders to put Habré’s Senegalese trial to a halt. As far as the third order is concerned, Senegal’s referral to the AU led many to believe the defendant state intended to comply. Seized by Senegal, the AU AHSG decided at its 16<sup>th</sup> Ordinary Session

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<sup>54</sup> The French term of ‘autorité de la chose jugée’ used in the ECCJ’s judgment may be translated as ‘final decision’.

that ‘the [AU] Commission undertakes consultations with the Government of Senegal in order to finalise the modalities for the expeditious trial of Hissein Habré through a special tribunal with an international character consistent with the ECOWAS Court of Justice Decision’.<sup>55</sup> During its 17<sup>th</sup> Ordinary Session, the AU AHSG reiterated its ‘revised mandate’ to Senegal<sup>56</sup> and called upon other AU member states willing to try Habré to notify such willingness to the AU Commission.<sup>57</sup>

However, the domestic process of the case revealed very little if no political will to comply with the ECCJ’s order by internationalising the municipal trial machinery already in place.<sup>58</sup> This argument is valid for at least as far as Senegal is concerned under the government of former President Abdoulaye Wade. President Wade’s government had taken steps back and forth for a decade from Habré’s indictment in 2000 to several dismissals of extradition requests in 2005 and 2012. In 2011, the panel of jurists appointed by the AU to assist Senegal in implementing the order actually came with a proposal which they were expected to discuss and finalise in Dakar upon an invitation from the Government of Senegal. During the meeting called to discuss the statutes and rules of the hybrid *ad hoc* tribunal, the Government of Senegal withdrew from the discussion.<sup>59</sup> President Wade subsequently sent a letter to the AU informing it that Senegal would not proceed.<sup>60</sup>

This deadlock led the AU to discuss alternative African destinations for the trial, including Rwanda and Chad, the country to which Senegal at some point announced it was ready to extradite the former Chadian president. In January 2012, a new Belgian request for extradition offered Senegal an opportunity for alternative compliance, which was either

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<sup>55</sup> African Union, Decision on the Hissène Habré case, Doc.Assembley/AU/9(XVI), 30-31 January 2011, para 9.

<sup>56</sup> African Union, Decision on the Hissène Habré case, Doc.Assembley/AU/8(XVII), 30 June-1 July 2011, para 3.

<sup>57</sup> African Union as above, para 4.

<sup>58</sup> Donors had pledged up to €8.6 million to fund the trial.

<sup>59</sup> Meeting held at Hotel Méridien on 30 May 2011. Interview with Senegalese Lawyer Advocate Assane Dioma Ndiaye (Dakar, 24 January 2012).

<sup>60</sup> See Radio France International ‘Affaire Habré: retourner le dossier à l’Union africaine?’ <http://www.rfi.fr/afrique/20110123-affaire-habre-retourner-le-dossier-union-africaine> (accessed 5 August 2012).

to try or extradite. The Appeal Court of Dakar, however, denied extradition on the grounds that Belgium did not submit a certified copy of the 2005 arrest warrant.<sup>61</sup>

In short, Senegal consistently declined to comply with the ECCJ's 'binding recommendation' as to the 'modalities' for trying Habré. It is believed that President Wade's Senegal probably never intended to do so, although the formulation of that specific 'order' has also entertained controversy.<sup>62</sup> However, any controversy was cleared by the International Court of Justice (ICJ) in July 2012 when the world Court ruled that Senegal must immediately prosecute Habré or execute Belgium extradition requests.<sup>63</sup> In any case, prior to the ICJ's judgment, the change of government that occurred in Senegal following the February 2012 presidential election had already brought about a significant positive impetus towards giving full effect to the ECCJ's judgment.

As indicated under chapter three's section on Senegal, immediately after assuming office in early 2012, the newly elected President Macky Sall repeatedly pledged that his country would prosecute Habré.<sup>64</sup> Negotiations were fast completed by the new government, which led to the signing of an agreement with the African Union in late 2012. 'Extraordinary African Chambers' established under the agreement were inaugurated in February 2013, thus paving the way for the trial of Hisssein Habré to commence.<sup>65</sup> Considering that former President Wade's government had withdrawn from negotiations towards the establishment of the same chambers despite the decision of the ECCJ, the 2012 presidential election had a catalytic effect in speeding up the conclusion of an agreement towards Senegal's full compliance with the ECCJ's judgment.

Going by the benchmarks of this study, the case is termed as situational/full compliance. This categorisation is reasoned by the multiple hesitations of Senegal under President Wade's government over a decade, which revealed very little political will to prosecute or extradite Habré in the first place. It became evident that the change of government in

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<sup>61</sup> Decision of the Appeal Court of Dakar, 11 January 2012.

<sup>62</sup> See interview with Advocate Assane Dioma Ndiaye.

<sup>63</sup> See Questions relating to the obligation to prosecute or extradite (*Belgium v Senegal*), Judgment, 20 July 2012.

<sup>64</sup> See Jeune Afrique 'Tchad: Hissène Habré, un "Sénégalais" pas comme les autres' (13 September 2012) <http://www.jeuneafrique.com/Article/JA2695p032-033.xml> (accessed 17 November 2012).

<sup>65</sup> See Human Rights Watch 'The Chronology of the Habré Case' as above.

early 2012 had a great bearing in Senegal's compliance with the ECCJ's main 'binding recommendation' in the *Habré* judgment. As all the orders were eventually implemented, the case also falls under full compliance.

### **3.7 The Registered Trustees of the Socio-Economic Rights Action Project (SERAP) v Nigeria<sup>66</sup>**

#### **3.7.1 Facts of the case**

In October 2007, the Independent Corrupt Practices Commission (ICPC) in Nigeria reported having funds of more than 488 million naira looted from state offices and headquarters of the Universal Basic Education Commission (UBEC). The report indicated another 3.1 billion naira looted by UBEC officials. The ICPC reported it was still battling to recover this amount. A previous report of investigations submitted to the Presidency in April 2006 equally centred on the mismanagement of funds allocated for basic education in ten states of the Federation of Nigeria.

Having corroborated the information and convinced that the fact of embezzlement concerned had caused harm to the effective implementation of the right to basic education, SERAP initiated a suit before ECCJ against Nigeria and UBEC in December 2007. The Lagos based socio-economic rights NGO contended that such practices had caused Nigeria's failure to train more teachers and to provide books and other teaching materials. SERAP argued especially that the Federal Government had 'contributed to these problems [the alleged violations] by failing to seriously address all allegations of corruption at the highest levels of government and the levels of impunity that facilitate corruption in Nigeria'.<sup>67</sup> SERAP further contended that 'the destruction of Nigeria's natural resources through large scale corruption is the sole cause of the problems denying the majority of the citizens' access to quality education'.<sup>68</sup>

In the Community Court, the applicant sought a range of declarations and orders, among others that Nigeria recognise the right to free and compulsory basic education and make adequate provisions for the compulsory and free education of every child. On 30

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<sup>66</sup> ECW/CCJ/JUD/07/10, 30 November 2010.

<sup>67</sup> *SERAP (Education) v Nigeria*, para 6.

<sup>68</sup> As above para 7.



November 2010, the ECCJ declared that the right to education was justiciable ‘under the African Charter’ and ‘before Court’,<sup>69</sup> and ordered that the government provided the 3.5 billion naira missing while it took steps to recover the distracted funds or prosecute the suspects.<sup>70</sup>

An analysis of the full text of the operative part of the judgment is needed for an accurate categorisation of the case. In fact, the Court held as follows:

The applicant is saying that following the diversion of funds, there is insufficient money available to the basic education sector. We have earlier referred to the fact that embezzlement or theft of part of the funds allocated to the basic education sector will have a negative impact; this is normal since shortage of funds will disable the sector from performing as envisaged by those who approved the budget. Thus whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the first defendant should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.<sup>71</sup>

One could have interpreted this holding as inferring an order to prosecute the suspects. However, the Court expressly declined competence to make such an order.<sup>72</sup> As a consequence, the only order left was to replace the missing funds. However, prosecution seems to be an implied order, which is discussed further under chapter seven on influence.

### 3.7.2 Compliance narrative and status – Full compliance

The ECCJ’s Registrar served the judgment on Nigeria together with a writ of execution.<sup>73</sup> In April and June 2011 the solicitor to SERAP and executives of various NGOs wrote to the President of Nigeria requesting his government to comply.<sup>74</sup> At the ECCJ’s 10<sup>th</sup> anniversary celebration attended by Nigeria’s Attorney-General, the Presidents of both

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<sup>69</sup> As above para 26.

<sup>70</sup> As above para 28.

<sup>71</sup> As above para 28.

<sup>72</sup> As above para 29.

<sup>73</sup> See interview with Advocate Athanase Atannon, Deputy Registrar, ECCJ (Abuja, 10 May 2011).

<sup>74</sup> See interviews with Advocate Fanala and Mr. Mumuni. See also SERAP ‘Request to Jonathan on ECOWAS Court judgment’ (23 April 2011) <http://www.serap-nigeria.org/campaign/request-to-jonathan-on-ecowas-court-judgment/> (accessed 13 September 2011) and SERAP ‘Open letter to Jonathan on the ECOWAS Court judgment’ (1 June 2011) <http://www.serap-nigeria.org/campaign/request-to-comply-with-ecowas-court-judgment/> (accessed 13 Sept. 2011).

the ECOWAS Commission and the Court urged speedy compliance.<sup>75</sup> Nigeria did not reject the decision and till late 2011, a year after the judgment, lawyers involved in the case believed the Government was willing to comply with the order to replace the funds.<sup>76</sup>

However, a proper categorisation of this case requires an accurate understanding of how the basic education programme operates in Nigeria, and what considerations led the ECCJ to its findings in the *SERAP Education* judgment. In respect of the first issue, the Federal Government of Nigeria has established the Universal Basic Education Commission (UBEC) through an Act to oversee the Universal Basic Education (UBE) programme in Nigeria. According to information obtained at Federal level, the programme is implemented mostly at state government level. Through the UBEC, the Federal Government provides matching grants to each state to enhance the implementation of that programme. As a consequence, states access federal grants when they are able to provide their own part of the joint contribution. The fact that a state is unable to access its own grant from the Federal Government (through UBEC) in a particular year does not mean that the money is lost. The backlog can be accessed at any time, and the funds are released on the basis of a workplan approved by the supervising agency, which is UBEC.

It appears that the Federal Government cannot force states to access their funds and disbursement can be delayed. Apparently, the delay incurred by some states in accessing their grants was what prompted SERAC to institute the *Education* suit in the ECCJ. Consultation with sources at Federal level reveals that the UBE scheme is going on as usual, and states affected by the *SERAP Education* judgment have or are accessing their funds that were lying trapped with the Federal Government.

As to considerations that led to the findings of the ECCJ recalled above, it must be stressed that the Court first satisfied itself that the Federal Government of Nigeria was responsible through UBEC. In the view of the Court, the Federal Government established UBEC 'to take care of the basic education needs of the people of Nigeria' and allocated necessary funds to the agency for that purpose.<sup>77</sup> The Court then considered that 'UBEC

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<sup>75</sup> AllAfrica 'ECOWAS Court President urges speedy compliance with Court decisions', (11 July 2011) <http://allafrica.com/stories/201107140899.html> (accessed 13 Sept. 2011).

<sup>76</sup> See interview with Advocate Falana.

<sup>77</sup> *SERAP (Education) v Nigeria* para 19.

is responsible, albeit vicariously, if the funds are utilised for other purposes'. Responsibility is triggered because, in the opinion of the Court, by providing that the agency 'shall not disburse' if the funds are not properly utilised the UBEC Act places on the agency the onus to be satisfied of a good use.<sup>78</sup> Having established UBEC, the Federal Government shares the same responsibility and bears the same onus, and at the time the case was instituted in the ECCJ, both had failed to act against those who allegedly looted the funds.

From the foregoing, it appears that the responsibility of the Federal Government is engaged. Having said that, it is important to recall that the final objective of the Court's order to replace the funds is 'to ensure a smooth implementation of the programme'.<sup>79</sup> The benchmark for assessing compliance should therefore be not whether the Federal Government has provided cash to replace the 3.5 billion naira diverted but whether the programme has continued without any impediment.

According to consultations with both SERAP and contacts at Federal level, the UBE programme has not stopped in any of the states involved in the report that was the genesis of the ECCJ *Education* case.<sup>80</sup> In addition, as a consequence of the judgment, officials of the Basic Education Commission involved were put under trial in Nigerian courts and measures have been taken to ensure that the use of funds received from the Federal Government is monitored more effectively.<sup>81</sup> As they were not in implementation of express orders made by the ECCJ, these actions are discussed further in chapter seven on influence. According to the benchmark set above, this case is categorised as full compliance.

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<sup>78</sup> As above para 15.

<sup>79</sup> As above para 28.

<sup>80</sup> See telephone interview with Adetokumbo Mumuni, Executive Director of SERAP (Cotonou, 13 June 2013).

<sup>81</sup> See interview with Adetokumbo Mumuni, Executive Director of SERAP (Abuja, 6 September 2012).

### 3.8 Musa Saidu Khan v The Gambia<sup>82</sup>

#### 3.8.1 Facts of the case

Mr Saidu Khan was a journalist and Chief Editor of the *Independent* newspaper based in Banjul. Mr Saidu Khan complained to the ECCJ on 19 November 2007 that, following the publication in his newspaper of the names of the alleged masterminds of the 21 March 2006 *coup* in The Gambia, he was arrested six days later by military and police agents without an arrest warrant. Mr Saidu Khan was subsequently taken to the headquarters of the National Intelligence Agency and detained for 22 days *incommunicado* under inhuman conditions. There, members of the Agency unclothed him and applied electric shocks on his body to obtain his admission that he was implicated in the alleged coup. Mr Saidu Khan further complained that, as a consequence of his torture, he was injured on his back, his legs, arms and left jaw. He also claimed to have suffered mental and psychological torture.

After he was eventually released, and as security agents continued to shadow him, the complainant decided to flee from The Gambia with his wife. On 13 May 2006, they fled to neighbouring Senegal where he first received medical attention at the cost of Amnesty International before he made his way to the United States of America.

Mr Saidu Khan complained to the ECCJ of the violation of his rights to personal liberty, fair trial, freedom from torture, and dignity. Having examined the case, the ECCJ found The Gambia in violation of the complainant's rights under the African Charter. On 16 December 2010, it ordered the respondent state to pay the amount of \$200 000 damages in compensation for the loss suffered.

#### 3.8.2 Compliance narrative and status – Non-compliance

On 3 March 2011, The Gambia applied for review of the judgment notifying its 'dissatisfaction with the entire judgment'.<sup>83</sup> Among other grounds, the respondent state's application singled out the Court's failure to consider some facts, the lack of evidence of the basis upon which the US\$ 200 000 award was calculated, the fact that the

<sup>82</sup> ECW/CCJ/JUD/08/10, 16 December 2010.

<sup>83</sup> See Ministry of Justice of The Gambia, Application for review of judgment, 31 March 2011.

said amount was excessive and a lack of a basis as to why the claim and award were expressed in US Dollars while the plaintiff had always lived in The Gambia and used The Gambian currency, the Dalasi.<sup>84</sup>

In its written submission in opposition to The Gambia's application for review, the Media Foundation for West Africa, on behalf of the plaintiff (respondent in the review case), challenged such application as lacking merits and being frivolous having been filed three months after the judgment was delivered.<sup>85</sup> Set to be heard on 26 September 2011, the case was adjourned.<sup>86</sup> On 6 February 2012, the Community Court eventually dismissed The Gambia's claims on the grounds that there was no new evidence that would warrant such an application and therefore ordered that the state complies with the judgment. As at November 2013 the state had yet to comply.

### **3.9 Ms Manavi Isabelle Ameganvi and 8 Others v Togo<sup>87</sup>**

#### **3.9.1 Facts of the case**

In the October 2007 election, the complainants were all elected as Members of the Parliament of Togo. They had run on the list of the main opposition party *Union des Forces du Changement* (UFC) which won 27 seats in all. During their nomination ceremony, the candidates were required by the then President of the Party, Mr. Gilchrist Olympio, to

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<sup>84</sup> Ministry of justice of The Gambia as above 99. There was yet a little doubt in the first place that the respondent state simply had no intention of complying with the order. The state challenges the ECCJ's (lack of) method of calculation, which, it contends, has no link with the earning of the complainant or any loss he is presumed to have suffered as a consequence of the violations found. According to the state, the compensation ought to be evaluated in Gambian Dalassi, the currency that has ever been used by the complainant. In the view of the respondent state, the amount is outrageous and paying such compensation will transform the complainant into an 'instant millionaire' which, as argued in the written submissions, is not the actual purpose of reparation by compensation. As a matter of fact, the state clearly calls ECOWAS Court to 'drastically slice the judgment sum downwards'. On behalf of the complaint, Media Foundation for West Africa opposes non-compliance with the Court Rules pointing out the respondent state's belated application for review. The Accra based NGO also prays the ECCJ to quash the respondent state's application for lack of merits arguing that the Court has discretion in the calculation of the compensation and that, following death threats, the complainant has been living abroad, mainly in the United States, thus using the US Dollar.

<sup>85</sup> See Media Foundation for West Africa, Plaintiff/respondent's written submission, 15 June 2011. Article 88(1) and (2) of the ECCJ's Rules of Procedure prescribes that application for review shall be filed within 3 months of the judgment.

<sup>86</sup> Media Foundation for West Africa Alert 'ECOWAS Court adjourns hearing on Gambian Government request for review of two landmark judgements', 28 September 2011.

<sup>87</sup> ECW/CCJ/JUD/09/11, 7 October 2011.

sign various documents. One of these was an undated letter of resignation to the address of the President of the National Assembly.

Following political negotiations in which Mr. Olympio agreed to join the ruling party coalition and sit in the cabinet, 20 of the 27 elected MPs resigned from the UFC and its parliamentary group on 5, 8 and 24 October 2010. The splitting MPs created a new political party, the *Alliance Nationale pour le Changement* (ANC) and had a new parliamentary group registered in the National Assembly.

On 10 November 2010, the President of the parliamentary group of the UFC transmitted the letters referred to above to the Constitutional Court of Togo as letters of resignation. The transmission allegedly supported a request for replacement of the complainants after the Constitutional Court had declared their seats vacant. The letters were not dated and the names of the signatories were hand-written by a third person. Convinced that those letters were forged the complainants contended that both the Parliament and Constitutional Court ought to have ascertained their resignation in a fair hearing before proceeding to replace them.

On 30 November 2010, they challenged their exclusion and replacement as a violation of both the ECOWAS Democracy and Good Governance Protocol and the African Charter. They argued in their submission to the ECCJ that such process was in violation of their rights to a fair trial. They further argued that such practice was in violation of the ECOWAS Democracy and Good Governance Protocol. Not only does the Protocol entrench the principle of the strengthening of national parliaments; it also erects the African Charter and international human rights instruments to the rank of a '*principe de convergence constitutionnelle*'.<sup>88</sup>

On 7 October 2011, finding Togo in violation of their right to fair hearing, the ECCJ ordered the government to remedy the violation and pay compensation of the amount of CFA 3 million (\$6 000) to each of the 9 complainants.

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<sup>88</sup> Principle of constitutional convergence. In other words, the Democracy Protocol makes those instruments common constitutional law in all ECOWAS member states.



### 3.9.2 Compliance narrative and status – Full compliance

In a communiqué released within 25 days of the judgment, Togo's Minister of Justice 'took note of the ECCJ's decision on behalf of the Government'. The communiqué proceeded to indicate that the Minister 'reported to the Cabinet during a meeting on 2 November 2011 and seized the Minister of Finance for the amount of \$6 000 to be paid to each of the complainants as decided by the ECCJ'.<sup>89</sup>

When it came to implementation, a dispute arose as to the interpretation of the order to 'remedy' the violation. Both the Government and Constitutional Court of Togo took the view that by 'remedy', the ECCJ meant compensation but not reinstatement of the MPs, which would have been in violation of the binding force of the final decision of the Constitutional Court.<sup>90</sup> Sticking to the letter of the operative part of the judgment, the complainants, their counsel and opposition parties were rather of the view that the Community Court made two different orders which were to 1) 'remedy' the violation of fair trial rights and 2) pay \$6 000 to each of the complainants. It was therefore no surprise that counsel for the parliamentarians sent back the nine cheques to Togo's Minister for Justice with a letter indicating that payment of compensation was in partial compliance of ECCJ's decision.<sup>91</sup>

Further field investigation revealed that the Government was presented with an alternative opportunity to deal with the matter. Indeed, informal negotiations were conducted between both parties as some of the MPs had considered accepting damages in reparation for their undue and illegal replacement.<sup>92</sup> Apparently, figures were even put forward but hardliners within the Government were not in favour of the prospective agreement, which led the Government to restrict execution to the amount indicated by the ECCJ. Certainly, convinced that reintegration will never occur due to the political

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<sup>89</sup> See République Togolaise 'Chèque ou espèces' <http://www.republicoftogo.com/Toutes-les-rubriques/Politique/Cheque-ou-especes> (accessed 6 November 2011).

<sup>90</sup> See Cour constitutionnelle du Togo 'Pas de réintégration des ex-députés UFC' <http://www.courconstitutionnelle.tg/> (accessed 23 February 2012). On 22 June, the Constitutional Court of Togo dismissed an application by the complainants in the same case for lack of *locus standi* as individuals have no direct access to the court.

<sup>91</sup> See interview with Advocate Zeus Ajavon, counsel for four of the complainants (Lome, 18 January 2012).

<sup>92</sup> As above.

environment of the case,<sup>93</sup> counsel for the complainants initiated new proceedings requesting the Community Court to make a clear order.<sup>94</sup>

On 13 March 2012, although it did not reverse its initial findings that violations had occurred which called for ‘remedy’ as ordered in the October 2011 judgment, the Court responded that it did not fail to consider the relief.<sup>95</sup> Noteworthy, counsel for the parliamentarians based the new application mainly on the argument that the ECCJ had failed to respond to the reparation relief sought in the initial application, meaning he was still seeking their reinstatement in Parliament. Whether such litigation strategy was appropriate in the particular political environment of the case is discussed under the relevant compliance analysis in the next chapter.

In all, the case would have come under partial compliance had the initial judgment remained unchallenged. However, the Court stated clearly through its findings in the revision judgment that Togo was bound to comply only with the payment order, which had already been carried out a few weeks following the first decision. The case therefore falls within full compliance according to the criteria of this study.

#### **4. Conclusion**

This chapter sought to introduce the reader to decisions of the ECCJ selected for study. After putting compliance in context and undertaking a categorisation of compliance, each case was introduced through a presentation of the facts followed by a compliance narrative and an indication of the status of the judgment.

Going by the benchmarks adopted by the study, of the nine cases discussed, five judgments received full compliance, one falls under situational compliance while three were not complied with at all. In terms of percentage the overall compliance is 66 per cent, including full and situational compliance, and non-compliance is 34 per cent. It is

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<sup>93</sup> In fact, reinstatement would jeopardise the long-negotiated political agreement that led the complainants’ previous political party to join the incumbent party in a coalition government. Interviews revealed that the leader of the said opposition party had threatened the government to withdraw from the coalition should Togo reintegrate unseated MPs.

<sup>94</sup> See interview Advocate Ajavon.

<sup>95</sup> The author attended the 13 March 2012 session of the ECOWAS Court of Justice in Abuja at which the new judgment was read.

noteworthy that in none of the cases has a state expressly rejected any judgment of the Court. Besides, non-compliance cases may be considered as cases in progress. These cases have either gone under review at some point, new proceedings were instituted in follow-up of initial cases, the decisions are too recent or steps were being taken for implementation. Such cases make up at least 34 per cent of the study cases.

In all compliance cases, governments have played the central role in ensuring domestic compliance either by having damages paid, instructing competent members of the government or sending a letter to the competent body to implement an administrative measure. Of the cases discussed no express order to enact legislative changes was made by the ECCJ.

The chapter revealed an overall compliance with judgments of the ECCJ. However, it also appeared that particular states, namely The Gambia and Nigeria, have shown a relatively consistent non-compliance behaviour. Those states have equally become frequent defendants before the ECCJ. This finding therefore begs the question why there is overall compliance, while some states have shown a pattern of non-compliance.

The next two chapters attempt answering that question. For the sake of presentation, compliance factors are discussed in two chapters mainly due to the amount of information displayed and the length of analysis. Chapter five therefore discusses factors relating to the ECCJ and compliance-monitoring mechanisms. Chapter six then provides an analysis of the same factors with a focus on cases studied, the domestic environment of defendant states, and the political will of ECOWAS as a Community to ensure compliance by member states.

As independent parts of this study, each of the two chapters includes its own introduction and conclusion. However, being the leading chapter on the discussion on reasons why states have complied with the ECCJ's judgments, chapter five's introduction explains the methodology also applied in chapter six. Chapter five equally contains a common section on the literature on compliance factors. The same section contextualises state compliance literature by explaining why particular interest is afforded to factors prompting compliance with the decisions of human rights bodies in the African human rights system, especially the African Commission. On the assumption that compliance in

the ECCJ regime and the African system is prompted by concurring and differentiating factors, such factors are discussed only while concluding chapter six. This option is justified by the fact that comparative factors can be spelt out only after a full discussion of compliance factors under the next two chapters.

## CHAPTER V: Compliance factors relating to the Court and monitoring mechanisms

### 1. Introduction

This chapter is devoted to an empirical analysis of how and why states have complied or not complied with the decisions of the ECOWAS Community Court of Justice (ECCJ).<sup>1</sup> The chapter begins with a short overview of theoretical and empirical research on factors predictive of state compliance with decisions of international bodies. This overview applies to analysis under chapter six of the present study.

Factors that have influenced state compliance with ECCJ's decisions are subsequently singled out and discussed against factors arising from international law theories of compliance. The analysis below includes only ECCJ decisions on the merits, ordering defendant states to comply with specific orders. The discussion therefore covers only orders expressly made in the operative parts of the judgments in the cases investigated. Consequences arising from an implementation of those orders are considered as implicit or implied orders. They are therefore discussed as an influence of the judgments which chapter seven investigates.

Compliance information and analysis are sourced mainly in interviews, conferences and other meetings, and to a lesser extent from local newspapers and internet media. Being a case study in its essence, the research was qualitative rather than quantitative which determined that that interviewees be selected from only the most relevant candidates. Interviewees were chosen among persons directly involved in the cases or holding a particular position in study countries' relevant departments.

Such persons thus include ECCJ judges and staff, counsel for complainants, executives of NGOs leading some of the cases on behalf of victims or providing assistance to complainants, justice and foreign affairs ministries' personnel, and judges of domestic courts handling landmark cases involving the state or proceedings led by complainants

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<sup>1</sup> The term 'empirical' is referred to as meaning 'based on experiments or experience rather than ideas or theories', as defined by the Oxford Advanced Learner's Dictionary OUP 2011. Put in context, the current chapter discusses state compliance not on the basis of compliance theories solely but also based on analysis of the facts of the cases, case law of the ECOWAS Court, and proceedings of interviews of ECCJ judges, Court staff, counsel, NGOs, government officials, and domestic courts' judges.

prior to taking their case to ECCJ. Most of the interviews were conducted during research visits to the ECOWAS Court and to the five study countries in 2011 and 2012, and incidentally at conferences attended by interviewees in third countries. Additional information was obtained electronically and through field research in 2013.

## 2. State compliance factors according to theoretical and empirical research

Research has identified three major factors as to why states comply with international rules and rulings. These are 'coercion', 'persuasion' and 'acculturation'.<sup>2</sup> All three concepts are defined under chapter one's section on literature review on compliance and influence. Some authors have also discussed how international law has helped internal actors shape domestic politics.<sup>3</sup> In any case, all schools of thought acknowledge the inclusive nature of various factors and suggest that systemic empirical research is needed to theorise state compliance. Studies focusing on state compliance with decisions of international bodies do not significantly distance themselves from such a position.<sup>4</sup>

These studies concur that the reason why states obey international rules definitely informs how they do so. In the present context, one should presume that the overall positive compliance trends and absence of express rejection are informed by factors that are specific to the ECOWAS human rights protection system. Accordingly, there must be reasons for the compliance status of study countries. The aim of this section is to identify these factors and assess whether they could conclusively be identified as predictive of compliance or non-compliance. This exercise will be done against generally accepted

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<sup>2</sup> See in general HH Koh 'How is international human rights law enforced?' (1999) 74 *Indiana Law Journal*; R Goodman & D Jinks 'International law and state socialization: Conceptual, empirical and normative challenges' (2005) 54 *Duke Law Journal*; and BA Simmons 'Compliance with international agreement' (1998) 1 *Annual Review of Political Science*.

<sup>3</sup> See in general BA Simmons *Mobilizing for human rights: International law in domestic politics* (2009); and OC Okafor *The African human rights system: Activist forces and international institutions* (2007). Both authors demonstrate that state compliance with international (human rights) law mainly depends on the amount of influence that domestic forces, including counter and non-governmental actors, are capable of displaying in the presence of both government and international actors.

<sup>4</sup> See among others, JL Atangana 'La négociation dans l'exécution des arrêts de la Cour internationale de justice' (2006) 7-8 *La Voix de l'Intégration Juridique et Judiciaire Africaine* 60; LR Helfer & E Voeten 'Measuring judicial influence: Does the European Court of Human Rights promote social and legal change?' Conference on 'Domestic consequences of human rights treaty ratification' (15-16 October 2010) 4 NYU School of Law's Centre for Human Rights and Global Justice; in general F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *The American Journal of International Law*.



factors indicative of (non)compliance with the decisions of international human rights bodies. Contextualisation suggests using the African human rights system as a reference. Due attention is afforded to other systems where relevant.

The state compliance study by Viljoen and Louw (the reference study) has particular merits as has already been mentioned. One of them is to have proposed a detailed and contextualised categorisation of African human rights system compliance-related factors. Factors borrowed from the reference study include: factors related to the body (period of the decision in the lifetime of the body, length of time to complete the case, state involvement in the procedure, reasoning in a particular finding, formulation of the remedy or order, and follow-up on compliance or compliance monitoring); factors related to the case (nature of the right violated, nature of the duty imposed on the state, scale of the violation, and nature of the remedy); factors related to the respondent state (situation prevailing in the state); factors related to civil society actors (involvement of non-governmental organisations in the case); involvement of the press; the political will of the umbrella organisation; pressure from other states; and international pressure.

However, because the contexts and features of the two regimes are different the classification of factors under ‘constant’ and ‘variable’ in the reference study is not relevant to the present study.<sup>5</sup> This discussion therefore adopts the categorisation of factors presented above. The category of ‘proceedings in domestic courts’ is added to categories used in the reference study.

It is important to recall the widely supported belief that the major weakness of the African human rights system is the absence of a judicial body making binding decisions, and that the advent of the African Court will act as a solution together with an effective supranational political body legitimately vested with compliance-securing powers and willingness.<sup>6</sup> This perception is not peculiar to reflections on the African system. It has

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<sup>5</sup> Viljoen & Louw as above 12.

<sup>6</sup> See among others, JD Boukongou ‘The appeal of the African human rights system’ (2006) 6 *AHRLJ* 288-292; M Mubiala *Le système régional africain de protection des droits de l’homme* (2005) 5-18; Rachel Murray *The African Commission on Human and Peoples’ Rights and international law* (2000) 54-55; and M Mubiala ‘La Cour africaine des droits de l’homme et des peuples: mimétisme institutionnel ou avancée judiciaire?’ (1998) 102 *Revue Générale de Droit International Public* 779.

been relevantly discussed in respect of other regional systems<sup>7</sup> and even as regards compliance with the decisions of UN human rights treaty bodies.<sup>8</sup> However, the same studies have concluded that those factors do not on their own account for variances in compliance behaviours.<sup>9</sup> They consequently identified other factors including those relating to the cases and the situation prevailing in the state at a particular time.<sup>10</sup>

### 3. Factors related to the body (the ECOWAS Court of Justice)

As was alluded to in chapter two of the present study, decisions made by the ECCJ carry a legally binding force. The Court is a full judicial body and it is therefore assumed that the implementation of its orders does not, at least in law, depend on the will of state parties. The actual status of compliance with ECCJ's decisions provides *prima facie* evidence of overall positive trends of compliance and collaboration with the Court. Despite the fact that it is assumed that the judicial nature of the ECCJ and the binding character of its decisions should help it secure more compliance than the African Commission, a more detailed analysis is needed to arrive at accurate conclusions. This is the more so because the present study deals with a very limited number of cases upon the discussion of which generalisation cannot systematically be made.

The ECCJ is therefore assessed against all six aspects used to test the effectiveness of the African Commission.<sup>11</sup> Aspects considered to reach the results presented in table B include: 1) the period in the life time of the ECCJ when the decisions was made, on the premises that compliance has improved as the system matured; 2) the length of time it took the Court to reach a decision on the merits; 3) the extent of state involvement in the

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<sup>7</sup> See for instance, in general, LR Helfer & AM Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* and JL Cavallaro & SE Brewer, 'Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-American Court' (2008) 102 *The American Journal of International Law*.

<sup>8</sup> Among factors explaining the poor compliance with the decisions of UN treaty bodies is that they lack legal binding force even where states have accepted the competence of the relevant body to hear the case.

<sup>9</sup> See Viljoen & Louw (n 4 above) 12. See also, Open Society Justice Initiative *From judgment to justice: Implementing international and regional human rights decisions* (2010) 28. As showcased in the OSJI Report, state compliance with UN treaty bodies provides interesting examples in which compensation has been paid in cases where states had contested the position of the body or neglected the follow-up procedure.

<sup>10</sup> See Viljoen & Louw (n 4 above) 12.

<sup>11</sup> See Viljoen & Louw (n 4 above) 13.

proceedings and finalisation of the case; 4) the degree of reasoning and substantiation of the findings; 5) the clarity and precision of remedies; and 6) the absence or presence of mechanisms or initiatives to follow-up on the implementation of findings or orders.

### 3.1 Maturity of the ECOWAS human rights ‘regime’

Although it is of relatively recent formation, commentators agree that judicial protection of human rights in the ECOWAS Court of Justice may be talked of in terms of a ‘system’ as meaning a combination of rules or norms, institutions and relationships developed within that framework.<sup>12</sup> Authors have accordingly referred to the newly conferred human rights mandate and subsequent developments in ECCJ as the ‘emergence of a viable sub-regional human rights system’.<sup>13</sup> However, there has been a subsequent approach shift to referring to the ECCJ human rights framework rather as a ‘regime’, which would be part of the bigger African human rights ‘system’. The main differentiating factor suggested is that the ECOWAS framework lacks a human rights catalogue of its own, which it borrows from the African system.<sup>14</sup>

This differentiation appears to be mainly conceptual. For instance, other authors define ‘international regimes’ as ‘principles, norms, rules and decision making procedures around which actor expectations converge in a given issue-area’.<sup>15</sup> The present study adopts the concept of ‘regime’ while referring to the ECOWAS human rights framework with the understanding that it has human rights norms, though borrowed from the African system, institutions and procedures. Having adopted a conceptual approach, the

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<sup>12</sup> The Black’s Law Dictionary defines a system as: ‘Jurisdiction’s basis of applying law’. However, this definition of legal system has broadened significantly in the recent decades expanding to not only a set of norms, but organs and institutions that make and implement the law, relations between actors involved, and mechanisms that monitor its application. See DR Rothwell *et al International law: Cases and material with Australian perspectives* (2010) <http://www.cambridge.org/aus/catalogue/catalogue.asp?isbn=9780521609111&ss=exc> (access 6 May 2013).

<sup>13</sup> See ST Ebobrah ‘A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice’ (2007) 2 *AHRLJ* 328 and M Mubiala ‘L’application de la Charte africaine des droits de l’homme et des peuples par la Cour de justice de la CEDEAO’ Unpublished conference paper on file with author (2011) 13.

<sup>14</sup> Reference is made to the African Charter on Human and Peoples’ Rights. See ST Ebobrah ‘Application of the African Charter by African Sub-regional organisations: Gains, pains and the future’ (2012) 16 *Law, Democracy and Development* 50.

<sup>15</sup> SD Krasner ‘Structural causes and regime consequences: Regimes as intervening variables’ (1982) 36 *International Organisations* 185-205. See also J Donnelly ‘International human rights: A regime analysis’ (1986) 40 *International Organisations* 499-642.

issue is then whether this regime has matured over time or if it was born with some degree of maturity that would attract greater compliance than other bodies of the African human rights system, particularly the continental bodies.

While the Court was created in 1991 and operated from 2001, it received competence to hear individual human rights cases only in 2005 when it decided its first human rights case.<sup>16</sup> In comparison with the African Commission which has been in operation for 25 years at the time of writing, the ECCJ turned ten in 2011<sup>17</sup> and had adjudicated human rights cases just for less than 10 years in 2013. The most effective system would probably not have matured within such a limited period of operation. It may be argued that maturity of the system would be more relevant to the African Commission which has, over its decades of operation, improved its functioning and arguably secured greater related compliance.

The reference study investigated communications examined between 1990 and 2003, which were divided into two periods: cases decided between 1990 and 1996, and those decided between 1997 and 2003. From the observation that all six cases of compliance with the African Commission's recommendations were decided in the 1997-2003 period, the authors interrogated whether such could be indicative of better compliance as the system matured.<sup>18</sup> As they noted, because nine of the 13 cases of non-compliance were also decided in the same period, one could not draw peremptory conclusions. They pointed out the fact that, in any case, non-compliance instances were too recent to have allowed enough time for respondent states to comply. However, an important fact is that the complainants had also observed that the concerned states took no clear step towards compliance. The authors thus concluded that, even if 'it is a noteworthy factor, it would be too early to conclude that the maturity of the African system plays a decisive role in state compliance'.

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<sup>16</sup> See *Ugokwe v Nigeria*.

<sup>17</sup> See ECOWAS Court of Justice 'ECOWAS Court of Justice celebrates its ten years next July' [http://www.courtecowas.org/site/index.php?option=com\\_content&view=article&id=106%3Atenyearspressrelease&lang=en](http://www.courtecowas.org/site/index.php?option=com_content&view=article&id=106%3Atenyearspressrelease&lang=en) (accessed 17 September 2011).

<sup>18</sup> See Viljoen & Louw (n 4 above) 13.

The same conclusions may apply to the ECOWAS system. This is first because the ECCJ had decided human rights cases for only eight years in 2013 and it could consequently be too early for the system to have matured. Secondly, as indicated earlier, the Court has delivered a limited number of judgments on the merits in respect of human rights matters. However, conclusions of the reference study in respect to maturity may apply equally to the ECOWAS system *a contrario*. Indeed, one may argue that because the ECOWAS human rights system was born with a ‘normative and institutional maturity’, as opposed to the African Commission, it would attract more compliance from the very beginning. The major features of such maturity could include, without being limited to the non-exhaustion of local remedies, binding and directly enforceable decisions, proximity with litigants, on-site hearings, monetary awards and sanction of non-compliance. Those features may explain, it is suggested, that the overall compliance rate is positive and instances of full compliance have occurred right after first ECCJ’s human rights judgments.

Attempts to explain the role of ECOWAS in the effectiveness of the human rights regime backing the ECCJ cannot ignore developments spearheaded by the Community in the framework of what is termed as new regionalism. Some of the related elements reinforce the argument of the maturity to the ECOWAS human rights regime. In accordance with this line of reasoning, an important additional pillar of the ECCJ’s legitimacy is provided by the fact that ECOWAS member states granted Community citizens direct access to the Court, while they were reluctant to do same with other regional human rights bodies in Africa.<sup>19</sup>

Because the scope of the reference study is limited to 2004, it would have been interesting to compare compliance behaviours of the study countries for decisions of the ECCJ and African Commission rendered between 2005 and 2012. Nigeria is the only study country involved in cases decided by the African Commission in 2005. Of the three

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<sup>19</sup> As at November 2013, only seven of the 54 African Union member states had made the declaration allowing individuals and NGOs to access the African Court on Human and Peoples’ Rights after exhausting local remedies. Exhaustion of local remedies is also required in the African Commission on Human and Peoples’ Rights.

communications involving Nigeria, one was declared inadmissible.<sup>20</sup> In the two others the Commission decided to close the file following withdrawal of the communication by the complainant<sup>21</sup> and lack of further interest in the communication by the complainant.<sup>22</sup> The same year, the ECCJ ordered provisional measures in one case against Nigeria which the state complied with.<sup>23</sup>

Senegal is the only country under study against which the African Commission decided a case in 2006. The Commission declared the communication inadmissible.<sup>24</sup> The same year, the ECCJ did not decide any case involving study countries.

In 2008, the Commission examined one case involving Nigeria which it declared inadmissible.<sup>25</sup> The ECCJ did not deliver any judgment involving Nigeria in 2008. Cases decided by the ECCJ the same year involved The Gambia and Niger.<sup>26</sup>

In 2007 and 2009, the Commission did not examine any communications brought against study countries. In 2009, the ECCJ decided a case involving Nigeria in which the state was ordered to pay monetary damages to the complainants. While the complainants are yet to receive compensation, the respondent state has not rejected the judgment and has reportedly pledged to comply.<sup>27</sup> None of the communications decided by the African Commission in 2010 and 2011 involved the study countries. In 2012, only three cases were filed against Nigeria.<sup>28</sup> In the period between 2010 and 2012, the ECCJ considered more than 40 cases against four of the five study countries, Nigeria providing the highest number of cases, which is 15.<sup>29</sup>

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<sup>20</sup> *Ilesanmi v Nigeria* (2005) AHRLR 48 (ACHPR 2005).

<sup>21</sup> *Interights (on behalf of Husaini & Others) v Nigeria* (2005) AHRLR 56 (ACHPR 2005).

<sup>22</sup> *Centre for Advancement of Democracy, Social Justice, Conflict Resolution and Human Welfare v Nigeria* (2005) AHRLR 62 (ACHPR 2005).

<sup>23</sup> *Ugokwe v Nigeria*. See compliance narrative and status of compliance in chapter four.

<sup>24</sup> *FIDH & Others v Senegal* (2006) AHRLR 119 (ACHPR 2006).

<sup>25</sup> *Socio-Economic Rights and Accountability Project v Nigeria* (2008) AHRLR 108 (ACHPR 2008).

<sup>26</sup> *Manneh v The Gambia* and *Koraou (Slavery) v Niger*. See compliance narrative and status of compliance in chapter four.

<sup>27</sup> *Djotbaya v Nigeria*. See compliance narrative and status of compliance in chapter four.

<sup>28</sup> *Chief Essien Akpabio and Lady Apostle Helen Akpabios (represented by Victor Ukutt) v Nigeria* Communication 418/12; *Legal Defence and Assistance Project (on behalf of Mr. Abiodun Subaru) v Nigeria* Communication 425/12; *SERAP (on behalf of Daniel Nsofor and Osayinwinde Agbomien) v Nigeria* Communication 427/12.

<sup>29</sup> ECOWAS Court, List of cases filed 2004-2013.



Unfortunately, as all the cases involving study countries before the African Commission did not proceed beyond the admissibility stage, there was no recommendations with which to comply. This fact does not therefore permit a comparison of compliance with the African Commission and ECCJ between 2005 and 2012. Despite that conclusion, analysis of the same information reveals that both litigation and findings against study countries in the African Commission have decreased during the aforementioned period, particularly from 2009. In turn it appears that litigation and findings increased in the ECCJ to the detriment of the African Commission as far as study countries are concerned.

As an illustration, in 2005 the African Commission considered three cases from study countries for every one by the ECCJ. The figures are of one for the Commission and none for the Court in 2006, no data for 2007, one for two in 2008, none for one in 2009, none for four in 2010, none for one in 2011 and three for 41 in 2012.

Although thorough investigation and analysis are needed to draw accurate conclusions as to the reasons for this trend, it is suggested that the maturity of the ECOWAS system as described earlier in this section should be considered as an important attractiveness factor. As discussed in greater detail in the conclusion to chapter six, the same factor has a significant bearing in securing compliance both actually and potentially.

### **3.2 Length of time to complete the case**

This factor is premised on the fact that the shorter it takes the body to complete cases, the better states will comply. As argued in the reference study, the immediacy of the events stimulates implementation and leaves states with a sense of due process.<sup>30</sup> This argument is corroborated by the theory of obedience prompted by the sentiment of legitimacy of both the body and the order. Counting on the basis of the number of ordinary sessions of the African Commission,<sup>31</sup> the authors arrive at an average of 5,8 sessions (2-3 years) to complete full compliance cases and 6,3 sessions (3-4 years) for non-compliance cases. Because several non-compliance cases took fewer sessions to complete, the analysis was inconclusive.

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<sup>30</sup> See Viljoen & Louw (n 4 above) 13.

<sup>31</sup> The African Commission holds two ordinary sessions per year.

The 1991 ECOWAS Court Protocol provides that sessions of the Court are convened by its President.<sup>32</sup> As for the dates and duration of the sessions, they ‘shall be fixed by the President and shall be determined by the roll of the Court’.<sup>33</sup> It follows from these provisions that the number of sessions in any one year should be determined by the President of the Court as well. In line with this, the Court has held an increasing number of sessions over the years since it assumed human rights jurisdiction in 2005, 457 sessions having been held in all as at October 2013.<sup>34</sup>

Since there is no fixed number of sessions per year as is the case for the African Commission, it appeared more accurate to measure the time laps in numbers of months or years in respect of the ECCJ. On average, it takes 1,25 years for the Court to complete one case.<sup>35</sup> However, this may be termed as a ‘rough’ average and may not reflect the pace at which the Court handles cases in general. For instance, four of the nine cases have been handled within a year. One case has been completed within four months and the lengthiest proceedings have lasted three years, which is even quicker than for most African Commission cases.

The Court would have probably delivered at an even quicker pace had it not been for some operational challenges, both internal and external. One of these is the lack of resources which affects the length of time to complete cases in the ECCJ. The presidency of the Court has constantly complained of the lack of French-English-French translators with proved expertise in the fields of international law, human rights, and legal and judicial terminology.<sup>36</sup> The time that elapses between the submission of an application and translation of documents for enrolment of the case, results in long delays in the

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<sup>32</sup> 1991 ECOWAS Court Protocol, art 27(1).

<sup>33</sup> 1991 ECOWAS Court Protocol, art 27(2).

<sup>34</sup> According to information obtained from the Registry, 5 sessions were held in 2004, 23 in 2005, 25 in 2006, 43 in 2007, 26 in 2008, 34 in 2009, 74 in 2010, 72 in 2011, 105 in 2012, and 50 as at October 2013.

<sup>35</sup> This ‘rough’ average is obtained by dividing the total of months to complete all the 9 cases discussed by the number of cases.

<sup>36</sup> Interview with Hon. Judge President Awa Nana Daboya, President of the ECOWAS Court of Justice (Abuja, 11 May 2011).

proceedings.<sup>37</sup> Currently, at least four of the seven judges are francophone lawyers or judges.<sup>38</sup> Four of the nine cases discussed were filed by anglophone litigants.

Delays are also incurred by the parties and their counsel who frequently fail to stick to the Court's rules of procedure.<sup>39</sup> The ECCJ seems to have taken a tolerant approach arguably because, being in its early years of operation, the Court needs to be litigant-friendly.

Although the ECCJ has decided all compliance cases in a shorter time than all non-compliance cases, with one exception, the length of time cannot be considered as having a bearing on compliance since the Court is in any case one of the fastest of its kind in the world. However, seen from a comparative perspective, the ECCJ would be more attractive than the African Commission, should states shape their compliance behaviour on the length of time to decide the case.

### 3.3 State involvement in the procedure

In only one of the nine decisions reviewed and for the first time has a country refused to participate in proceedings before the ECCJ in 2009-2010.<sup>40</sup> That refusal should be understood in context. In the same period, the Government of The Gambia put forth a proposal first, that access to the court is limited to instances where domestic remedies have been exhausted and second, that the subject matter of any human rights claim falls within the scope of international human rights instruments ratified by the respondent country. The proposal was unanimously rejected by the ECOWAS Council of Ministers and was strongly criticised by all ECOWAS member states' legal experts except Gambian representatives. Civil society organisations also rebuked the proposal and initiated legal action against The Gambia before the ECCJ for violating the Court Protocol and seeking to

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<sup>37</sup> Interview with Hon. Judge Clotilde Médégan-Nougbodé, Judge of the ECOWAS Court of Justice (Abuja, 11 May 2011).

<sup>38</sup> The current bench includes four male and three female judges from the following nationalities: Nana Awa Daboya (Togo, President), M. Ramos Benfeito (Cape Verde, Vice-President), Hansi N. Donli (Nigeria), Anthony A. Benin (Ghana), S. Dirarou Sidibé (Niger), Clotilde M. Nougbodé (Benin), and EIAM M. Pottey (Côte d'Ivoire). Four of the judges are Francophone, two are Anglophone and one is Lusophone.

<sup>39</sup> Interview with Advocate Athanase Atannon, Deputy Registrar, ECOWAS Court of Justice (Abuja, 11 May 2011).

<sup>40</sup> That was in the case of *Manneh v The Gambia*. See compliance narrative and status of compliance in chapter four. See also ST Ebobrah 'Human Rights Developments in Sub-Regional Courts in Africa during 2008' (2009) 9 *AHRLJ* 319.

avoid complying with the Community Court's judgments handed down against the Gambian government. Following the final decision of ECOWAS political organs, the case was discontinued.<sup>41</sup>

In light of the foregoing and considering the general positive trend of state participation, The Gambia's option not to defend the action in the *Manneh* case should, however, not be seen as indicative of a general defiance trend towards the Court. As noted, such situation occurred once and that country has actively defended cases before<sup>42</sup> and after<sup>43</sup> the *Manneh* judgment.<sup>44</sup>

Similarly to the practice developed by the African Commission,<sup>45</sup> the ECCJ served several notices on the defendant state on The Gambia in the *Manneh* case, and even adjourned hearings to enable the respondent to enter an appearance and defend the action.<sup>46</sup> The reference study envisaged a comparison of full compliance with state involvement with non-compliance in the absence of state participation. While their comparison was inconclusive, the authors found that involvement and participation had improved over the years. States also failed to participate in several instances.<sup>47</sup>

The same would not be of a particular relevance to the present study. Even the single case of non-participation is somewhat unclear since the state has returned to the Court at a later stage of the case, namely after the NGO representing *Manneh* instituted new proceedings for payment of damages for his disappearance. Moreover, the state has

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<sup>41</sup> See *SERAP and Another v Attorney General of The Gambia and Another*, Suit No ECW/CCJ/APP/11/09 of 28 September 2009. See also AW Maki 'ECOWAS Court and the promise of the local remedies rule' *The Human Rights Brief Center for Human Rights and Humanitarian Law* (4 November 2009) <http://hrbrief.org/2009/11/ecowas-court-and-the-promise-of-the-local-remedies-rule/> (accessed 1 June 2012). As the relevant sections briefly allude to in chapter two of the present study, similar trends have been observed which were fatal to the SADC Tribunal and sought to control the independence of East African Community Court judges.

<sup>42</sup> *Etim Moses Essien v The Gambia*, ECW/CCJ/JUD/10/07, 29 October 2007.

<sup>43</sup> *Saidykhan v The Gambia*, 16 December 2010.

<sup>44</sup> In 2012, the same state has responded to processes from the Court in *Dayda Hydera Jr. & 2 Others v The Gambia* ECW/CCJ/APP/30/11, concerned with the case of a journalist assassinated in 2009.

<sup>45</sup> The Commission had the opportunity to flesh out its use of this practice namely in *Free Legal Assistance Group v Zaire* (2000) AHRLR 74 (ACHPR 1995) which it explained was in conformity with the practice of other international human rights adjudicatory bodies.

<sup>46</sup> *Manneh v The Gambia*, para 4.

<sup>47</sup> See Viljoen & Louw (n 4 above) 14-15.

responded to the notification of the initial judgment by explaining that it was willing to comply but for the impossibility of locating the complainant.

Whether the state could provide evidence that it has released the complainant in the first place is another issue altogether. Considering that it did not participate in the initial proceedings at any stage, The Gambia could have merely rejected the judgment and made it clear that it would not comply with the order. One may reasonably conclude that the ECCJ has enjoyed an overwhelming state collaboration in its proceedings right from the beginning. This may explain the overall positive state compliance with judgments of the Court.

### **3.4 Proceedings in domestic courts prior to instituting the case in the ECCJ**

In six of the nine cases discussed, the matter had been examined or decided by a domestic organ prior to the related case being instituted in the ECCJ. Compliance instances account for five of those six cases. More importantly, the ECCJ's decision in those cases did not reverse the findings of domestic organs. Actually, the Community Court eventually aligned with, confirmed or reinforced such findings.

There seems to be a general trend of state compliance in most cases that involved some domestic proceedings prior to the ECCJ's adjudication.<sup>48</sup> It could be argued that through a 'win-win' approach to adjudication adopted by the ECCJ, states agree to ensure the Court of their continued cooperation. The idea is particularly that states would consider the Court's adjudication approach as mitigating the loss incurred by conceding 'non-exhaustion of local remedies' to the ECCJ.<sup>49</sup>

### **3.5 Reasoning in a particular finding**

This factor is based on the assumption that well-reasoned decisions are more likely to be implemented.<sup>50</sup> The reference study identifies three categories: brief reasoning, limited

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<sup>48</sup> Evidence is displayed in chapter seven on influence.

<sup>49</sup> Authors have concluded that the adoption of non-exhaustion of local remedies create rivalry between international courts and domestic courts. See for instance K Alter *et al* 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 108 *American Journal of International Law* 19.

<sup>50</sup> The philosophy of such assumption is based on the fact that states are more eager to respond to persuasive rather than coercive authority. See in general Helfer & Slaughter (n 7 above).

reasoning and substantial reasoning. Applied to cases of compliance with the recommendations of the African Commission, the authors arrived at the conclusion that the depth and width of the reasoning is not decisive in securing compliance.<sup>51</sup>

At a first glance, the factual and substantive parts of ECCJ's judgments reveal that the Court deals with issues brought before it relatively lengthily. The practice of the Court in these respects equally appears to be consistent and the same applies to the structure of its decisions. For instance, all ECCJ's judgments under study include a presentation of the facts and procedure, consideration of the parties' pleas-in-law, evidence of witnesses, issues for determination, and an operative part including conclusions in terms of form and on the merits. Although the number of paragraphs does not necessarily reflect the quality of the reasoning in a decision, it may be indicative of the length devoted to addressing each of the issues raised.<sup>52</sup> While they have not always agreed with specific arguments made by the ECCJ, commentators have not complained of the brief reasoning of the Court.<sup>53</sup> Even in the three cases where states lodged an application for review, their submissions did not challenge the length or structure of the reasoning.<sup>54</sup>

The quality and depth of arguments would, however, carry a greater weight than their length and structure in a decision. This is because quality and depth are central to establishing the authority of a court and reliance on its jurisprudence.<sup>55</sup> In the case of the ECCJ, it is therefore not surprising that commentators have become critical and state parties have challenged findings of the Court in connection, whether directly or indirectly, with the reasoning that led to the judgment.<sup>56</sup>

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<sup>51</sup> See Viljoen & Louw (n 4 above).

<sup>52</sup> As an illustration, the length of the nine judgments studied, in terms of number of paragraphs, *Ugokwe v Nigeria* (43), *Manneh v The Gambia* (39), *Koraou v Niger* (96), *Djot Bayi v Nigeria* (50), *Tandja v Niger* (22), *Habré v Senegal* (72), *SERAP v Nigeria* (32), *Saidykhan v The Gambia* (48), *Ameganvi v Togo* (72).

<sup>53</sup> See for instance, ST Eboerah 'Human rights in African sub-Regional Economic Communities during 2009' (2010) 10 *AHRLJ* 242-258.

<sup>54</sup> *Djot Bayi v Nigeria* and *Saidykhan v The Gambia*.

<sup>55</sup> See KJ Alter 'The global spread of European style international courts' (2012) 35(1) *West European Politics* 135-154; and in general G Canivet 'Les influences croisées entre juridictions nationales et internationales' <http://www.ahjucaf.org/Les-influences-croisees-entre,7177.html> (accessed 16 April 2012). Mr Canivet is former President of the French Court of Cassation and member of the Constitutional Court of France.

<sup>56</sup> See for instance Eboerah (n 40 and 53 above).



One major issue is the obvious lack of reasoning in cases that have led to review. One may also suggest that some orders would have seen full or better compliance had the reasoning been deeper. In such instances, reasoning also had some connections with the findings and orders in the operative part of the considered judgments. In some cases, the Court seemed to find that the defendant state's responsibility was engaged in its reasoning but declined to conclude that violation occurred or, when it did, refused to make the consequent order. In the positive perspective, issues thus raised do not seem to affect the majority of the ECCJ's judgments. The negative perspective is that such issues arose in what may be termed as landmark judgments of the Court, thus setting a trend.

For instance in the *Habré* case, the Court failed to clarify that ratification of ICCPR by Senegal at the time the crimes were allegedly committed already made the Convention binding on that state and had precedence over its municipal law.<sup>57</sup> The Convention having become part of Senegalese law imposed an obligation on Senegal to give effect to its provisions. The clear understanding of non-retroactivity of criminal liability under ICCPR is that the principle does not apply to offences which constituted crimes under customary international law at the time they were committed, such as is alleged in the case of *Habré*.

The ECOWAS Court therefore seemed to have erred on that issue and it was rightly suggested that either the African Court or African Commission for instance would have reached a different conclusion had they determined that alleged offences constituted crimes against humanity in 1982 when *Habré* was still ruling Chad.<sup>58</sup> The ECOWAS Court's application of the *nullum crimen sine lege* principle under article 7(2) of the African Charter in its *Habré* judgment was too absolute.

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<sup>57</sup> Senegal is a monist country. Art 98 of its Constitution provides that 'treaties and agreements duly ratified or approved have, upon their publication, an authority superior to that of the laws under the condition for each treaty or agreement of their application by the other party'. The wording of the provision is largely accepted to mean that not only do ratified international instruments automatically enter the municipal law upon publication, but that they also acquire precedence over domestic legislation (see Constitution of Senegal, 2001, art 79). See also M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander *International law and domestic human rights litigation in Africa* (2011) and H Adjolahoun 'Impact of the African Charter and Women's Protocol in Senegal' in Centre for Human Rights (ed.) *Impact of the African Charter and Women's Protocol in selected African states* (2012).

<sup>58</sup> See F Viljoen 'The African Human Rights Court: A newcomer to the African judicial family' Paper presented at the iCourts inaugural conference University of Copenhagen (14-15 September 2012) 10.

The same applies to the UN Convention Against Torture, thus imposing an obligation on Senegal to try or extradite. Whether the Senegalese domestic legal order was prepared or already reformed to facilitate applicability is a different issue which in fact does not in any way affect international responsibility of the state.<sup>59</sup> In effect, such responsibility was constituted at the time Habré obtained asylum in the country. This understanding was confirmed by the International Court of Justice in the case of *Belgium v Senegal* where the world court decided that Senegal's duty to comply with CAT 'cannot be affected by the decision' of the ECOWAS Court.<sup>60</sup>

Having said that, experience shows that 'the application of international law in national courts is in practice hardly ever, if at all, fully independent of national laws'.<sup>61</sup> Besides, sight should not be lost of the fact that the dispute before the Community Court was limited to whether legal changes effected by the defendant state violated non-retroactivity or not. Still, the Court ought to have expanded its reasoning further to stress that the failure for Senegal to give effect to universal jurisdiction at the time of domestic proceedings did not affect the applicability of both conventions. The judgment rather left an impression that precedents of Senegalese courts with regard to domestic validity of the conventions bound the Community Court of Justice.<sup>62</sup>

On another note, it has appeared that the Court failed to address express submissions of the parties or seemed to have considered issues that were not raised in the heads of argument.<sup>63</sup> One of such instances is in the *Manneh* case where the Court omitted the claims based on articles 4 and 5 of the African Charter while it added article 2 of the African Charter which was not part of the original formulation of the claim by the complainant.<sup>64</sup>

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<sup>59</sup> See United Nations, Vienna Convention on the Law of Treaties, 1969, art 27.

<sup>60</sup> See Questions relating to the obligation to prosecute or extradite (*Belgium v Senegal*), Judgment, 20 July 2012.

<sup>61</sup> WN Ferdinandusse *Direct application of international criminal law in national courts* (2006) 9, 40-49. As the author argues, direct application seems to be voluntary rather than mandatory. The dilemma of the Belgian courts in the *Pinochet* as well as the *Sharon and Yaron* cases, and flagrant interferences of the Senegalese Government in the *Habré* case support such argument.

<sup>62</sup> See *Habré v Senegal* ECW/CCJ/JUD/06/10, 18 November 2010, para 61(2).

<sup>63</sup> On a comprehensive analysis of the legal issues discussed in the ECCJ's judgments see Ebobrah (n 40 and 53 above).

<sup>64</sup> See *Manneh v The Gambia* ECW/CCJ/JUD/03/08, 5 June 2008, para 25.

In the *Manneh* case the Court also adopted a controversial interpretation of some African Charter provisions. It found that article 2 of the Charter affirmed the ‘recognition and protection of individual fundamental rights’ while the common understanding of the provision is protection from non-discrimination. In the same case, the Court further refers to article 6 to find a presumption of innocence while such right is expressly provided for in article 7 of the Charter. The ECCJ’s decision that the victim’s relatives may not claim compensation on his behalf in the *Manneh* case is not consistent with international human rights standards either. Namely, United Nations’ standards make such claims possible and in fact provide that they must be allowed particularly in cases of disappearance.<sup>65</sup>

In at least one case, the ECCJ failed to assess domestic practice against international standards. In the *Koraou Slavery* case,<sup>66</sup> the Court concluded that it could not assess the legality of a detention as far as it is based upon a judicial decision made in application of the law. This approach could be restrictive since international bodies, while they may not directly reverse the decisions of their domestic counterparts, may assess the legality of municipal actions or acts based on domestic law that is not in line with international commitments.

In the same case, although the ECCJ found that the complainant has suffered a violation due to delayed proceedings, the Court failed to find a violation of article 1 of the African Charter by Niger’s failure to provide effective tribunals as domestic remedies. This is more surprising where the defendant state was found in violation of other provisions of the Charter, which findings, in the circumstances of the case, offered a legal and jurisprudential basis for an article 1 finding.<sup>67</sup> Whether the adoption of an anti-slavery law

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<sup>65</sup> See for instance United Nations, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, arts 17(d), 24(6) and 25(4); United Nations, General Assembly Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly resolution 47/133, 18 December 1992, arts 10 and 19; Working Group on Enforced or Involuntary Disappearance, Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance, General Comment on article 19 of the Declaration [http://www.ohchr.org/documents/Issues/Disappearances/GeneralCommentsDisappearances\\_en.pdf](http://www.ohchr.org/documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf) (accessed 29 May 2012); and *Bleier v Uruguay*, CCPR Communication No. 30/1978, final views, 29 March 1982.

<sup>66</sup> *Koraou v Niger*.

<sup>67</sup> See for instance, in the practice of the African Commission, *Jawara v. The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 46.

is sufficient to fulfil its obligation to protect Nigerien citizens from slavery or if the state is obligated further to ensure that the law is given full effect has not been clarified by the Court either.<sup>68</sup>

This trend of failing to make comprehensive remedial orders after finding responsibility on the part of the defendant state is observable in subsequent decisions of the Court. For instance, after it found amnesty laws in violation of the right to effective remedy in international criminal law and established state responsibility for such violation, the ECCJ, however, declined competence to order the state to investigate the matter, arrest and charge the alleged perpetrators in the *Ibrahim* case.<sup>69</sup> It has been argued that ‘the Court’s appreciation of the limits of its powers has a potential to increase user confidence in it’.<sup>70</sup> This argument is valid but too much self-censorship may well undermine the authority of the Court by diminishing the effectiveness of its remedies. The Court should learn lessons from its misfortune in the *Ameganvi (Togolese Parliamentarians)* case where its judgment was purposely interpreted by the Constitutional Court and the Government of Togo. The ECCJ declined to order the reinstatement of the MPs after finding the domestic process in violation of African Charter rights.

Questions have also been raised regarding consistency in the reasoning of the Court especially in cases sharing striking similarities. This interrogation applies for instance to the *Djotbayi* and *Amouzou*<sup>71</sup> cases in which the Court decided that parading the accused persons was in violation of their rights to fair trial and to be presumed innocent in the first case but reached the conclusion that no violation occurred in the second case.<sup>72</sup>

An issue on which the Court has also adopted an inconsistent and unprincipled approach is one of standing, namely who may bring human rights claims before it. In 2010, faced

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<sup>68</sup> See for instance J Allain ‘Hadijatou Mani Koraou v The Republic of Niger: ECOWAS Community Court of Justice judgment on protection from slavery’ LexisNexis (2009) <https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=103+A.J.I.L.+311&srctype=smi&srcid=3B15&key=d178182b71e8598b2a771ec754df49bc> (accessed 29 May 2012).

<sup>69</sup> See *Sidi Amar Ibrahim & Another v Niger*, ECW/CCJ/JUD/02/11, 8 February 2011.

<sup>70</sup> ST Ebobrah ‘Human rights developments in African sub-Regional Economic Communities during 2011’ (2012) 12 *AHRLJ* 223.

<sup>71</sup> *Henri Amouzou & Others v Côte d’Ivoire*, ECW/CCJ/JUD/04/09, 17 December 2009.

<sup>72</sup> Commentators concur to this inconsistency. See for instance, interview Advocate Falana; and Ebobrah (n 40 and 53 above).

with preliminary objections by Nigeria that SERAP had no standing as an NGO and that socio-economic rights are not justiciable in Nigeria, the ECCJ rightly determined that those rights were justiciable under the African Charter and the applicant had standing under *actio popularis* as long as it could prove public interest.<sup>73</sup>

The same year, the ECCJ confirmed *actio popularis*-based standing for NGOs in the subsequent case of *SERAP (Environment) v Nigeria* concerned with pollution and associated human rights violations in the Niger Delta by major oil companies operating in Nigeria.<sup>74</sup> In the matter, SERAP alleged that ‘the government of Nigeria and the oil companies are individually and/or collectively responsible for serious violations of the right to an adequate standard of living, including the right to food, to work, to health, to water, to life and human dignity, to a clean and healthy environment; and to economic and social development’.<sup>75</sup>

However, in 2011 and 2012, the ECCJ changed its reasoning regarding standing without justifying or providing benchmarks for its approach shift although the cases involved NGOs just as did the SERAP cases. A comparative approach to human rights NGO standing as applied by the ECCJ is instructive. In its March 2011 decision in the case of *Godwill Mrakpor v Authority of Heads of State and Government (ECOWAS) (Provisional measures against ECOWAS military intervention in Côte d’Ivoire)*, the ECCJ correctly determined that Mr. Mrakpor’s status of ECOWAS citizen and human rights activist did not clothe him with standing to seek the annulment of a decision by an organ of the Community. The Court’s position is justified mainly by the fact that the case was clearly not one of an individual human rights claim and targeted an act of a community organ but not human or peoples’ rights violations.<sup>76</sup> However, in the same case the Court remained silent on whether Ivorian NGOs that were also complainants in the matter had standing to prevent human rights violation should military intervention be carried out.

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<sup>73</sup> See *SERAP (Education) v Nigeria*, Preliminary ruling, ECW/CCJ/APP/08/08, 29 October 2009, para 34(d).

<sup>74</sup> *SERAP (Environment) v Nigeria and Others*, Preliminary ruling, ECW/CCJ/APP/07/10, 10 October 2010.

<sup>75</sup> *SERAP (Environment) v Nigeria and Others*, ECW/CCJ/JUD/18/12, 14 December 2012, para 18.

<sup>76</sup> See *Godwill Mrakpor and 5 Others v ECOWAS Authority of Heads of State and Government* Preliminary Ruling – Provisional Measures ECW/CCJ/ADD/01/11, 18 March 2011, para 13-16.

While the answer given to Mr. Mrakpor is understandable, it is suggested that non-governmental organisations with human rights mandates should not be treated on the same footing as individuals when it comes to issues of standing. This suggestion should apply at least to civil society organisations involved in the protection and promotion of public interest rights or pursuing such interest, at least for cases of human rights violation. That approach was actually the one adopted by the Court in the *SERAP* cases referred to earlier in this section.

It was therefore surprising that, in the case of *Centre for Democracy and Development and Another v Niger*, decided in May 2011, the Court held that the two NGO complainants lacked standing as ‘only natural persons could trigger its human rights jurisdiction’. By doing so, the ECCJ entertained the defendant state’s argument that the applicant needed a mandate from the people of Niger in a matter concerned with an unconstitutional presidential term extension and the use of the military to quash peaceful demonstrations.<sup>77</sup> The *Centre for Democracy and Development* case being a clear departure from the *SERAP* precedents, the Court ought to have explained the rationale behind such a change of approach to *actio popularis* and public interest-based standing.

The shift is also subject to criticism in the sense that the Court itself rightly interpreted the word *personne* in article 10(d) of the French text of the 2005 Protocol as meaning natural or legal persons, and therefore held that, to enjoy full standing before it, legal persons must have legal capacity nationally and prove direct injury.<sup>78</sup> Unfortunately, the Court took the position that even assuming the human rights NGO complainants had legal capacity in their state of registration, they were not direct victims and had no interest in the matter.<sup>79</sup> As the Court held, because the two human rights NGOs were registered in Benin and Nigeria respectively, and the challenged acts affected directly only persons within the jurisdiction of Niger, the complainants were not direct victims and therefore lacked interest and standing.<sup>80</sup>

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<sup>77</sup> *Centre for Democracy and Development and Another v Niger*, Arrêt ECW/CCJ/JUD/05/11, 9 May 2011.

<sup>78</sup> As above, para 27.

<sup>79</sup> As above para 28.

<sup>80</sup> As above para 29.



Arguments submitted by the parties in the subsequent case of *RADDHO v Senegal*<sup>81</sup> heard in March 2012 illustrate well the contradictions which the Court had entertained and which it was called to clarify for the sake of its jurisprudential authority. As a positive move, the preliminary ruling in the matter confirms the Court's decision to stick to the principles of *actio popularis* and public interest litigation by which litigants that have no connection with the victim or interest in the matter may initiate human rights suits.<sup>82</sup>

How the Court evaluates monetary damages has been another bone of contention with at least one defendant state. In a decision which was called for review, The Gambia challenged the whole judgment, among others on the grounds that the Court failed to provide details on how it arrived at the \$200 000 awarded to the plaintiff in the *Saidykhan* decision. The respondent state equally demanded the Court's guidance on why the amount was expressed in US dollars while the complainant had always used the Gambian Dalassi. The state particularly challenged the lack of method of calculation, which in its view had no connection with the earning capacity of the complainant or the injury suffered.<sup>83</sup>

Having said that, arguments stated above raise doubt about The Gambia's intention of complying with the order. This argument is reinforced by the state's contention that the amount is outrageous and paying such compensation will transform the complainant into an 'instant millionaire' which, as argued in the written submissions, is not the actual purpose of reparation by compensation. Moreover, the Court provided reasons why it put forward that amount of compensation. The Court began by stating that the object of awarding damages for human rights violations is to remedy violations and restore dignity and rights.<sup>84</sup> The Court then established that the complainant had to abandon his job and flee the country as a consequence of the violations complained of. It consequently

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<sup>81</sup> *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) (with the support of the Centre for Human Rights) v Senegal*, Application ECW/CCJ/APP/03/12, 17 February 2012.

<sup>82</sup> The decision was not available yet as at November 2013. However, the ruling was confirmed by the Registrar of the Court at a workshop organised by the Media Foundation for West Africa, Abuja, July 2012.

<sup>83</sup> See Ministry of Justice of The Gambia, Application for review of judgment, 31 March 2011.

<sup>84</sup> *Saidykhan v The Gambia*, para 43.

decided to ‘consider the loss of job, loss of earnings and illegal detention for 22 days, and physical injury that has caused pain and suffering in assessing damages’.<sup>85</sup>

Such details give at least some guidance as to which elements were considered by the Court while deciding the amount of compensation. Providing parameters in the *Saidykhan* case may be seen as a positive development since the Court had given far fewer indications in previous cases. In the *Koraou Slavery* judgment for instance, the Court merely regretted that the complainant did not support her compensation request with any method of calculation. It concluded that ‘an all-inclusive sum of money’ can be granted.<sup>86</sup> The Court then went on to vaguely indicate that the complainant was subject to ‘physical, psychological, and moral harm due to nine years of slavery’.<sup>87</sup>

The *Manneh* case concerned with illegal detention and fair trial rights violation is probably one of the most elaborated illustrations of the Court’s attempt to explain its evaluation of damages. The Court itself has referred to that precedent in the *Saidykhan* case. In the *Manneh* judgment, after extensive discussion of various categories of damages and their use by both the European and Inter-American human rights Courts, the ECCJ set aside punitive damages as irrelevant in human rights cases. The Community Court then satisfied itself that the purpose of compensation is to ensure ‘just satisfaction and no more’.<sup>88</sup> The Court, however, stressed that the complainant must put sufficient elements before it to justify the loss suffered and support the quantum requested. The ECCJ has reverted to similar arguments in the *Djotbayi* case concerned with illegal arrest, detention and media parading of suspects.<sup>89</sup>

In the practice of the European Court of Human Rights, the purpose of award is to compensate the complainant for the actual harmful consequences of the violation. The complaint must, however, show that pecuniary damage has resulted from the violation and submit relevant documentation to prove the existence and amount of damage. Only if there is no information can the Court make an estimate based on the facts of the case.

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<sup>85</sup> As above, para 45.

<sup>86</sup> *Koraou (Slavery) v Niger*, para 95.

<sup>87</sup> As above, para 96.

<sup>88</sup> See *Manneh v The Gambia*, paras 29-40.

<sup>89</sup> *Djotbayi v Nigeria*, paras 41-43.

As far as calculation is concerned, the Court may decide to take guidance from domestic standards.<sup>90</sup>

All in all, it is suggested that the ECCJ has provided at least some indications as to why it granted compensation even though a method of calculation has not been clearly set out. Although The Gambia's submission for review was thrown out for lack of new evidence in the *Saidykhan* case,<sup>91</sup> it could be argued that more clarity and consistency about why and how the quantum is reached could save the Court's resources, and strengthen its jurisprudence and authority.

Last but not least on the list of issues regarding the reasoning of the ECCJ is its reference to the jurisprudence of already existing continental human rights bodies. The Community Court has never as at November 2013, which is in almost a decade of human rights adjudication, made a substantive reference to the jurisprudence of the African Commission in a judgment.<sup>92</sup> Even when the Community Court was presented with the best opportunity in the *SERAP Education* case, it did not acknowledge the landmark *SERAC* socio-economic rights case decided by the Commission.<sup>93</sup>

It must be clarified that the ECCJ does not have any legal obligation to rely on decisions of the African Commission. However, as the ECCJ shares the African Charter with the Commission as the material basis of their jurisdictions, jurisprudential harmonisation suggests that the Community Court avoids inconsistent interpretation and application by referring to the work of the Commission, which has been the main continental interpreter of the Charter for two decades until the African Court begun its operations in 2007. In addition, in the *SERAP Education* case, the ECCJ adjudicated socio-economic rights just as did the Commission in the *SERAC* case against the same state, Nigeria. Viljoen observes that 'showing more appreciation for complementarity between the decisions of [Regional Economic Communities] courts and its own mandate, the African Commission (...) called on The Gambian Government to 'immediately and fully comply with the ECCJ's

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<sup>90</sup> See European Court of Human Rights 'Just satisfaction claims: practice direction' [echr.coe.int/Documents/PD\\_satisfaction\\_claims\\_ENG.pdf](http://echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf) (accessed 14 June 2013).

<sup>91</sup> *Musa Saidykhan v The Gambia* ECW/CCJ/APP/11/07 Review judgment, 7 February 2012.

<sup>92</sup> At para 24 of the *Koraou Slavery* judgment, the ECCJ observed that it applies the African Charter without necessarily doing so in the same manner as would the African Commission.

<sup>93</sup> *Social and Economic Rights Action Centre v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

judgment in the *Manneh* case'.<sup>94</sup> There is evidence that the Commission has shown such appreciation. In 2008, it adopted a Resolution calling on The Gambia to comply with the ECCJ's judgment in the *Manneh* case. In 2013, the Commission has also expressly used legal arguments of the ECCJ's *Essien* judgment<sup>95</sup> in a decision relating to the right to work, particular the principle of equal work for equal pay.<sup>96</sup>

As none of the defendant states justified non-compliance by the limited reasoning of the Court in its judgment, and cases are almost equally shared among compliance and non-compliance instances, assessment of the 'reasoning' factor must be declared inconclusive but certainly not irrelevant. In all, the ECCJ has adopted depth and length in its judgments so far. However, some decisions of the Court have lacked clarity in their reasoning, while a consistent approach is also wanting in respect of important issues such as standing. Although none of the defendant states has expressly mentioned those issues to justify non-compliance, some review instances reveal a potential for non-compliance or resistance on the basis of the reasoning factor. Assuming such issues could be justified by the earliness of the ECCJ's operation, addressing them becomes central to strengthening the authority of the Court.

### 3.6 Formulation of the remedy or order

The hypothesis here is that the more exact and precise the order the more likely it is that states will comply with it. Again, this factor is more relevant to recommendations of the African Commission which evolved over the years from 'the total absence of remedies to the inconsistent prescription of remedies with varying precisions'.<sup>97</sup> Viljoen and Louw identified three categories of remedy: No remedy, vague remedies and specific remedies.

As a general trend, the ECCJ ordered specific remedies in all the cases investigated.<sup>98</sup> However, a closer examination reveals problematic or unclear orders in at least two important cases. One case attracted criticism for the recommendation-like feature of

<sup>94</sup> See F Viljoen *International human rights law in Africa* 2<sup>nd</sup> ed. (2012) 496-497.

<sup>95</sup> *Etim Moses Essien v The Gambia* ECW/CCJ/APP/05/07, 29 October 2007. In *Interights and Others v DRC* Communication 274/03 and 282/03 (2013) the Commission also referred to the ECCJ's judgments in the *Manneh* and *Koraou* cases.

<sup>96</sup> See *Dabalarivhuma Patriotic Front v South Africa* Communication 335/07 34th Activity Report (2013).

<sup>97</sup> Viljoen & Louw (n 4 above).

<sup>98</sup> For an overview, see Table B.

some paragraphs of its operative part. The same findings were criticised as *ultra petita*. Under a strict interpretation of the findings in the *Habré* case, the French word ‘ordonne’ - the Court orders - was used in only one of the five sentences of the operative part of the judgment. If one relies on the constant use of the word ‘order’ in other ECCJ’s decisions under review and generally, only the prescription that ‘Senegal respects the non-retroactivity principle’ should be considered as an order.

Yet, in the same operative part, the Court ‘declares’ that ‘Senegal must respect the decisions of its own domestic courts namely by respecting their *res judicata*’. The most recommendation-like<sup>99</sup> finding of the Court in the same case is another ‘declaration’ that ‘the African Union mandate to Senegal assigns the state rather with a mission to design and propose all appropriate modalities for prosecuting [Habré] within the strict framework of an *ad hoc* special criminal process of international character as practised under international law by civilised nations’.<sup>100</sup> It is suggested that although the word ‘order’ was not used in the formulation of these two declarations, the Court sought to explain what it meant by ‘respect of the non-retroactivity principle’ which is the only finding of the operative part preceded by the word ‘order’. This argument is supported by the fact that Senegal did not complain of the lack of clarity of the order which it took action to comply with.<sup>101</sup>

While the ordinary meaning of the express order would have requested Senegal to stop trial arrangements, some commentators initially suggested that the ECCJ’s judgment obligated Senegal not to renounce the trial but set up an international special criminal tribunal for such purpose.<sup>102</sup> This argument is again supported by the fact that Senegal did not complain of the lack of clarity of the order and took action to comply. Notwithstanding this fact, the impact of July 2012 ICJ’s judgment in the case of *Belgium v Senegal* cannot be ignored. In addition, although a stranger to the case, the African Union

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<sup>99</sup> The nature of this finding may be justified by the very fact that the ECCJ cannot order the African Union.

<sup>100</sup> ECW/CCJ/JUD/06/10, 18 November 2010, para 61(4).

<sup>101</sup> See for instance, interview with B N’do Pabozi, Legal Expert, Assistant to the President of ECOWAS Court of Justice (Dakar, 12 October 2011). This is confirmed by the decision of African Union’s Heads of State and Government to instruct that Senegal complies with the ECCJ’s ‘recommendation’. See discussion in case law narrative under chapter four of the present study.

<sup>102</sup> See for instance, interview with B N’do Pabozi, Legal Expert, Assistant to the President of ECOWAS Court of Justice (Dakar, 12 October 2011).

has also instructed Senegal to internationalise the domestic mechanisms initially envisaged for the trial of Habré ‘in compliance with the ECCJ’s judgment’.<sup>103</sup> In any case, the compliance narrative in chapter four of this study counts all three findings in the ECCJ’s judgment as orders for the purpose of analysis. In all, issues raised about the formulation of the orders did not have a great bearing on Senegal’s compliance behaviour.

One may not be as imperative about the *Ameganvi (Togolese parliamentarians)* case which comes under scrutiny for a lack of clarity of the order to remedy the violation of the right to be heard. Just a few weeks after the judgment was issued, disputes have raged over the interpretation of orders made by the Court in the case.<sup>104</sup> Awaiting transmission of the judgment, the Government of Togo is reported to have issued a communiqué declaring that it takes note of the fact that the ECCJ ‘dismissed the applicant’s claim to be reinstated as Members of the Parliament thus recognising decisions of the Constitutional Court of Togo as final and irrevocable’.<sup>105</sup> Actually, the Community Court held in the judgment that the process leading to the replacement of the parliamentarians was unfair and thus illegal. However, in the operative part, it failed to clearly order that the MPs be reinstated. The order rather read that the Government must ‘remedy’ the violation of their right to fair hearing which would have logically, had the process been held afresh and fairly, led to the MPs’ restating that they had never resigned in the first place. Their reinstatement would have been inevitable.

Whether there was any prospect for the process to be repeated at all - considering the political stakes of the case - has been considered earlier with a negative conclusion. Arguably, the ECCJ avoided making an express declaration that the Constitutional Court decision authorising their replacement was null and void, thus sticking to its *Ugokwe* precedent of not being an appeal court vis-à-vis national courts. The Community Court took a similar position in previous judgments, namely in cases concerned with strictly

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<sup>103</sup> See discussion in case law narrative under chapter four of the present study.

<sup>104</sup> *Ameganvi and Others v Togo*.

<sup>105</sup> See T Kossi ‘TOGO: la notification de l’affront à l’Etat togolais attendue dans le courant de la semaine’ <http://www.togosite.com/?q=node/1699> (accessed 5 November 2011).



electoral matters<sup>106</sup> and undue delay in domestic courts.<sup>107</sup> Interestingly, subsequent developments of the case show that the ECCJ ought to have come up with a clearer order in respect of reinstatement.

In the face of the obvious lack of clarity, an interpreter had to step in and clear doubts raised by the Government's communiqué. The Deputy Registrar of the ECCJ had no doubt that 'The Court's pronouncement is very clear. The Court determined that the process leading to the exclusion of the parliamentarians was illegal and, as a consequence, the Government of Togo must remedy the harm caused to those complainants. I believe that it is left to Togolese authorities to draw the consequences of the Court's decision. Since the process is invalid, the first consequence is the reinstatement of the MPs and then the payment of compensation'.<sup>108</sup> For the sake of credibility, the ECCJ ought to release parties from the burden of interpreting its decisions. This is more so where 'drawing consequences' recalls the ambiguous and most criticised wordings of the recommendations of the African Commission at a point in time.<sup>109</sup>

There is an important lesson for the Court to learn from its failure to make a clear order, particularly in the *Togolese Parliamentarians* case. Despite the fact that the government of Togo executed an ECCJ judgment (the pecuniary order in the first judgment) within the shortest time frame, the ECCJ still had to face its self-imposed censorship as counsel for complainants seized the Court afresh to explain what it meant by 'remedy the violation'. To the disappointment of the complainants, the Court declined to order their reinstatement as their counsel rather sought a declaration that the ECCJ had failed to address the reinstatement, a question which the Court responded it did answer.<sup>110</sup> Considering his awareness and personal involvement in the history of the case, it is suggested that counsel should have simply claimed further damages in reparation of

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<sup>106</sup> *Ugokwe v Nigeria*. See compliance narrative under chapter four. The matter had been heard domestically by both the electoral tribunal and appeal court.

<sup>107</sup> *Koraou v Niger, Slavery* case. See compliance narrative in chapter four. Domestic courts had either failed to proceed in a reasonable time or had ignored considering slavery at all.

<sup>108</sup> See Kossi (n 103 above).

<sup>109</sup> See for instance G Naldi 'Future trends in human rights in Africa: The increased role of the OAU' in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* (2002) 1.

<sup>110</sup> See discussion under compliance narrative in chapter four.

unlawful exclusion as he should have known even an explicit reinstatement order would have received no better compliance either.

From the ongoing, one could conclude that the formulation of the remedy had some bearing in the behaviour of the defendant states in the *Togolese Parliamentarians* case but not necessarily in the *Habré* case. In the first case, notwithstanding political implications, a clear order to reinstate would have spared the Court public criticisms, a fierce dispute over the meaning of the order to ‘remedy’ and a review judgment. In the second case, it is more delicate to argue that a clear order to try Habré would have led Senegal to comply without delay. This is because Habré’s trial was an ancillary issue. In addition, for almost two decades, highest political authorities in Senegal had shown little willingness to try Habré.

The causality between the formulation of the order and compliance is conclusive in at least one instance. In the rest of the cases, none of state parties, litigants or their counsels has complained of the inappropriate formulation of the remedy or order. Submissions for revision were not directed at unclear orders either.

### **3.7 Tempered judicial lawmaking for sustained legitimacy**

From the foregoing, it is suggested that both the reasoning of the ECCJ and its formulation of remedies and orders are part of an overall adjudication and jurisprudential policy that aims at ensuring state compliance and continued cooperation. The subsequent analysis therefore covers the two precedent sections.

There is an argument that states comply with judicial orders when and because they deem such orders legitimate. The presumption is that legitimacy affords authority, which in turn generates compliance. In other words, legitimacy provides a perception of rightness.<sup>111</sup> The relevant question in this study is whether international courts such as the ECCJ lose legitimacy because of controversial rulings or too bold judicial lawmaking. An empirical comparative study brings illustrations from three continents by showcasing namely the European Court of Justice, the Tribunal of Justice of the Andean Community

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<sup>111</sup> On legitimacy as predictive of compliance, see Oran Young (1979) *Compliance and public authority* cited in Simmons (n 46 above) 77; I Hurd ‘Legitimacy and authority in international politics’ (1999) 53 *International Organization* 381.

in Latin America, and the ECCJ.<sup>112</sup> The study reaches conclusions that support the argument of a connection between the ECCJ's cautious lawmaking and state compliance with its decisions thus far.

The main finding is that international courts do not gain legitimacy by refraining from making controversial rulings. Constrained lawmaking could actually weaken the authority of a court. For instance, the Andean Tribunal avoided clashes with Government by refusing to reverse non compliant domestic practices but lacked the strength to develop Community law. In turn, the Tribunal has been stronger specifically on intellectual property rights due to domestic support on that branch of Community law.<sup>113</sup>

A related finding is that caution in judicial lawmaking does not necessarily afford legitimacy or avoid political challenges. As an illustration, the ECCJ's refusal to grant individual access through a purposive interpretation of *locus standi* rules in the *Afolabi* case resulted in political support for the West African Court, whose mandate was expanded through the 2005 Supplementary Protocol. Conversely, a prudent lawmaking in the *Ameganvi (Togolese Parliamentarians)* and *Gambian journalists'* cases did not spare the Court strong criticisms. Conversely, the ECCJ's interpretative application of non-exhaustion of local remedies was challenged by Government but the Court arose stronger.

In conclusion, judicial lawmaking becomes risky when it purpotes to create new rights or obligations that limits state discretion or are expressly forbidden. A relevant example is the East African Court of Justice's approach of adjudicating human rights related matters by reading through its mandate to interpretate Community law. The EACJ thus circumvented its express lack of jurisdiction to entertain human rights claims. While the Court faced no political challenge, at least not in response to that course of action, similar lawmaking trends led the SADC Tribunal to dissolution.

There is a suggestion that what is acceptable in judicial lawmaking is to explore what was left unspecified but not add to the existing legislation or fill gaps that supplementary

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<sup>112</sup> See L Helfer and K Alter 'Legitimacy and lawmaking: The tale of three international courts' (2013) 14 *Theoretical Inquiries in Law* 479.

<sup>113</sup> As above 491-494.

legislation should have filled. The illustration is provided by the ECJ, which gave direct effect to some state commitments in the Treaty of Rome by guessing from the Commission what states could accept at a particular point in time. The ECJ's approach to lawmaking has also been progressive and embraced constant cooperation with domestic actors, particularly by empowering national courts to own the development of Community law.<sup>114</sup>

Arguably, an explanation for the ECCJ's caution in adjudicating human rights is the Court's awareness of the challenges related to state compliance. For instance, over the years, the ECCJ has reinforced standards of proof and limited the scope of orders issued against states. Regarding pleading and proof requirements, in *Keita v Mali*,<sup>115</sup> the ECCJ has demanded that the complainant specified the right violated, while asking for 'sufficient, convincing and unequivocal' evidence in *Garba v Benin*.<sup>116</sup>

As exemplified above, the ECCJ has also used circumspection with regard to remedies. In the *Koraou Slavery* case, it awarded \$20 000 to the complainant but refused to find the state responsible for the laws, practices and customs that gave rise to the violations. In the *SERAP Education* judgment, the Community Court did not follow-up on the request to allocate funds to educate all primary school age children, yet it ordered that the embezzled funds be replaced and officials be prosecuted.

In what could be perceived as triggering the Government's responsibility only indirectly, the ECCJ condemned Nigeria in the *SERAP Environment* case for failing to regulate the activities of multinationals in the Niger Delta. However, the Court rejected a demand for \$1 billion in damages on the ground that the complainants failed to identify specific victims and that mass damages would be impracticable in terms of 'justice, morality, and equity'.<sup>117</sup> In addition, the Abuja judges have consistently rejected human rights claims

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<sup>114</sup> As above 486-490.

<sup>115</sup> ECW/CCJ/APP/05/11, Judgment of 11 June 2012, para 34.

<sup>116</sup> ECW/CCJ/APP/09/08, Judgment of 17 February 2010, para 39.

<sup>117</sup> *SERAP Environment* judgment, paras 113-115. For a discussion on the ECCJ's remedial policy see K Alter et al 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 108 *American Journal of International Law* 29-30.

against non state entities, such as corporations, as exemplified in the *SERAP Environment* judgment.<sup>118</sup>

In a similar vein, the ECCJ has upheld states' arguments based on domestic law as was the case in *Manneh v The Gambia*. As discussed under the compliance narrative in chapter IV, faced with the defendant state's non-compliance, representatives of the complainant requested a declaration that his disappearance violated the right to life and demanded compensation. Having awarded \$100 000 in damages in its first judgment, the ECCJ agreed with the defendant state that such application was premature in terms of the state's domestic legislation, The Gambia's Evidence Act. According to that law, death may be presumed only upon seven years of disappearance.<sup>119</sup>

### **3.8 Follow-up: A political option under the 2012 Supplementary Act?**

Just as the African Commission, the ECCJ has no explicit mandate to undertake follow-up measures to ensure that state parties comply with its orders. As a court, the ECCJ's job is therefore supposed to end with the delivery of judgments. In the African human rights system, the African Commission has developed several follow-up practices including sending letters to state parties, undertaking promotional or protection visits to follow-up on state compliance, incorporating follow-up measures in its findings and questioning government delegates during state reporting.<sup>120</sup> The African Commission undertook follow-up action in four of the six compliance cases. Because the Commission did not take follow-up action in respect of any non-compliance cases, the authors concluded that the factor was relevant to state compliance with the decisions of the Commission. They consequently noted that the absence of an express follow-up provision in the African Charter has inhibited state compliance.

Other regional systems provide for an express follow-up mechanism. In the European and African human rights systems; the Council of Europe's Committee of Ministers and

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<sup>118</sup> See *SERAP Environment*, para 69-71. The Court consistently applies the same rules to private parties and subnational political bodies as was the case respectively in *David v Uwechue* ECW/CCJ/APP/04/09, Ruling of 11 June 2010, para 48 and *Hassan v Nigeria* ECW/CCJ/APP/03/10, Judgment of 15 March 2012, para 41.

<sup>119</sup> See *MFWA (on behalf of Manneh) v The Gambia*, Judgment of 6 February 2012.

<sup>120</sup> See Viljoen & Louw (n 4 above) 17.

African Union Executive Council are mandated to monitor the execution of their respective human rights courts' decisions. America has taken a judicial approach to compliance monitoring as discussed earlier. The EAC Council of Ministers has a similar role with regard to enforcement of decisions of the EAC Court of Justice.<sup>121</sup>

Unlike findings of the African Commission,<sup>122</sup> the ECCJ's judgments are not only expressly binding but also backed with a detailed implementation procedure and non-compliance sanctions. Implicit compliance monitoring in the Treaty and Court Protocol is fleshed out and backed by sanctions in the 2012 Supplementary Act. The situation following the adoption of the Act is therefore one of multiple routes that all lead to a compliance-monitoring procedure finalised by the political organs of ECOWAS. Under the Act, individuals, legal entities, member states and institutions of the Community, including the Court, may report non-compliance to the President of the Commission. Monitoring reports of the Commission are submitted to the Council of Ministers, which then makes recommendations to the Authority as to what sanctions to mete against the non-compliant state.<sup>123</sup> A coherent analysis of the system as it stands requires reading the provisions in various instruments together and going through the mechanism in an orderly fashion.

### 3.8.1 The Court and defendant states

Prima facie, one may argue that responsibility as to whether judgments are ultimately implemented is primarily shared between the Court and defendant states. This is because, according to article 24 of the 2005 ECCJ Protocol, implementation of the ECCJ's judgments starts with the Court serving its decision on the defendant state together with a writ of execution. National authorities, already designated by member states, must then take it up by proceeding to enforce the judgment according to domestic rules of civil procedure. Only after the defendant state has failed to comply with the judgment may the enforcement or compliance-securing mechanisms be activated. In other words, a

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<sup>121</sup> See discussion of compliance experiences under chapter two.

<sup>122</sup> See for instance R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 54-55; and in general F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law*.

<sup>123</sup> See discussion of compliance norms and mechanisms under chapter two.



judicial or administrative implementation monitoring process is done at the Court level before the ultimate political monitoring mechanism is activated.

Actually, though the work of the ECCJ ends at the delivery of judgments in principle, the Court has always been concerned about the execution of its decisions.<sup>124</sup> The practice of the Court's successive Presidents or senior staff undertaking sensitisation visits to ECOWAS member states attests to such preoccupation.<sup>125</sup> Arguably, the ECCJ took this cooperative approach in the early years of its operation, while keeping the use of collective compliance securing mechanisms, such as the ECOWAS Authority and Commission, as a last resort. In effect, the ECCJ may also refer non-compliance findings directly to the Authority which has a mandate to 'oversee the functioning of Community institutions and follow-up implementation of Community objectives'.<sup>126</sup>

As at November 2013, the Court had never made use of this mechanism, arguably because it is implied but not expressly in the Treaty and Protocols. The ECCJ rather opted for including in its annual report, a list of its relevant decisions and whichever information it has at its disposal on the implementation of such decisions.<sup>127</sup> In addition, the Court writes to liable states once a year to remind them of their compliance records.<sup>128</sup> It should rather be said that the ECCJ reminds such states that judgments have been handed down against them. The Court does not seem to compile records of how states have

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<sup>124</sup> See Panapress 'Dix plaintes déposées devant la Cour de justice de la CEDEAO' <http://www.panapress.com/Dix-plaintes-deposees-devant-la-Cour-de-justice-de-la-CEDEAO--12-633050-99-lang4-index.html> (accessed 19 February 2011).

<sup>125</sup> For instance, Presidents of the Court visited Niger in 2005; between 2004 and 2006, sensitisation missions were conducted by senior staff and judges in Benin – Nigeria border, in Burkina Faso, Côte d'Ivoire, The Gambia, Niger, Mali and Senegal; in Guinea Bissau and Sierra Leone in 2007; Côte d'Ivoire in 2009; Benin and Ghana in 2011. A senior staff delegation visited Senegal in 2011. During such visits, members of the Court and its staff not only conduct awareness programmes to the attention of civil society organisations, legal professionals but also meet with top state officials including heads of state and ministers to stress the need to abide by their legal obligations. See ECOWAS Court of Justice 'Other activities of the Court' Annual Report (2007) 36-37; Kofi Net 'CEDEAO: la Cour de justice impressionnée par la Grande chancellerie' (2009) <http://www.koffi.net/koffi/actualite/63077-Cedeao-La-Cour-de-justice-impressionnee-par-la-Grande-chancellerie.htm> (accessed 29 May 2012); Sene News Actu 'Candidature de Wade en 2012: Que le Sénégal ne compte pas sur les juridictions sous-régionales pour arbitrer' (28 September 2011) <http://www.senenews.com/2011/09/28/candidature-de-wade-en-2012/> (29 May 2012).

<sup>126</sup> ECOWAS Revised Treaty, art 7(3)(b).

<sup>127</sup> The report has consistently been published thus far. See Interview with Advocate Athanase Atannon, Deputy Registrar, ECOWAS Court (Abuja, 10 May 2011).

<sup>128</sup> Interview Atannon.

implemented its orders, to what extent and within which time frame.<sup>129</sup> Subsequent to activities organised by the ECCJ, namely its October 2012 Conference in Accra, Ghana, the Abuja Court has based its compliance monitoring records on the results of the present study.

After exploring these routes, the ECCJ subsequently engaged in a more technical enterprise. Three main of such measures were adopted during an international conference which the Court organised in 2011 in Accra, Ghana. Firstly, the Court decided to set ‘sub-registries’ within ECOWAS national units for the purpose of facilitating both access to the Court and implementation of its judgments.<sup>130</sup> Secondly, the Court considers it as imperative for member states to designate the national authority which shall receive and enforce its judgments domestically.<sup>131</sup> Finally, an important recommendation of the 2011 Accra conference was to establish a *Comité de surveillance* (Follow-up Committee), the composition of which is to be determined, with a mandate to ‘follow-up on the execution of its judgments’.<sup>132</sup>

As detailed in the report, the ‘Follow-up Committee shall annually draw a compliance report exposing non-compliant states and making recommendations to the Authority on a case-by-case basis as deemed relevant’.<sup>133</sup> Finally, the report shall be ‘made public and submitted to the Authority with no change’. For the smooth implementation of the last recommendation, the ECCJ 2011 Accra Conference suggested that article 19 of the 1991 ECCJ Protocol<sup>134</sup> be amended to include a new provision on the ‘Follow-up Committee’.

While the compliance-surveillance mechanism was being put in place, from within the ECCJ sounded louder and more threatening voices about the imperative for states to

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<sup>129</sup> Interviews conducted by the author during a visit to the Court on 4 May 2012 revealed that the Court keeps no records of whether and how its judgments have been or are being complied with.

<sup>130</sup> See ECOWAS Court ‘Rapport général de la conférence internationale sur le thème: stratégies de renforcement de l’effectivité de la Cour de justice de la CEDEAO’ (on file with author) (Accra, 21-25 February 2011) 6-7.

<sup>131</sup> ECOWAS Court as above 8.

<sup>132</sup> ECOWAS Court as above 7.

<sup>133</sup> ECOWAS Court as above.

<sup>134</sup> The said provision deals with practical aspects relating to decisions of the Court and how they shall be made public.

comply and consequences of non-compliance.<sup>135</sup> The message of the Deputy Registrar in accordance with that reasoning is quite clear regarding misinterpretations entertained by the Togolese Government as to the findings of the ECCJ in the *Ameganvi (Togolese Parliamentarians)* case. The Deputy Registrar is reported to have warned that ‘the Government of Togo may not decide to defy to the ECOWAS Court of Justice by rejecting the reinstatement of the parliamentarians. Should this, however, happen, it would be a failure to abide by the [2005 ECCJ] Protocol which all member states have signed. I do not think and do not believe that Togo will want to oppose the decision of the Court. In any case, I wish the state could execute the judgment. Otherwise, it will put itself in an uncomfortable situation’.<sup>136</sup>

Under the 2012 Supplementary Act, the implied monitoring role of the ECCJ is clarified. By virtue of article 15(1) of the Act, the Abuja Court is one of the institutions of the Community, which is empowered to report non-compliance with its decisions to the President of the Commission. In the light of this new power, and capitalising on initiatives put in place prior to the Act, the present study suggests that compliance monitoring initiated by the Court should unfold in the following stages. At a first stage, the Court shall notify the decision to the defendant state together with a writ of execution. At a second stage, there shall be a determination on a case-by-case basis, and in cooperation with the state, of the timeframe within which the decision should be implemented, and a request for periodical state reports on implementation. A third stage will consist of preparing a compliance table and narrative as part of annual reports of the Court, publishing the report, and submitting it to the President of the Commission on an informational and preventive basis. The final stage will be one of preparation and submission of 2012 Supplementary Act non-compliance reports to the President of the Commission in case the time frame agreed on is not met.

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<sup>135</sup> As at November 2013, this procedure had not been implemented as the Court had yet to complete the operation of the mechanism. Interview with Advocate Athanase Attannon, Deputy Registrar ECCJ (Accra, October 2012).

<sup>136</sup> « *L’Etat du Togo ne peut pas vouloir défier la Cour de Justice de la CEDEAO en réfutant la réintégration des députés. Mais si cela arrivait, ce serait un manquement au protocole que tous les Etats ont signé. Je ne pense et ne crois d’ailleurs pas que l’Etat du Togo va vouloir s’opposer à la décision de la Cour. En tout cas, c’est cela mon souhait. Je veux qu’il mette en exécution la décision. Autrement, il se mettrait dans une situation inconfortable* ». See Kossi (n 103 above).

For this process to be rendered effective it is essential to operationalise the *Comité de surveillance* – or Monitoring Committee – proposed by the 2011 Accra Conference, whose membership should include judges and staff of the Court but should also involve litigants, defendant states, individual lawyers and civil society organisations. The Monitoring Committee should be in charge of overseeing the process. In addition, ECOWAS member states must designate the national authorities to receive and enforce judgments of the Court. This designation would facilitate the process though ECOWAS’s widely accepted practice shows that failure to designate cannot be an impediment or argument to shy away from compliance. Finally, the proposal to create sub-registries of the Court in member states should be implemented immediately as it will provide proximity and facilitate enforcement.

### 3.8.2 Individuals, legal persons and member states

As beneficiaries of ECCJ judgments, complainants may also undertake follow-up actions. While they could do so by instituting non-compliance suits in the Court before the advent of the 2012 Supplementary Act, the Act opened another avenue. Just as the Court, individuals may report non-compliance to the President of the Commission.<sup>137</sup> The same applies to NGOs as they clearly qualify as ‘any legal person’ as provided for in the Act.

Interviews and research revealed several cases of complainants filling non-compliance suits with the ECCJ, though indirectly. At present, individual lawyers, counsel for complainants and NGOs bringing cases on behalf of individuals have aptly substituted victims in undertaking follow-up actions. Data displayed in table B shows that, to date, lawyers, counsel and NGOs have had a quasi-exclusive initiative over follow-up in cases involving individuals. Actions have included sending letters to political authorities of the defendant states,<sup>138</sup> initiating new proceedings in execution of initial judgments,<sup>139</sup> or mounting media and international pressure against non-compliant states.<sup>140</sup>

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<sup>137</sup> See 2012 Supplementary Act, art 15(1).

<sup>138</sup> For instance in *SERAP v Nigeria*, and *Djotbaya v Nigeria*.

<sup>139</sup> As was the case in *Manneh v The Gambia*, *Saidykhan v The Gambia*, and *Ameganvi (Parliamentarians) v Togo*.

<sup>140</sup> In the cases against The Gambia but also in the *Habré* case to some extent.

In 2012, civil society organisations from ten ECOWAS countries have also, under the aegis of Media Foundation for West Africa, adopted a declaration with a view to mounting pressure on non-compliant states mainly by using the provisions of article 77 of the Revised Treaty.<sup>141</sup> In the era of the 2012 Supplementary Act, individuals may bypass the judicial non-compliance avenue and initiate a political compliance monitoring procedure by sending a simple letter to the President of the Commission. As discussed below, the process appears to be cost free for individuals since the political authorities are tasked to conduct the fact and information findings in full.

Considering their institutional capacities, civil society organisations should support individual reports to the Commission, especially in cases in which they are involved but also in cases of public interest or strategic litigation. However, civil society organisations may as well initiate reports individually or as coalitions namely for cases in which neither the Court nor the victims have done so. One of such initiatives is currently underway, which is to create a Coalition for the ECOWAS Court to support the work of the Court and advocate for the effectiveness of its decisions.<sup>142</sup>

In the exercise of their collective compliance securing duty, member states non-party to the dispute may, under the Revised Treaty, claim reciprocity rights towards non-compliant states. As the relevant treaty provision reads, the Authority 'shall refer where it deems necessary any matter to the Community Court of Justice when it confirms that a Member state or institution of the Community has failed to honour any of its obligations ...'.<sup>143</sup> Non-compliance with ECCJ's judgment in a case to which a state is party amounts to a failure to honour its obligations.<sup>144</sup>

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<sup>141</sup> See Media Foundation for West Africa 'Abuja Declaration adopted at the Regional civil society forum on the enforcement of judgments of the ECOWAS Community Court of Justice' (Abuja, 30 July 2012).

<sup>142</sup> The proposal was spearheaded by representatives of the Media Foundation for West Africa and the Centre for Human Rights and adopted by participants at an international conference organised by the ECOWAS Court in Accra, 15-19 October 2012.

<sup>143</sup> ECOWAS Revised Treaty, art 7(3)(g). Also in many national constitutions, at least those of Francophone African countries, applicability of international law is subject to compliance by other parties. In most regional integration schemes, compliance is secured not only by the Community as a whole through its organs but also by individual states who may act in the community court or organs against non-compliant states.

<sup>144</sup> ECOWAS Revised Treaty, art 77; and 2012 Supplementary Act, arts 1 and 2(2)3.

The 2012 Supplementary Act individualises a Member State's right to report non-compliance by another state to the President of the Commission.<sup>145</sup> It would be risky to predict that ECOWAS member states would deny solidarity and embrace naming and shaming by reporting peer states to the President of the Commission. However, as discussed below in greater detail, ECOWAS has a well-established practice of compliance monitoring as a Community of states. This practice makes room for member states to report a peer state's non-compliance as a group of states, namely through the Authority. Bigger states who fear no potential retaliation for reporting a peer may as well initiate non-compliance reporting.

### **3.8.3 The President of the Commission and Council of Ministers**

As discussed in previous chapters, under the Treaty and Court Protocols, the President of the Commission has implied powers to initiate compliance-monitoring activities. He or she may do so by including in its own report to the Authority, non-compliance information given in the annual report of the Court. The 2012 Supplementary Act fleshes out this role by placing the President of the Commission at the heart of the non-compliance reporting procedure. Not only should all reports be submitted to the President of the Commission, but the Commission itself may initiate reports as an institution of the Community. Granting such power to the Commission is more than relevant. Indeed, other institutions of the Community may be brought to the Court and become addressees of its orders. For instance, in labour suits brought by Community staff against an institution of the Community, the Commission should use its reporting prerogative. More importantly, if Community law is to develop, the Commission should spearhead purposive litigation and use its reporting powers to expose member states that drag the Community down by poor implementation practices.

However, the use of its powers by the Commission would reflect its relationships with member states and the Authority. Under the operation of the Treaty, internal observers already wondered whether the 'Chief Executive Officer' of the ECOWAS Commission might have the boldness to call member states before the Community Court for non-

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<sup>145</sup> See 2012 Supplementary Act, art 15(2).



execution of its judgments.<sup>146</sup> There was fear that the Commission behaved rather like an annexure to states and did not demonstrate the necessary independence to activate a follow-up provision.<sup>147</sup> This trend seems to be confirmed from within the Commission. The view is that, due to separation of powers, the ECOWAS Commission should avoid interfering with the independent operation of the Community Court.<sup>148</sup> Therefore, the Commission may follow up only upon referral from the Court and that has yet to occur.<sup>149</sup> On that basis, it is argued that the power granted to the Commission to report non-compliance to the political organs would not be used to its best advantage.

Notwithstanding the lack of recourse to compliance monitoring thus far, there is evidence that the President of the ECOWAS Commission is concerned about state compliance with the ECCJ's judgments. On relevant occasions the President has called upon states to comply with orders made by the Court in cases to which they were party.<sup>150</sup> The Commission has several opportunities to channel findings of its follow-up activities to the Authority. Under the current practice, the President of the Commission submits reports on Community activities to all meetings of the Authority and ECOWAS Council of Ministers.<sup>151</sup> The Council meets at least twice a year<sup>152</sup> and the Authority meets at least once a year.<sup>153</sup> It should normally be assumed that once the Commission has channelled compliance reports to the Authority, the Council would be tasked with the diplomatic stage of securing compliance. This is because the Council is both the technical and legal adviser of the Authority. As indicated earlier, there is no evidence yet of the use of this follow-up mechanism by the ECOWAS Commission or any other ECOWAS political organs.

Again, the 2012 Supplementary Act leaves no room for doubt about the powers of the Commission to report non-compliance. Placing the Commission as the starting point of

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<sup>146</sup> See Interview with Advocate Abdoulaye Bane, Researcher, ECOWAS Court of Justice (10 May 2011).

<sup>147</sup> Interview Advocate Bane.

<sup>148</sup> See Interview with Mr. Eyesan Okorodudu, Principal Programme Officer, Democracy and Governance, Department of Political Affairs, Peace & Security, ECOWAS Commission (11 May 2011).

<sup>149</sup> Interview Mr. Okorodudu.

<sup>150</sup> AllAfrica 'President Gbeho urges speedy compliance with Decisions of ECOWAS' (5 July 2011) <http://allafrica.com/stories/201107051050.html> (accessed 15 Sept. 2011).

<sup>151</sup> ECOWAS Revised Treaty, art 19(3)(e).

<sup>152</sup> ECOWAS Revised Treaty, art 11(1).

<sup>153</sup> ECOWAS Revised Treaty, art 8(1).

the political monitoring procedure is understandable. As article 22(3) of the 1991 ECCJ Protocol reads, ‘Member states and institutions of the community shall take immediately all necessary measures to ensure execution of the decision of the Court’.<sup>154</sup> From experience it may be said that institutional follow-up has more coordinated potential than individual states’ actions to secure compliance.

This hypothesis leads to suggest that the President of ECOWAS Commission is the best positioned to give life to the follow-up mechanism. As indicated earlier, the President of ECOWAS is the chief ‘executive officer’<sup>155</sup> and ‘legal representative’<sup>156</sup> of ECOWAS and ‘its institutions in their totality’.<sup>157</sup> The President is therefore legally and legitimately positioned to demand that states abide by their duties to the Community. However, it seems that the Commission is empowered to receive non-compliance reports on behalf of the Council of Ministers. Article 15(2) of the 2012 Supplementary Act provides that ‘all reports shall be made to the Council of Ministers through the President of the Commission’. The Commission is therefore envisaged more in a secretarial role.

In the light the practice in the European human rights system, one would expect the ECOWAS Council of Ministers to follow up on state compliance with ECCJ’s judgments.<sup>158</sup> The problem is that functions of the Council are more of general affairs, including that it shall ‘make recommendations to the Authority on any action aimed at attaining the objectives of the Community’ or ‘request advisory opinions from the Community Court of Justice on any legal questions’.<sup>159</sup>

However, article 15(2) of the 2012 Supplementary Act places the Council of Ministers as the political body which receives non-compliance reports through the Commission. All fact-finding activities undertaken as part of the procedure are therefore on behalf of the Council of Ministers to which the President of the Commission reports. As a matter of fact, any decisions, including the timeframe for answering questions or implementing the

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<sup>154</sup> 1991 ECOWAS Court Protocol, art 22(3).

<sup>155</sup> ECOWAS Revised Treaty, art 19(1).

<sup>156</sup> ECOWAS Revised Treaty, art 88(3).

<sup>157</sup> ECOWAS Revised Treaty, art 19(2).

<sup>158</sup> In terms of article 10(2) of the ECOWAS Revised Treaty, the Council shall comprise the Minister in charge of ECOWAS affairs and any other Minister of each member state.

<sup>159</sup> ECOWAS Revised Treaty, arts 10(a) and 10(h).

decisions concerned, are made by the Council and channelled to the state through the Commission. Finally, the Council decides whether the state still failed to comply after facts finding consultations and makes recommendations to the Authority for sanctions.

### **3.8.4 The Authority of Heads of State and Government**

The Revised Treaty makes room for the Authority to get involved in compliance monitoring and enforcement. First, article 7(3)(b) of the Treaty provides that ‘the Authority shall oversee the functioning of Community institutions and follow-up implementation of Community objectives’. Article 77 then empowers the Authority to mete out sanctions against states that fail to abide by their community obligations. The 2012 Supplementary Act clarifies that decisions made by the Court constitute obligations within the meaning of article 77 of the Treaty. The Act designates the Authority as the final decision-making body in the compliance monitoring process. Upon receipt of the report and recommendations of the Council of Ministers, the Authority decides on the basis of the list drawn under articles 5 to 12 of the Act which sanctions to impose on the non-compliant state. Imposition of sanctions for non-compliance is discussed in the next chapter under factors relating to peer pressure and the political will of the umbrella organisation.

It transpires from the on-going that follow-up monitoring or supervision of compliance with the decisions of the ECOWAS Court is only a matter of time. All is in place for it to happen. According to more specific timeframe provisions of the Act and all other provisions read together, the present study suggests that the political compliance-monitoring process should unfold in the following steps. The process would begin with seizure of the President of the Commission through non-compliance reports by individuals, legal persons, member states, the President of the Commission, the Court or any other organ of the Community. The President of the Commission would then notify the report to the state concerned with a request to comply within 30 days of the notification or enter a defence. The 30-day fact-finding investigation by the President

would follow, upon the expiry of the 30-day period given to the state to comply or enter defence, to verify whether the state has complied. The next step will involve a notification of the fact-finding report to the state and report to the Council of Ministers at its next meeting.

If non-compliance is constituted and the state has not taken or begun to take any implementation measures upon the launching of the fact-finding investigation, the President of the Commission would submit a memorandum to the Council of Ministers on the case. The Council fixes a deadline for the state to comply. If upon the expiry of the deadline the state has not complied, the Council makes a recommendation to the Authority as to what sanctions to mete out against the state.<sup>160</sup>

Imposition and follow-up on non-compliance sanctions are discussed in chapter six under the section on the political will of the umbrella organisation. At this point, it may be concluded that ECOWAS opted for a compliance-monitoring mechanism that is two-entry, political and judicial, but with the political process as final. The 2012 Supplementary Act itself provides for two overall categories of sanctions, which are judicial and political, which means both processes may be used to monitor compliance.<sup>161</sup> In other words, the political process does not exclude non-compliance suits in the Court prior to reporting non-compliance to the political bodies.

This approach is purposive because it might be difficult for complainants to establish non-compliance or indeed practically impossible to do so for various reasons, including cost limitations or threats from the defendant state. Another reason for using the judicial process before resorting to the political one is that a non-compliance report by the Court might carry greater authority and neutrality than individual reports. In addition, the Treaty provides that the Authority 'shall refer where it deems necessary any matter to the Community Court of Justice when it confirms that a Member State ... has failed to

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<sup>160</sup> See discussion of relevant provisions of the 2012 Supplementary Act under the section on follow-up, a political option in chapter five.

<sup>161</sup> See 2012 Supplementary Act, art 3(1).

honour any of its obligations'.<sup>162</sup> It follows that the political bodies may decide to use the judicial mechanism before reverting to the political one.

#### 4. Conclusion

This chapter has undertaken an empirical analysis of factors that could be seen as predictive of state compliance with the judgments of the ECOWAS Community Court of Justice. Focus was placed only on factors relating to the Court and compliance-monitoring mechanisms on the understanding that other factors are dealt with in the next chapter.

Although some factors appear to matter more than others to why states have complied with the ECCJ's judgments, all factors carry some importance in the particular perspective of comparing the ECCJ regime with the African Commission-based system. The maturity factor can be considered to be irrelevant in respect of the ECCJ due to the limited duration of its operation and number of cases discussed. Yet, the same factor could be relevant if considered in the comparative approach *a contrario*.

Except for one case, the ECCJ enjoyed overwhelming state involvement as, of the 15 ECOWAS states, 13 have participated in proceedings before the Court in cases to which they were a party. As far as domestic proceedings prior to instituting the matter in the ECCJ are concerned, they appear to have influenced the adjudicatory policies of the Court, namely in respect of the findings and orders. Some of the orders discussed appear to have seen fast compliance.

Although only a minority of defendant states has challenged the reasoning of the ECCJ with regard to monetary compensation, other issues point to the importance for the Court to adopt a more accurate and consistent approach for the sake of authority. The same applies to the formulation of orders and remedies in respect of which at least one case has demonstrated how critical specific findings can prove to be to compliance.

Compliance follow-up and monitoring mechanisms have yet to operate in practice. It is, however, interesting to note the diversity of judicial and political mechanisms provided

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<sup>162</sup> ECOWAS Revised Treaty, art 7(3)(g).

for. Even if the impact of these procedures can only be speculative in these early years of their establishment, they have the potential of proving relevant to compliance as the regime grows.





## **CHAPTER VI: Compliance factors relating to the cases, defendant states and political pressure**

### **1. Introduction**

Analysis in this chapter follows on the discussion under chapter five of factors that have influenced the behaviour of study countries towards judgments of the ECCJ. The chapter focuses on cases studied, the domestic environment of defendant states, and political pressure within ECOWAS and from international actors.

As indicated in the introduction to the previous chapter, methodology and benchmarks adopted there apply to this chapter. Factors related to the case include the nature of the right violated, the nature of the duty imposed on the state, the scale of the violation, and the nature of the remedy. The defendant state factor speaks to the situation prevailing in the state. Two related sub-factors include the involvement of non-governmental organisations and the media in the case. Finally, the political pressure factor relates not only to ECOWAS but also to international actors as having exerted or having the potential and willingness to exert influence on states' behaviour towards the decisions of the ECCJ.

The conclusion to this chapter contains overall conclusions on compliance factors that apply to the previous chapter. Before closing, the discussion singles out some of the most important differentiating factors between the ECOWAS human rights regime and the African system.

### **2. Factors related to the case**

As the authors discussed in the reference study, state compliance has also been moved by issues relating to the specific dispute. Variances will therefore refer to the nature of the rights violated, whether violations found imply a duty on the government to respect, protect or fulfil; the scale of the violations, and the remedy required.

#### **2.1 Nature of the right violated**

Authors of the reference study explained that although the 'three generations' division of human rights has lost much of its 'currency', it is still relevant to African Charter-based adjudication. This is mainly because, as they justify, socio-economic rights are justiciable

and equal to other rights in the African Charter which is the first international human rights instrument of such kind. Furthermore, the Charter contains a detailed list of collective ‘peoples’ rights’. The study concluded that non-compliance instances likely pertain to the violation of civil and political rights although the authors are quick to indicate that by far the majority of cases decided by the African Commission deals with such rights.

An analysis of the data displayed in table C shows that the overwhelming majority of cases decided by the ECCJ are concerned with civil and political rights, while socio-economic and ‘solidarity’ rights have also been determined. Compliance instances involve civil and political rights, but also one case of socio-economic rights. The majority of civil and political rights cases pertain to arbitrary arrest, detention, torture and violations of fair trial rights, thus articles 6 and 7 of the African Charter.

Finding that all socio-economic rights cases fell in the category of full non-compliance, the reference study suggested that states could still consider those rights as less justiciable.<sup>1</sup> In the present study, civil and political rights cases are almost equally shared among compliance and non-compliance instances. Although the only socio-economic rights case fell within compliance, there is still an interest in discussing the particular circumstances that have guided such behaviour, and what would have explained non-compliance in the specific domestic environment of the defendant state. In the *SERAP Education* case the respondent state, Nigeria, was ordered to provide 3.5 billion naira<sup>2</sup> to ‘cover the shortfall to ensure smooth implementation of the education programme’ in ten states of the Federation.

Consider first, the idea that non-compliance with a socio-economic rights case would be justified by the fact that those rights are considered as less or non justiciable. That assumption may not necessarily or exclusively be relevant in the *SERAP Education* case decided by the ECCJ. This is because in its judgment, the Court confirmed the justiciability of socio-economic rights under the African Charter. It appears, contrary to the common

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<sup>1</sup> See F Viljoen & L Louw ‘State compliance with the recommendations of the African Commission on Human and Peoples’ Rights 1994-2004’ (2007) 101 *The American Journal of International Law* 18.

<sup>2</sup> Approximately \$22 million.

view, that those rights are justiciable in Nigeria not only through the domestication of the African Charter but also through domestic judicial precedent. Neither the provision for these rights under the DPSP umbrella in the Nigerian Constitution nor the fact that most domestic courts have taken the position that those rights are not justiciable would change this fact.<sup>3</sup> As a matter of fact, Nigeria has never rejected the *SERAP Education* judgment.<sup>4</sup> In addition, the same state has adopted quite progressive new rules of fundamental rights enforcement which are believed to have the potential of significantly advancing human rights litigation in domestic courts.<sup>5</sup>

As discussed under chapter seven's section on the influence of the *SERAP Education* judgment on Nigerian courts, the issue of justiciability of socio-economic rights in Nigeria is less one of constitutional limitation of those rights than one of a wrong interpretation of the relevant provisions of the Constitution and related issues. The suggestion that Nigeria could afford less importance to socio-economic rights in its laws is also flawed by the facts that many courts have ruled that they are justiciable.<sup>6</sup> One more argument in support of justiciability is that Parliament has the power to make legislation on any provision of the Constitution including those under the Directive Principles of State Policy, where some socio-economic rights are entrenched.<sup>7</sup> Finally, if Nigeria does not dispute the fact that those rights are justiciable under the African Charter as it did by

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<sup>3</sup> On the non-justiciability of socio-economic rights in Nigeria, see CA Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327-369; O Nnamuchi 'Kleptocracy and its many faces: The challenges of justiciability of the right to health care in Nigeria' (2008) 52 *Journal of African Law* 1-42; S Ibe 'Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities' (2010) 10 *AHRLJ* 197-232; and Centre for Social Justice Limited by Guarantee 'Justiciable constitutionalisation of economic, social and cultural rights: A framework for action' A contribution to the planned review of the Constitution of the Federal Republic of Nigeria 1999 (Unpublished conference paper on file with author) (2010).

<sup>4</sup> However, Nigeria filed an application for review in the case of *Djotbayi and 9 Others v Nigeria*, ECW/CCJ/JUD/01/09, 28 January 2009. In any case, application for review has become common among defendant states in the ECCJ. Besides Nigeria, cases of review have involved The Gambia, Liberia, and Togo. In all, in ten years of activity, as at November 2013, 11 cases were filed for review of judgment or ruling. Statistics were obtained from the Registry of the Court.

<sup>5</sup> The rules also have many shortcomings. See A Sanni 'Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform' (2011) 11 *AHRLJ* 511-531.

<sup>6</sup> See discussion on the influence of the *SERAP Education* judgment on Nigerian courts under chapter seven of the present study.

<sup>7</sup> See article 4 of the Constitution of Nigeria (1999), and item 60(a) of part I of the Second Schedule on legislative powers. It falls within the powers of the Legislature to 'promote and enforce the observance of Fundamental Objectives and Directive Principles contained in this Constitution'.

accepting the ECCJ's judgment, it should not dispute either that they are justiciable in Nigeria. It is so because the Charter was made domestic law by virtue of an Act of Parliament.

According to the argument above, the relevant issue is therefore not necessarily or mainly the rejection of socio-economic rights as justiciable. The argument that the Federal government of Nigeria lacks the financial means to disburse 3.5 billion naira (US\$22.3 million) is not tenable either. A valid point could have been the one of budgeting as the disbursement of such amount of money would definitely require appropriate planning. However, as explained in chapter four's section on compliance narrative, the Universal Basic Education programme has not stopped and the Federal Government has continued providing grants to the states concerned. In the face of it, and against the environment of rampant corruption that generally prevails in Nigeria, issues relating to the implementation or enforcement of socio-economic rights should rather be analysed through the lenses of political will and issues relating to administration and good governance.

Given the complexity surrounding the implementation of the *SERAP Education* judgment, and particularly the fact that the programme has not been discontinued for lack of provision of grants by the state, analysing related issues requires some level of hypothetical consideration. Assuming the funds were to be replaced as such, or the programme had been stopped for lack of continued grant provision, analysis would have been two-fold. In the first hypothesis, replacement of the funds would have required cutting from a different budget line, thus creating a gap that should have eventually been filled in any case. This hypothesis takes one back to the issue of good governance.

In the second hypothesis, consider which parameters would guide the Federal Government's choice to replace looted funds or not. Through a cost-benefit analysis an averagely reasonable country would most unlikely engage in 'replacing' funds distracted by state officials. Especially, in a country suffering from endemic corruption and where distraction of public funds is common, the Government would probably never open this Pandora's box.

The crucial parameter in the case of Nigeria should, perhaps, be sought in the widespread culture of impunity promoted by state officials involved in corruption. Impunity renders meaningless the fact that the ECCJ even made it easier for Nigeria to comply by holding that payment does not forfeit the government's right to take action against officials responsible for the funds embezzlement.<sup>8</sup> The truth is that the Federal Government of Nigeria would not have paid and take action against the suspects simply because in the current state of affairs the Government is not willing to hold such persons accountable. In fact, it appears that suspects are mostly to be found among the Federal Government's and states' officials. Cases of embezzlement of education funds in Nigeria have remained common in the years following the *SERAP Education* judgment with no prompt reaction from the government to prosecute.<sup>9</sup> As a consequence, the fact that basic education officials involved were put to trial could be seen as some degree of commitment to meet Nigeria's obligations to ECOWAS, even though many of them were subsequently released without being charged. Such fact should not be perceived as a political will to address the wider situation of corruption in the education sector and in Nigeria at large.

The lack of willingness may apply as well to why Nigeria, which as at November 2013, almost three years after judgment, had still not complied in the *Djotbayi* case while the total amount of damages to be paid is less than US\$500 000.<sup>10</sup> In the case, 10 of the 14 complainants are not Nigerians. Immediately in the aftermath of the case being brought before the ECCJ, Nigerian authorities had all their nationals released. Others were released later. There is a perception that the Nigerian Government is not keen to pay US\$47 750 to a non-national.<sup>11</sup> Again, this thinking is supported by the fact that abuses suffered by both Nigerians and West Africans at the hands of Nigerian security agents are common place. Paying such amounts of damages could give rise to an avalanche of compensation suits to which the Federal Government could be reluctant to give a

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<sup>8</sup> See *SERAP (Education) v Nigeria*, para 28.

<sup>9</sup> See Pointblanknews 'After looting N50 billion, UBEC boss sacked, angry with Education Ministers' [pointblanknews.com/pbn/exclusive/after-looting-N50-billion-ubec-boss-sacked-angry-with-education-ministers-funds-acf-cpc/](http://pointblanknews.com/pbn/exclusive/after-looting-N50-billion-ubec-boss-sacked-angry-with-education-ministers-funds-acf-cpc/) (accessed 13 June 2013); and Daily Independent 'N140 million scandal rocks Enugu UBEC' [dailyindependentnig.com/2012/08/n140m-scandal-rocks-Enugu-ubec/](http://dailyindependentnig.com/2012/08/n140m-scandal-rocks-Enugu-ubec/) (accessed 13 June 2013).

<sup>10</sup> ECW/CCJ/JUD/01/09, 28 January 2009. See compliance narrative in chapter four of the present study.

<sup>11</sup> Interview with Pabozi.

positive response. Having said that, the very quick compliance in the *Ugokwe* case<sup>12</sup> seems to confirm that states are more eager to comply with administrative orders than venture into wide legislative reforms or substantial monetary compensation.

Another interesting issue raised by the *SERAP Education* judgment is whether ECCJ's decisions require domestication before they can be enforced in Nigeria and other common law countries by extension. Faced with the delay in implementation, SERAP executives had at a point in time planned to institute a domestic version of the *SERAP Education* case before Nigerian courts.<sup>13</sup> It must be clarified that the intention behind a domestic procedure was not to transfer the enforcement of ECCJ's judgments to Nigerian courts.<sup>14</sup> Besides, in their view, new proceedings in Nigeria did not exclude 'political' negotiations initially undertaken to secure compliance with ECCJ's orders. This seems to support the perception that the idea of non-justiciability of socio-economic rights in Nigeria will still encounter better days ahead, at least from the judicial and political perspectives.<sup>15</sup> At the least, domestic proceedings would have offered an opportunity for testing how amenable Nigerian judges have been to the ECCJ's pronouncements. In any case, the procedure would have amounted to an indirect domestication of the ECCJ judgment, given the identity of parties, issues, claims and relief sought.

A warning needs to be made of the dramatic effects of the registration of the *SERAP Education* judgment at the Supreme Court of Nigeria as well as of just any domestic proceedings subsequent to an ECCJ judgment with the purpose of seeking faster implementation. In the case of Nigeria, for instance, it has been suggested that similar procedure would reverse landmark domestic courts' decisions and render an amendment of the Constitution inevitable.<sup>16</sup> Supposed limitations of socio-economic rights by the

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<sup>12</sup> ECW/CCJ/JUD/03/05, 7 October 2005. See compliance narrative in chapter four. The Federal Government instructed the Speaker of Parliament not to swear any one in till the ECCJ decided the merits of the matter.

<sup>13</sup> See Interview with Mr. Adetokumbo Mumuni, Executive Director of SERAP (Dakar, 11 October 2011).

<sup>14</sup> Telephone interview with Mr. Adetokumbo Mumuni, Executive Director of SERAP (Cotonou, 13 June 2013).

<sup>15</sup> The new human rights enforcement rules referred to earlier compel courts to make reference, while adjudicating relevant matters, to international human rights instruments adopted by the country. Whether litigants will be quick to bring cases based on chapter IV of the Nigerian Constitution and the outcome of such cases remains to be seen.

<sup>16</sup> See ES Nwauche 'Enforcing ECOWAS law in West African national courts' (2011) 55 *Journal of African Law* 198.



Constitution have been discussed earlier in this section and further in chapter seven's section on influence on Nigerian courts of the ECCJ's judgment. Furthermore, it is evident that such procedure would amount to treating ECCJ's decision as a foreign judgment which would be in clear violation of the enforcement provisions of the 2005 ECCJ Protocol. The relevant provision expressly prescribes that the Nigerian enforcement authority, here the Attorney-General of the Federation, shall satisfy itself only with the fact that the judgment originates from the Community Court.<sup>17</sup> Finally, a domestication procedure in the Supreme Court would have the effect of opening an avenue for more confusion and give an opportunity for the defendant states to delay compliance. In effect, Nigeria has designated the Attorney-General of the Federation, not the Supreme Court, as the authority to receive and enforce ECCJ's judgments.

To sum up, because cases of compliance and non-compliance involved both civil and political and socio-economic rights, it is difficult to ascertain that the nature of the right violated was the main reason why states complied or otherwise. However, at least the *SERAP Education* case has shown that the nature of the rights involved has the potential of guiding the behaviour of the state when associated with the domestic environment of the country, particularly governance when it comes to socio-economic rights for instance. The same could apply to civil and political rights with democracy as the relevant benchmark. Besides, it is suggested that the nature of the rights violated has intricate links with the nature of the duty imposed on the state, which is discussed below.

## **2.2 Nature of the duty imposed on the state**

Are states more eager to comply depending on whether the right violated imposed on them an obligation to respect, protect or fulfil the rights at stake? Relying on Shue's classification,<sup>18</sup> obligation to respect requires that states refrain from acting in a way that would cause violation. The obligation to protect entails the duty for a state to take necessary measures to protect individuals from violations by third parties. The third obligation, the one to fulfil, requires a state to effectuate or implement a specific

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<sup>17</sup> See 2005 ECOWAS Court Protocol, art 24(3).

<sup>18</sup> See in general H Shue *Basic rights: Subsistence, affluence and US foreign policy* 2<sup>nd</sup> ed. (1996).

outcome. This categorisation of state obligations has been endorsed by the UN Committee on Economic, Social and Cultural Rights<sup>19</sup> and the African Commission.<sup>20</sup>

Study of compliance with the African Commission shows that state parties seem to find it easier to respect rights than to protect or fulfil rights.<sup>21</sup> Analysis on the nature of the ‘most prominent’ rights violated seems to reveal that states are more willing to refrain from committing violations than preventing third parties from doing so or implementing a specific action.<sup>22</sup> However, the reference study acknowledges that the duty to respect might be more burdensome than one is led to believe. This is because such duty includes not only a negative but also a positive obligation, for instance scrapping impugned legislation and enacting new laws.

Just as the reference study found in respect of the African Commission’s recommendations, the majority of ECCJ’s decisions involved the duty of states to respect rights. Two of the non-compliance cases and one of the compliance cases additionally involve the duty to protect. One of the cases is concerned with the duty to fulfil. If states had been more inclined to respect rights, compliance would have occurred in all cases as all four compliance cases refer to the same obligation. It would therefore be difficult to conclude that the nature of the duty was a compliance-promoting factor.

### 2.3 Scale of the violation found

Is the respondent state more inclined to comply when the case involves a single complainant, more than one complainant or when the violation has occurred on a large scale? For instance, compliance with the African Commission’s recommendations was recorded in none of the cases concerning massive violation. The authors justified such

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<sup>19</sup> See United Nations Committee on Economic, Social and Cultural Rights, General Comment no 14 on ‘The right to the highest attainable standard of health’, para 33 (2004).

<sup>20</sup> In *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001), the African Commission recommended that Nigeria stopped all attacks on Ogoni communities (respect), investigate the human rights violations by private parties identified in the case and prosecute responsible (protect), and clean-up the lands and rivers damaged by oil operations (fulfil).

<sup>21</sup> See Viljoen & Louw (n 1 above) 18.

<sup>22</sup> As above.

‘automatic’ non-compliance by the lack of action by the OAU AHSG despite several referrals by the African Commission under article 58 of the African Charter.<sup>23</sup>

No such process is in place in the ECOWAS human rights regime because of the very nature of the decisions made by the Community Court. Moreover, only one non-compliance case relates to a massive violation while the majority of compliance cases concern single violations. There is a perception that wide-scale violations are mostly linked to the system of governance, political instability or civil war.<sup>24</sup> The *SERAP Education* case is a wide-scale violation situation of its own kind. The case posed an actual threat to basic education for millions of children in the ten states of Nigeria concerned. The instance is still peculiar as, at the time of the case, Nigeria enjoyed political stability and experienced no civil or social unrest. However, in the specific case of Nigeria, the scourge of corruption associated with severe maladministration may well have as much wrongdoing potential as a civil war. While conclusions in respect of the African Commission may not apply to the ECCJ, it is still early to find in favour of massive violations as a non-compliance related factor.

#### 2.4 Nature of the remedial action required

Since the African Commission’s recommendations were not meant to bind states in the first place, it is not surprising that the Charter included no mechanism to determine the quantum of compensation in cases of violation. However, the Commission has endeavoured to give effect to the right to an effective remedy under the African Charter by ‘awarding’ damages or confirming damages of domestic courts though in controversial cases.<sup>25</sup> While it took quite progressive stances to give life to remedies, the

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<sup>23</sup> The said provision enables the African Commission to refer findings of massive violations to the Assembly for action. The consistent inertia of the Assembly led the Commission to stop referring such cases to the AU political organ which, in the view of the authors, legitimated an automatic non-compliance in such instances. See Viljoen & Louw (n 1 above) 21.

<sup>24</sup> Viljoen & Louw (n 1 above) 21.

<sup>25</sup> For instance in *Antoine Bissangou v Congo* (2006) AHRLR 80 (ACHPR 2006), the Commission ordered Congo to pay 297 333 Euros to Bissangou ‘as ordered by the Tribunal of First Instance of Brazzaville’. The issue is whether, as discussed elsewhere, such decision should be considered as an order of reparation by the Commission in its own right or just a confirmation of the *res judicata* of a domestic court; in *Embga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995), the Commission afforded damages to the complainant although it failed to determine the quantum which it recommended should be fixed under domestic law. For different views on the issue, see G Musila ‘The right to an effective remedy under the African Charter on Human and Peoples’ Rights’ (2006) 6 *AHRLJ* 442-464

Commission still acknowledged difficulties relating to implementation especially when legislative changes are required.<sup>26</sup> It is therefore not surprising that the most relevant cases of such kind decided by the Commission have recorded partial compliance.<sup>27</sup>

Non-compliance was recorded in all the cases where the Commission failed to determine the amount of money after recommending the payment of compensation. The overall conclusion suggests that states were more eager to comply with the recommendations of the Commission requesting them to take administrative measures, such as the release of detainees, than with those pressing them to amend legislation or pay compensation to victims.<sup>28</sup> However, the authors could not conclude in favour of the nature of the remedy as an unequivocal compliance influencing factor. This was mainly because non-compliance cases were divided almost evenly among compensation, legislation and administrative action.

The picture is different with regard to compliance with the ECOWAS Community Court. In none of the cases studied has the ECCJ ordered the respondent state to undertake legislative change. The remedies are shared between monetary damages and administrative action. An overview of the cases reveals that states are more willing to take administrative measures than pay compensation. In two of the three non-compliance cases ordering compensation, the state has either lodged a request for the Court to reduce the award to a symbolic amount<sup>29</sup> or argued of the material impossibility to comply as it could not locate the complainant.<sup>30</sup>

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and H Adjolohoun *Droits de l'homme et justice constitutionnelle en Afrique: le modèle béninois à la lumière de la Charte africaine des droits de l'homme et des peuples* (2011) 64-66.

<sup>26</sup> The Commission expressed such views for instance in *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999) 83.

<sup>27</sup> For instance the recommendation, in *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) 75, that Zambia put 'its laws and Constitution in conformity with the African Charter' could obviously not be complied with overnight as it involved state organs other than the executive.

<sup>28</sup> Viljoen & Louw (n 1 above) 23.

<sup>29</sup> *Saidykhan v The Gambia* ECW/CCJ/JUD/08/10, 16 December 2010. See Ministry of Justice of The Gambia, Application for review of judgment, 31 March 2011, and discussion under compliance narrative in chapter four.

<sup>30</sup> *Manneh v The Gambia* ECW/CCJ/JUD/03/08, 5 June 2008. See Ministry of Justice of The Gambia, Letter ref. LD440/491/PART1/(13), 15 October 2009, and discussion under compliance narrative in chapter four.

However, those two cases involved The Gambia whose situation may not be used to draw a general conclusion. Not only does The Gambia holds poor human rights records, that country is also one that has not complied with any decision of the ECCJ. Besides, the payment of compensation by Togo has balanced the compliance picture equally between administrative and monetary orders.<sup>31</sup> Again, some of the arguments developed under the *SERAP Education* case may apply to the third non-compliance case requesting the payment of compensation. In the *Djot Bayi* case, the rest of the complainants, all West Africans, had been released before the ECCJ rendered its judgment.<sup>32</sup> It must be indicated that, as at November 2013, they had yet to receive compensation.<sup>33</sup> As suggested in the discussion of the *SERAP Education* judgment, Nigeria arguably avoided provoking a flow of complaints by paying monetary compensation for wrongs that are common place in the country.<sup>34</sup>

There is a point to make about the fact that Niger paid compensation in the *Koraou Slavery* case because the amount was fairly low, if not by far the lowest.<sup>35</sup> It may also be argued that Niger could afford to pay<sup>36</sup> and probably also wanted to attract some positive attention given the political context of a constitutional crisis at the time.<sup>37</sup> While the amounts of compensation could not be said to be beyond the means of The Gambia and Nigeria, one is tempted to argue that they would have been willing to pay much more

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<sup>31</sup> The case of *Ameganvi (Parliamentarians) v Togo* was concerned with unlawful removal of opposition parliamentarians for which the Court ordered that about US\$ 60 000 compensation should be paid to the complainants. See compliance narrative in chapter four.

<sup>32</sup> *Djotbayi and Others v Nigeria* was concerned with unlawful arrest and detention of the complainants for which the Court ordered that \$ 47 000 compensation be paid to each of the ten complainants and they should be released.

<sup>33</sup> See discussion under compliance narrative in chapter four.

<sup>34</sup> See discussion under chapter six's section on the nature of the rights violated, and chapter seven's analysis on the influence of the *SERAP Education* judgment on state policy in Nigeria.

<sup>35</sup> In the *Koraou Slavery* case the Court ordered the payment of \$20 000 while the amount of compensation in other cases ranged from \$100,000 (*Manneh*), \$200 000 (*Saidykhan*), \$500 000 (*Djotbayi*), \$54 000 (*Ameganvi Parliamentarians*). In the *SERAP Education* case, the Federal Government of Nigeria was ordered to provide for \$22,5 million to fill the embezzlement gap.

<sup>36</sup> For the 2008 financial year, Niger's *Direction du Contentieux d'Etat* received a budget of 1 billion CFA (\$2 million).

<sup>37</sup> The *Koraou* judgment was delivered in October 2008. Payment of compensation to Koraou occurred in March 2009. In early 2009, President Tandja of Niger had already attracted negative attention from ECOWAS and international stakeholders by making public his intention to force a third five-year term in violation of the Constitution. Despite criticism from all quarters, between March and August 2009, he successively disbanded Parliament and the Constitutional Court, and organised a referendum to change the Constitution.

‘reasonable’ damages. The Gambia and Nigeria are, however, non-compliant states of two different kinds. Each of them had different judgments to comply with and different attitudes towards the Court as well. The Gambia has adopted open non-compliance through rejection or delaying tactics while Nigeria has apparently embraced a silent and ‘cooperative’ approach to non-compliance.

More interestingly, Nigeria could rightly be qualified as ‘big brother’ in the region from demographic, economic and political standpoints. Conversely, The Gambia would definitely rank ‘little brother’ if assessed by the same factors. The question could therefore be: Why does Nigeria not pressure The Gambia to comply with ECCJ’s judgments? The answer could be: Because Nigeria has not complied either, at least with the *Djotbayi* and *SERAP Environment* judgments. Until the industrial scale exploitation of huge deposits of uranium and oil on its territory, Niger was one of the poorest countries in the world. Besides, the country is not politically or militarily strong in West Africa. Did Niger comply because it could not afford to behave otherwise? What about Senegal then? One may argue that it was too easy for Senegal to comply with an order requesting the government to stop all proceedings against former Chadian President Hissène Habré. In effect, there is little evidence that Senegal had ever wanted to try Habré in the first place, at least not prior to February 2012 when the country was still ruled by President Abdoulaye Wade.

Discrepancies in the figure awarded may also be relevant to apprehending state compliance in the case of the ECCJ. To provide a quick comparative picture, the Court has individually awarded \$20 000 for slavery; \$100 000 for unlawful detention, torture and denial of hearing; \$42 750 for unlawful detention; \$200 000 for arbitrary arrest and detention, torture and violation of fair trial rights; and \$6 000 for denial of hearing. The \$20 000 order has seen compliance within 18 months and the \$6 000 within 25 days while other monetary orders had been awaiting implementation for 1-4 years as at November 2013.

Does the ECCJ need to use caution or a more ‘realistic’ approach to monetary compensation? Currently, although the Court has provided reasoning for awarding compensation, it has not come up with specific benchmarks for quantum determination,



which seems to be done by a rough evaluation of the prejudice suffered.<sup>38</sup> It is submitted that the Court should learn from the comparative compliance records as displayed in the present study. However, this should not in any case suggest that the Court must ignore the loss suffered by complainants and direct its awards to the need for states to comply with ‘more reasonable’ monetary obligations. Doing so would likely lead to affording states a licence to violate rights. The suggestion is therefore for the Court to engage in a balanced and well-reasoned approach to quantum evaluation, which it seems to have succeeded doing as this study reveals.<sup>39</sup>

Except for one state, which has shown a constant pattern of non-compliance, there has not been any express opposition to comply due to the nature of the remedial action required. The factor is still relevant in many ways. Firstly, subject to the context of the country, states are more eager to undertake administrative measures than make payments. Secondly, the level of monetary compensation seems to have some importance since payments were made for only the lowest amounts although there was no evidence that defendant states could not afford higher pecuniary orders. Finally, the Court lacks pre-established benchmarks for calculating compensation and may face the dilemma of balancing complainants’ rights with compliance needs of defendant states.

### **3. Factors related to the respondent state**

This categorisation is based on the premise that the situation prevailing in the state party informs compliance. Yet, other factors have a strong impact on compliance for instance where the political umbrella organisation lacks both the legal mechanisms and political will to exert a minimum pressure on delinquent states. The possibility of continuing their participation without fear of exclusion or challenge based on their human rights records has encouraged a culture of non-compliance among the late OAU member states.<sup>40</sup> While

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<sup>38</sup> On the Court’s approach to monetary compensation and evaluation of damage see previous discussion under the section on the reasoning in a particular finding earlier in the present chapter.

<sup>39</sup> Authors suggest that, in response to challenges and non-compliance, the ECCJ has engaged in ‘cajoling’ governments to comply with its decisions. See K Alter *et al* ‘A new international human rights court for West Africa: The ECOWAS Community Court of Justice’ (2013) 108 *American Journal of International Law* 4 and 29.

<sup>40</sup> Viljoen & Louw (n 1 above) 25.

there has been a slight change in respect of suspension under the AU,<sup>41</sup> political will is still lacking towards the recommendations of the African Commission.<sup>42</sup> For instance, the AHSR has delayed the adoption of the 29<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> Activity Reports of the Commission for almost a year before finally adopting them in early 2012.

Having said this, the nature of the government of the day remains central to state compliance. As studies suggest, a certain type of government creates an environment that is conducive for domestic actors to pressure states towards compliance. For example, in none of the cases of non-compliance with the African Commission's recommendations was the respondent state categorised as 'free' at the time of the case.<sup>43</sup> Conversely, statistical analysis also reveals that a democratic system of government is conducive to compliance in the African human rights system.<sup>44</sup>

At the time of the cases discussed, none of the countries involved in proceedings before the ECCJ was 'free'; actually all were 'partly free'.<sup>45</sup> Equally, none of ECOWAS countries experienced dictatorship or civil war except Côte d'Ivoire which is not covered by the present study. However, a change of government occurred in one of the countries, Niger, following a military-led transition. Apparently, the military government had circumvented compliance by requesting the *Cour d'Etat*<sup>46</sup> to waive former President Tandja's immunity so he could be charged and tried.<sup>47</sup>

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<sup>41</sup> Namely in cases of unconstitutional changes of government as was the case following the post electoral crisis in Côte d'Ivoire (2010), and the military coups in Guinea (2008), Guinea Bissau (2012), Madagascar (2009), Mali (2012), Mauritania (2008) and Niger (2010).

<sup>42</sup> As indicated earlier, the AHSR urged African Union member states to implement African Commission's recommendations.

<sup>43</sup> According to Freedom House's Freedom in the World Index. Botswana might be a good exception that confirms the rule.

<sup>44</sup> Viljoen & Louw (n 1 above) 26.

<sup>45</sup> See section of chapter three on the law and experience of study countries regarding compliance.

<sup>46</sup> Highest Court under the military regime.

<sup>47</sup> The President was overthrown in a military coup and placed under house arrest on 18 February 2010. On 8 November 2010, the ECOWAS Court decided that his detention was illegal and ordered that the military junta release him immediately. The junta rather sought and obtained the *Cour d'Etat*, and waived the President's immunity and proceeded to charge him with embezzlement of public funds. The junta opposed his bail as ordered by three domestic courts' judgments. Eventually, after Niger returned to civilian rule in March 2011, the Appeal Court of Niamey overturned previous decisions and ordered his release. The new Government complied. See G Amadou 'Libération de Mamadou Tandja: liberté définitive ou répit ?' in *L'Événement hebdomadaire nigérien d'informations générales*, No 415 of 12 May 2011.

Niger eventually returned to civilian rule in March 2011. Such change arguably provided a positive environment for compliance, though indirectly. Indeed, the 2011 post-transition government in Niger did not comply with ECCJ's order to 'immediately release' former President Tandja but with the order of a domestic court to do so.<sup>48</sup> Stakeholders concur that non-compliance by the military junta was politically motivated<sup>49</sup> and supported by military controlled judicial organs established during the transition.<sup>50</sup> The return to a civilian government thus set Niger's judiciary free to annul on-going domestic proceedings and order that the complainant be released 'unless he is detained for any other reason'.<sup>51</sup>

One may also discuss Nigeria's compliance status against the factor of 'progress recorded following a change of government'.<sup>52</sup> Nigeria has not complied with two ECCJ's outstanding judgments since 2009 for the *Djotbayi* case and 2012 for the *SERAP Environment* case.<sup>53</sup> Yet, the country has designated its national authority to receive and execute ECCJ's judgments. The fact that this happened just after the coming into power of late President Yar'Adua could be interpreted as a shift. Such argument would be reinforced by indications that the current government is willing to comply as discussed earlier in this chapter. It is noteworthy that Nigeria continues to provide full support to

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<sup>48</sup> Arrêt No 111, Chambre d'Accusation, Cour d'Appel de Niamey, 3 May 2011.

<sup>49</sup> See interview with Ilguilas Weila, former Executive Director, Timidra NGO (Niamey, 16 May 2011). Correlated information reveals that President Tandja's illegal detention was regularised by the junta who realised that his release would disturb forthcoming elections or benefit his political party's candidate. See also interview with Hamani Hamani Abdou, Magistrate, former Head of Litigation, Ministry of Justice (Niamey, 16 May 2011).

<sup>50</sup> Lower courts had exercised competence to try former President Tandja despite clear contrary constitutional provisions that he may only be tried by the *Haute Cour de Justice*, a tribunal with exceptional mandate to try the President and members of the government for acts committed in the discharge of their duties.

<sup>51</sup> See Arrêt No 111 (n 49 above).

<sup>52</sup> Such discussion should, however, take into account that the change from late President Yar'Adua's presidency to current President Jonathan's regime was effected between two civilian regimes. In fact, the very use of the word 'regime' justifies the argument that some change is perceived to have occurred since the advent of President Jonathan's regime. Notwithstanding this perception, successive regime changes in the democratic era have apparently not brought a significant difference in the culture of state organs of disobeying or ignoring such orders.

<sup>53</sup> The *SERAP Environment* case was decided beyond the time limit set out in the methodology of this thesis. The study therefore included only informative analysis of the case. The case could be considered as in progress since it was decided in December 2012, and involves huge resources to address the tremendous environmental issues involved.

the Abuja-based ECCJ and has, at no time, expressed any opposition towards the Court. No regime change occurred in other study countries.

Bearing in mind the difficulty to prove causation in explaining state compliance, the ‘government of the day’ factor appears to be more valid for Niger than it is for Nigeria. However, even if they apply on a case by case basis, the present study points out other factors that could explain state compliance with the decisions of the ECCJ. Those factors could be said to be peculiar to this study, and to the ECOWAS human rights regime.

The first of those factors is state compliance with the decisions of domestic courts. The related survey conducted under chapter III revealed that, of the five countries discussed, Niger and Senegal have developed some culture of complying with decisions made by their domestic courts, and other international human rights mechanisms. On the contrary, The Gambia, Nigeria and Togo have shown far less or no eagerness to comply with the same decisions. Compliance with the study cases shows the same trend, except for Togo, which has complied in the *Parliamentarians* case, following a disputed revised judgment. Notably, the leading trend at the domestic level is that compliance is problematic when the executive is involved or entertains interests in the matter adjudicated. In that line, it is relevant to recall that the ECCJ adjudicates human rights matters only against states, and the complainant must demonstrate a failure to respect, protect, promote or fulfil on the part of the defendant state.

The second factor is state sovereignty, which is relevant specifically to non-compliance behaviours among study countries. It is assumed that states do not comply when it is not in their interest.<sup>54</sup> Yet, the issue could be whether defendant states decide not to comply actually because they can assert and exert sovereignty without any fear or reward, namely negative. A discussion of that factor is most relevant in the cases of The Gambia and Nigeria. While it is one with the least potential of influence and power in ECOWAS, The Gambia has not complied with any judgment of the ECCJ, and has led attempts to shrink the jurisdiction of the Court. Conversely, Nigeria is ‘big brother’ in the region, which could in a sense explain why that state would not be concerned about potential

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<sup>54</sup> See the literature review on state compliance and related factors under chapter I.

consequences of non-compliance.<sup>55</sup> Although it had not complied with some judgments of the ECCJ for years at the time of this writing, Nigeria has remained a frontline supporter of the Court in all other ways, including opposing limitations spearheaded by The Gambia.<sup>56</sup> Despite the provision for enforcement, compliance monitoring, and sanctions, no such action has been considered let alone meted against The Gambia. One could conclude that both states have asserted sovereignty, particularly as far as The Gambia is concerned.

One last factor is the legal system adopted by study countries. Of the defendant states discussed in this study, Niger, Senegal and Togo apply monism, while The Gambia and Nigeria are dualist states. The factor is based on the premise that the legal system applied by defendant states is relevant to whether and how they comply. In that line, it could be argued that the ECCJ's judgment in the *Habré* case has compounded Senegal's 'incidental dualism'. While obligations already arose from the conventions, Senegal resorted to incorporation to delay compliance.<sup>57</sup> However, the most relevant illustration is arguably provided in the *SERAP Education* case of how the legal system was relevant to compliance, or at least to full implementation and influence. Despite a proper domestication of the African Charter, Nigeria has some outstanding issues with regard to both the law and courts' practice when it comes to implement socio-economic rights. The non-justiciability of those rights in the Constitution, at least as commonly understood among relevant stakeholders, and the inconsistent jurisprudential trend, show the potential risks faced by ECCJ's judgments in Nigeria.<sup>58</sup>

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<sup>55</sup> On the role of Nigeria in the creation, normative and historical developments as well as major reforms in ECOWAS, see K Alter *et al* 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 108 *American Journal of International Law* 6-9. In analysing Nigeria's position a 'super power' in the Community, the authors argue that the country hold the biggest percentage of the GDP of the region, and other countries in the region are aware of Nigeria's hegemony backed by its oil wealth and vast market. Nigeria also contributes mainly to Community funds, greater than other countries, given that contribution to the Community budget is proportional to country GDPs.

<sup>56</sup> See discussions on the nature of the remedial action required under chapter VI.

<sup>57</sup> See discussions on the domestic experiences of compliance under chapter III, the compliance narrative under chapter IV, and the reasoning in a particular case under chapter V.

<sup>58</sup> See discussions on the nature of the right violated required under chapter VI, and the influence of the ECCJ's judgments on the domestic systems of defendant states under chapter VII.

#### 4. Factors related to civil society actors

The African Commission has enjoyed full compliance mainly in cases where NGOs had a leading role namely by bringing communications on behalf of the victims. Even in non-compliance instances, NGOs still shared the frontline role by assisting the complainants throughout the procedure in addition to bringing the case on their behalf. On another note, compliance was higher in ‘communal’ or ‘broader social movement’ than ‘insular individual interest’ cases. NGOs have found themselves as ‘guardians’ of state compliance with its international obligations, through follow up, lobbying and international pressure.<sup>59</sup>

Such conclusions could apply with no change to compliance with the decisions of the ECOWAS Community Court. The two cases involving former heads of state set aside,<sup>60</sup> NGOs instituted the suit or represented the complainant in almost all the cases. The current trends also reveal that NGOs have embraced a specialist approach to litigation. All cases involving individual journalists were led by the Media Foundation for West Africa (MFWA)<sup>61</sup> while the Socio-Economic Rights Action Project (SERAP)<sup>62</sup> was involved in wider impact litigation. However, of the six compliance instances out of nine cases discussed, only the *SERAP Education* and *Koraou Slavery* cases revealed specific involvement of NGOs, while such organisations were involved in two of the three non-compliance cases as well. Read together with ‘state obligation’ and ‘remedy ordered’-related factors, these findings could suggest that NGOs were involved in predictable non-compliance situations, namely because of the compliance records of The Gambia at least with the African Commission.<sup>63</sup>

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<sup>59</sup> See Viljoen & Louw (n 1 above) 28-29.

<sup>60</sup> *Tandja v Niger* ECW/CCJ/JUD/05/10, 8 November 2010; and *Godwill Mrapkor and 5 Others (Military intervention in Côte d’Ivoire) v ECOWAS Authority of Heads of State and Government* Preliminary Ruling ECW/CCJ/ADD/01/11, 18 March 2011. The second case involved former President Gbagbo of Côte d’Ivoire.

<sup>61</sup> The Media Foundation for West Africa is a human rights organisation that works to promote, advocate and defend press freedom and freedom of expression in West Africa. The organisation also works to promote the development of media professionalism. It is a non-governmental organisation registered under the laws of Ghana.

<sup>62</sup> SERAP is a non-governmental organisation registered under Nigerian Laws and whose mandates and objectives include the promotion of respect for socio-economic rights of Nigerians through litigation, research and publications; and advocacy and monitoring.

<sup>63</sup> See discussion in section on compliance law and experience of study countries under chapter three.



As discussed earlier, civil society organisations and individual lawyers were also involved in follow up of compliance with the decisions of the ECCJ. For instance, the MFWA instituted non-compliance suits in the Gambian journalists' cases. Even if the state concerned has yet to comply, civil society actions definitely acted as checks and balance as demonstrated by interactions of the Gambian Government with the Court. More coordinated initiatives were launched in 2011 and 2012 by the MFWA, the West African Bar Association, the Rencontre Africaine pour la Défense des Droits de l'Homme and the Centre for Human Rights, and Timidria. In late 2012, these organisations based in Ghana, Niger, Nigeria, Senegal and South Africa spearheaded the establishment of a Coalition for the ECOWAS Court. The main purpose of the joint venture was to support a more effective compliance-securing mechanism to give effect to the decisions of the Court.

## 5. Involvement of the media

Political and media pressure is difficult to establish. In any case, for the press and other media organs to use their attention-attracting potential, they must first be fed with accurate information. Publicity is not the strong point of the African Commission when it comes to disseminating its recommendations. Although involvement of the media and related institutions is said to play a major role in compliance with the findings of treaty bodies,<sup>64</sup> such involvement has not been prompted by the African Commission in relation to compliance with its recommendations.<sup>65</sup> Even if some pariah states have proved insensitive to it, name shaming has remained an important means of pressuring states to abide by their obligations. The press plays a key role in such mobilisation.

NGOs involved in cases before the ECCJ are media specialised or have developed wide connections among the media. Domestic actors believe that Niger's initial pledge to comply in the *Koraou Slavery* case was significantly prompted by the strong media

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<sup>64</sup> See MG Schmidt 'Follow-up Mechanisms Before the UN Human Rights Treaty Bodies and the UN Mechanisms Beyond' in AF Bayefsy (ed.) *The UN human rights treaty system in the 21<sup>st</sup> century* (2000) 233. See also United Nations Human Rights Committee, Report, General Assembly Official Records, 51<sup>st</sup> Session (1997) in which the Committee concluded that publicity for follow up would be the most appropriate means for making the procedure more effective.

<sup>65</sup> See Viljoen & Louw (n 1 above) 29. Initially, the Commission made a restrictive interpretation of article 59 of the African Charter and did not publish information related to individual communications. The Commission is now more open to publicity by annexing its findings to its annual report and in print after adoption by the AU Assembly. However, appropriate publicity and dissemination of the recommendations are still lacking.

pressure attracted from international headquarters, NGOs, anti-slavery and rights organisations as well as the media.<sup>66</sup> Prime international media coverage and international recognition to Koraou payed tribute to the victim but also demonstrated external interest in Niger's compliance behaviour. In other words, Niger complied among other reasons because it wanted to avoid bad publicity.<sup>67</sup> It is right that associated factors should not be ignored. At the time compliance was awaited, Niger's then President Tandja had already attracted international negative attention by tampering with constitutional order and disbanding state institutions. In fact, compliance could be said to be beneficial to the President as it presented an opportunity for him to mitigate international reaction to his attempt to cling on to power, which was fiercely contested both at home and abroad. All in all, without rejecting self obedience as the prime factor in the *Koraou Slavery* case, it is suggested that external factors have either prompted such obedience or prevented any shift between the time of the pledge and actual compliance. The *Habré* and *Djotbayi* cases provide interesting illustrations of significant behaviour shift between express statements of compliance and actual obedience.<sup>68</sup>

Unfortunately, two cases which enjoyed the strongest media involvement fall in the category of non-compliance. However, the main reason for such state of affairs is peculiar to one country and should therefore not be generalised as a trend. One could argue that the country has ceased to care about its reputation and will therefore unlikely be influenced solely by media pressure.

That argument could be mitigated by the fact that The Gambia has remained in constant dialogue with the Court. The state has even, in one case, expressed the will to comply in writing. This does not change the fact that The Gambia has lobbied for jurisdiction of the Court to be quashed and the requirement of exhaustion of local remedies be introduced. It cannot be emphasised enough that The Gambia's position has been both complex and

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<sup>66</sup> See individual interviews with Mr Weila, former President of Trimidria NGO, which supported Koraou in instituting the slavery case in the ECCJ; Advocate Chaibou, counsel for Koraou; and Ibrahim Habibou, President of Trimidria NGO (Niamey, 18 May 2011).

<sup>67</sup> Karoua's counsel said Radio France International gave him a phone call right after the compensation was paid thus confirming close follow-up of the case by international media.

<sup>68</sup> See discussion on Nigeria's non-compliance in the *Djotbayi* case, and Senegal's inconsistent behaviour in the *Habré* case under the sub-sections on compliance narrative in chapter four of this study.

ambiguous in its relation to the Community Court in various cases in which it was involved.

## 6. Political will of the umbrella organisation and peer pressure

### 6.1 ECOWAS Community culture of securing compliance

One very important factor in analysing state compliance with the ECCJ's judgments is definitely the political will of ECOWAS as a Community and pressure mounted against non-compliant states by their peers, or just the actual threat of such Community influence. Political influence of the umbrella organisation and pressure from peer states are relevant to compliance whether it is achieved through coercion, persuasion or acculturation.<sup>69</sup> Moreover, as ECOWAS is said to be the most advanced regional integration organisation in Africa,<sup>70</sup> it is relevant to assess whether 'communitarianism' has played a role in state compliance with the main judicial organ of the Community. It is suggested that ECOWAS has a higher and closer potential for pressure than international actors, so to say.

In their study on the African human rights system, Viljoen and Louw conclude that 'inadequate political commitment at the regional level is an important factor underlying the lack of state compliance with the recommendations of the African Commission'.<sup>71</sup> The authors insist that 'the legally binding and specific orders of the African Court will not guarantee improved compliance out of stronger domestic and regional political commitment, increased publicity and greater civil society involvement'.<sup>72</sup> Koh concurred that weak regimes and lack of political will are relevant in measuring compliance.<sup>73</sup>

It is not a secret that human rights was not the major concern of the OAU, even after the adoption of the African Charter, and findings of the African Commission attracted little

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<sup>69</sup> See HH Koh 'How Is International Human Rights Law Enforced?' (1999) 74 *Indiana Law Journal* 1400; and Viljoen & Louw (n 1 above) 18.

<sup>70</sup> See for instance BH Yaya 'ECOWAS and the challenges of building a new citizenship in West Africa' 7th Global conference: Pluralism, inclusion and citizenship, Prague, Czech Republic (12th March - 14th March 2012) 2; M Touré & CA Okae 'ECOWAS mechanism for conflict prevention, management and resolution, peace-keeping and security' (2008); and PE Vahard & H Adjolahoun 'OHCHR's perspective on mainstreaming human rights in African regional integration' (unpublished paper on file with authors) (2009) 2.

<sup>71</sup> Viljoen & Louw (n 1 above) 33.

<sup>72</sup> Viljoen & Louw as above.

<sup>73</sup> See Koh (n 70 above) 1398.

interest from the organisation which was said to lack political pressure to secure compliance.<sup>74</sup> The African regional body included human rights in its objectives and principles only in 2000 when the OAU became the African Union. This development allowed first debates on the work of the African Commission at the AU level and a call from the AU that member states implement decisions of the Commission.<sup>75</sup>

Created in 1975, ECOWAS implemented a move towards a human rights approach to regional integration far ahead of the 2000 OAU transformation into AU. The most significant illustration is legal and political transformation through the 1993 ECOWAS Revised Treaty that placed the African Charter at the heart of the integration and community project. The Community made a subsequent pledge to human rights by providing, under article 39 of its 2001 Protocol on Democracy and Good Governance, that the jurisdiction the ECCJ will be reviewed to include cases relating to human rights violations. Finally, the 2005 ECOWAS Court Protocol reinforced the legal framework and materialised political commitment to human rights at the same time the AU resolved to call for compliance with African Commission's recommendations.

Again, the ECCJ and its 2000s revival are fully within ECOWAS' 1990s grand plan to relaunch regional integration as introduced by the 1975 founding Treaty. Thus, the political will to shift to the 1993's – revised treaty – approach to integration re-designed ECOWAS with new and peculiar features from both normative and institutional perspectives. One illustration is that a human rights regime was transplanted onto a Community regime initially designed to foster interstate trade, economic and political integration. Compared to the European 'model', the ECOWAS approach to new regionalism read socio-economic and political integration into human rights. The same was eventually done under the European Union much latter in the life of the ECJ with the adoption of the EU rights Charter, yet in a different way. In a sense, ECOWAS adopted a harmonised approach mainly by centralising the judicialisation of Community governance in a 'two-in-one' judicial body: The ECCJ.

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<sup>74</sup> Viljoen & Louw (n 1 above) 33.

<sup>75</sup> See African Union, Decision on the 17<sup>th</sup> Annual Activity Report of the African Commission, EX.CL/109 (V)-Assembly/AU/Dec.49 (III), (2004) para. 3.

There are various suggestions for ECOWAS' approach to the new regionalism, which make a case for a historical rather than a solely functionalist approach to regional integration. For instance, prior to the events referred to earlier, which led to ECOWAS' normative and institutional reforms, ECOWAS was a Community of states. Individuals and organisations had little if no influence on how Community affairs were conducted. The 1990s decisions to intervene in internal conflicts in the region opened up an avenue for non states and civil society actors to push for more reforms, namely the ones that occurred in the 2000s.<sup>76</sup>

ECOWAS has also taken steps to fast track functionality and attain regionness and actorness. Under the 1975 founding Treaty, the Community implemented old regionalism with a limited supranationality of Community organs and left states with absolute discretion to give effect to community law. From 1993, the Revised Treaty introduced a new regionalism, mainly with the purpose of putting an end to the lethargy faced by the implementation of Community law. The most crucial reform in that line is certainly the decision from 2006 to allow the ECOWAS Authority to adopt Supplementary Acts with the same binding force as Protocols but immediately enforceable in member states with no need for subsequent domestic measures. These reforms created an overall normative environment that is conducive to supranationality of Community law.<sup>77</sup>

ECOWAS's proactivity and foresight are also illustrated by the organisation's early practice of suspending member states in which unconstitutional changes of government had occurred, namely through coups. Established practice in the cases of Niger and Guinea (2010) was strengthened by the decision of ECOWAS to successfully demand that the military junta hand over power to the Speaker of the Parliament to stick to constitutional provisions following the 22 March 2012 coup in Mali. While the African Union has recently adopted similar practices, and has suspended Mali even before ECOWAS did so, political will in ECOWAS appears to be more tangible, closer, consistent, and more effective.

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<sup>76</sup> See K Alter *et al* 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 108 *American Journal of International Law* 3.

<sup>77</sup> As above 9, 28.

For instance, ECOWAS has consistently had recourse to its military wing ECOMOG to secure compliance with political decisions or implementation of regional peace and security treaties through military intervention as was the case in Liberia (1990), Sierra Leone (1997), Guinea Bissau (1999) and Côte d'Ivoire (2003-2004).<sup>78</sup> Military intervention in Côte d'Ivoire in 2011 was prevented by the ECOWAS Court's provisional measures and the parallel intervention of France and the United Nations. Consistently with its practice, after the Mali coup, ECOWAS Authority of Heads of States decided to send 3 000 troops to reinstate constitutional order and curb the Northern Tuareg rebellion which was at the genesis of the coup and threatened the territorial integrity of Mali.<sup>79</sup> Finally, following the April 2012 coup in Guinea Bissau, ECOWAS successfully demanded that the military immediately handed power to a civilian prime minister and sent West African troops to monitor political transition.

The consistent practice of intervening to restore peace and constitutional order or defend member states' territory may have no direct relevance to the work of the ECCJ and compliance with its decision. It is suggested, however, that such practice has set a trend of ECOWAS taking action against states that do not live up to Community obligations and principles.

Besides its general relevance to the fulfilment by member states of their obligations under Community law, it is suggested that ECOWAS' general culture of securing compliance has also been demonstrated in the specific respect of the ECCJ's operations and decisions. The reaction of ECOWAS in at least two cases handled by the ECCJ could illustrate that argument. In *Ugokwe v Nigeria* decided in 2005, the ECCJ faced criticisms from Nigerian judges, lawyers and politicians for ordering Federal authorities to suspend the swearing-in of a candidate elected to the Parliament until it decided the case. The

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<sup>78</sup> See P Arthur 'ECOWAS and regional peacekeeping integration in West Africa: Lessons for the future' (2010) 57 *Africa Today* 3-24.

<sup>79</sup> See BBC Africa 'West Africa bloc ECOWAS agrees to deploy troops to Mali' (11 November 2012) <http://www.bbc.co.uk/news/world-africa-20292797> (19 November 2012). It is important to mention that ECOWAS experience of deployment of troops was put at serious test in the framework of the actual intervention in Mali. Intervention in Mali was eventually fast tracked and spearheaded by France in early 2013, under UN Security Council Resolution 2085 of December 2012, mainly for logistical inabilities on the part of ECOWAS. Arguably, the involvement of terrorist groups has led ECOWAS to face an unprecedented experience in respect of military intervention.



legal basis for that challenge was the provision under article 246(3) of the Nigerian Constitution that electoral matters are exclusively domestic matters.

The ECCJ eventually rejected the case for lack of jurisdiction to hear electoral matters. Rather than challenging the Court, the Community reacted by creating the Judicial Council of the Community. That reaction was believed to have provided an answer to national high courts' protest that 'ECCJ's judges with less qualifications and experience than they had could issue rulings that would be final and binding on them'. The 2006 Judicial Council reform, it is suggested, afforded national judges an increased influence in the appointment of Community Court's judges.<sup>80</sup> Importantly, Nigeria complied with the provisional order issued by the ECCJ in the *Ugokwe* case as reported in the compliance narrative under chapter IV.

The second situation arose while the merits of the *Saidykhan* case was pending, which is 2009. In 2008, The Gambia had refused to participate in the *Manneh* case, following which the ECCJ had proceeded and issued a judgment against the state. Having unsuccessfully asked the ECCJ to refer the *Saidykhan* case back to domestic courts, the Government of The Gambia put forth a proposal, first, that access to the Court is limited to instances where domestic remedies have been exhausted, and second, that the subject matter of any human rights claim falls within the scope of international human rights instruments ratified by the respondent country.

The proposal was unanimously rejected by the ECOWAS Council of Ministers and was strongly criticised by all ECOWAS member states legal experts except Gambian representatives. Civil society organisations also rejected the proposal and initiated legal action against The Gambia before the ECCJ for violating the Court Protocol and seeking to avoid complying with Court's decisions rendered against the Government of The Gambia.

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<sup>80</sup> On the challenges faced by the ECCJ in assuming human rights jurisdiction, see K Alter *et al* 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 108 *American Journal of International Law* 23. On the selection process, role and functioning of the Council, see discussions on the jurisdictional relationship between the ECCJ and domestic courts under chapter VII. However, it is partial to argue that the sole involvement of domestic courts in the appointment of ECCJ's judges will ensure the quality of the bench or improve the jurisprudential authority of the Court. For instance, the restriction of applications to professional judges has the weakness of excluding practicing lawyers and academics, which are well versed in international – human rights – law, case law and litigation.

Following the final decision of ECOWAS political organs, the case was discontinued.<sup>81</sup> The Gambia was eventually condemned to pay damages to the complainant in the *Saidykh* case.

It appears that, on the occasion of cases handled by the ECCJ, the Community was provided with clear opportunities to reconsider the extension of the Court's jurisdiction to entertain individual human rights suits. In reaction, ECOWAS recurred to alternative options, while reinforcing the mandate and authority of the Community Court.<sup>82</sup> From the foregoing, it is suggested that ECOWAS' reaction to those situations and the Community's overall culture of securing state compliance could be brought to bear in the effectiveness of compliance-monitoring mechanisms designed under the 2012 Supplementary Act discussed below. Most notably, the Act equates decisions of the ECCJ with ECOWAS law.

## 6.2 Sharpening the sanctions regime through the 2012 Supplementary Act

It is a valid argument that one may not equate enforcing political decisions with securing compliance with a court order, be it an ECCJ judgment. However, the facts show that ECOWAS is moving towards greater and more specific state compliance regime over the years. This move is demonstrated through the adoption of the 2012 Supplementary Act on Sanctions Applicable for Failure to abide by Community Obligations.<sup>83</sup> Prior to the Act, article 77(1) of the Revised Treaty already provided that 'where a Member State fails to fulfil its obligations to the Community, the Authority may decide to impose sanctions on that Member State'. The main issue was the lack of a detailed process for reporting non-compliance and the limited list of sanctions listed under the Treaty. Sanctions provided were exclusively economic and political and include suspension of new Community loans or assistance, suspension of disbursement on-going Community projects or assistance

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<sup>81</sup> See *SERAP and Another v Attorney General of The Gambia and Another*, Suit No ECW/CCJ/APP/11/09, 28 September 2009. See also AW Maki 'ECOWAS Court and the promise of the local remedies rule' *The Human Rights Brief Center for Human Rights and Humanitarian Law* (4 November 2009) <http://hrbrief.org/2009/11/ecowas-court-and-the-promise-of-the-local-remedies-rule/> (accessed 1 June 2012).

<sup>82</sup> For an empirical analysis of ECOWAS' response to challenges faced by the ECCJ, see Alter *et al* (n 79 above) 21-31.

<sup>83</sup> See ECOWAS, Acte additionnel A/SA13/02/12 portant régime des sanctions à l'encontre des Etats membres qui n'honorent pas leurs obligations vis-à-vis de la CEDEAO' Abuja, 17 February 2012.

programmes, exclusion from presenting candidates for statutory and professional posts, suspension voting rights, and suspension from participating in the activities of the Community.<sup>84</sup>

Under the dispensation of the 2012 Supplementary Act, the human rights regime is reinforced. The Act erects ECOWAS Court judgments to the same level as decisions made by the political bodies of the Community. In fact, non-compliance with decisions of the Court is equated with non-compliance with Community law.<sup>85</sup> In addition, non-compliance with decisions of the Community Court may be sanctioned by the political authorities. The Act goes further to expand the list of non-compliance sanctions provided in article 77 of the Treaty. For the sake of conciseness, the discussion does not include the extensive list of those sanctions. It suffices to shed light on the fact that the Act does not make any difference between sanctions to be imposed for non-compliance with purely political decisions or Community norms, and those to apply to a refusal to execute an order from the Court.

Thus, besides suspension of the state from all activities of the Community, travel restrictions may be imposed on officials of that state as well as assets freezing for family members and followers. It is assumed that, since the Act does not differentiate, such sanctions may be imposed in case of non-compliance with decisions of the Court. Importantly, the Act refers to the African Charter and the Protocol on Democracy and Good Governance, and recognises human rights as state obligations in the meaning of article 77 of the Treaty. One interestingly notes that sanctions imposed upon completion of the political compliance-monitoring process cannot be appealed before the ECOWAS Court or any other tribunal. Of course, the process is closely monitored and sanctions may be lifted upon a positive assessment of steps towards compliance.<sup>86</sup> As at November 2013, the process had yet to be put to test.

The foregoing is clear evidence that ECOWAS as a community has demonstrated unequivocal political will to act promptly and effectively against member states that fail

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<sup>84</sup> ECOWAS Revised Treaty, art 77(2).

<sup>85</sup> See 2012 Supplementary Act, art 1.

<sup>86</sup> See 2012 Supplementary Act, arts 18 to 21.

to abide by their community obligations, namely those related to political governance, democracy, human rights and the rule of law. It cannot be denied that the cost of non-compliance in terms of community and peer pressure is more effective, closer and actual in ECOWAS.<sup>87</sup> In a comparative approach, ECOWAS member states' 'positive socialisation' on the issues above seems inversely proportional to SADC member states' 'negative socialisation' on the same issues, and to a lesser extent in the AU. An example is provided by the fact that SADC could 'easily' suspend its Tribunal, arguably following Zimbabwe's lobbying, while ECOWAS rejected The Gambia's proposal to institute the exhaustion of local remedies requirement and restrict access to the Community Court.

Finally, one should not underestimate the internalisation of ECOWAS and international rules in the domestic order of ECOWAS member states together with the role of municipal 'activist forces'. The 1993 ECOWAS Revised Treaty, the 2001 Protocol on Good Governance and Democracy and the 2005 Supplementary Court Protocol make the African Charter part of Community law. Such indirect incorporation should have affected only states that ratified these ECOWAS instruments. However, from 2001, the Community has adopted the principle of a provisional entry into force of Protocols and Acts upon signature. In addition, all state parties to cases before the ECCJ have so far recognised the jurisdiction of the Court and cooperated. Governments of the day in study countries are classified as partly free including The Gambia, despite its human rights situation, and Niger, which experienced a coup. While their independence is another issue altogether, access to domestic courts is available and in fact was used in all cases, except those against The Gambia, before taking the matter to the ECOWAS Court.<sup>88</sup> In half of the situations examined, civil society organisations also enjoyed the necessary freedom to represent victims and mount pressure against non-compliance. On the face of it, international legal process and domestic democracy have also played a role in securing compliance with ECCJ's decisions.

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<sup>87</sup> See F Viljoen *International human rights in Africa* 2nd ed. (2012) 469-514.

<sup>88</sup> The ECOWAS Protocol on Democracy and Good Governance strengthens domestic human rights remedies by providing that where no specialised court is established, ordinary courts may exercise jurisdiction over provisions of the Protocol. The Protocol provides that the African Charter is common constitutional law in all member states.

## 7. International pressure

Just as for some other compliance-related factors, a difficulty with arguing international pressure as a compliance-securing means is how to establish causality. Analysis of compliance with the African Commission reveals there was a complete absence of international pressure in the overwhelming majority of non-compliance cases. As noted above, full compliance was recorded in several instances where NGOs had mostly mounted international pressure against non-compliant states.

When it comes to the influence of international pressure on compliance with the ECCJ's decisions, the conclusion is mixed. While there is evidence of international pressure, that factor had some relevance in both compliance by Niger<sup>89</sup> and non-compliance by The Gambia.<sup>90</sup> Again, this factor should be construed in conjunction with many other factors as discussed earlier in this chapter and illustrated by the statement reportedly made by the Head of the European Union Delegation to Togo in connection with the *Parliamentarians'* case. During a dialogue session with the Government of Togo a week after the judgment, the EU diplomat is said to have declared: 'We have stressed the importance of the decision of the ECOWAS Court of Justice and the importance to comply with them (...) at this crucial moment (...) when everything must be done to allow an appeased political climate for forthcoming electoral steps to be implemented in the most possible consensus'.<sup>91</sup> The government of Togo is also believed to have aptly complied at least with the monetary order due to pressure from third countries and the UN system as the country was due to undergo the UN Human Rights Council's Universal Periodic Review.<sup>92</sup> Arguably, the Inter-Parliamentary Union has also added to the pressure by condemning the complainants' revocation by the Togolese Parliament and Constitutional Court.<sup>93</sup>

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<sup>89</sup> Interviewees agree on evidence of international pressure in the *Slavery* case, namely from highest US authorities. See interviews Weila, Chaibou and Habibou.

<sup>90</sup> For instance, the Gambian journalists' cases have equally attracted international pressure from various headquarters.

<sup>91</sup> T Kossi 'TOGO: la notification de l'affront à l'Etat togolais attendue dans le courant de la semaine' <http://www.togosite.com/?q=node/1699> (accessed 5 November 2011).

<sup>92</sup> Interview Advocate Ajavon.

<sup>93</sup> See Union Inter-Parlementaire, *Décision confidentielle adoptée par le Comité à sa 133<sup>ème</sup> session, Panama, 15-19 April 2011.*

## 8. Conclusion

This chapter has undertaken an empirical analysis of reasons why states have complied or are likely to comply with the human rights judgments of the ECOWAS Community Court of Justice. Part of the following conclusions account for findings of both chapter five and six of the present study.

As to why defendant states have complied, several factors compete and reasons vary from one case to another. However, the political environment of the case and the nature of the remedy take the lead in all compliance instances. Compliance appears to have been driven by the low cost of the order in at least 60 per cent of the compliance cases,<sup>94</sup> while, conversely, refusal to implement the other part of the same decisions, or the decision to defer compliance, could be explained by the too high cost of obeying the orders in 60 per cent of the overall compliance instances.<sup>95</sup> In 20 per cent of the cases, compliance was apparently determined by the fact that external pressure was higher than domestic interests, or in fact because the latter were eventually reoriented by the former.<sup>96</sup> As far as the nature of the remedy is concerned, one may, on the basis of a qualitative analysis, conclude that compensation and administrative measures attract more compliance than orders to release or reinstate, as they account for 80 per cent of the relevant instances. However, both categories of orders were made in compliance and non-compliance cases almost evenly. The political environment of the case seems to have taken the lead irrespective of whether the judgments were complied with or not.

Although it applies to only some of the cases under study, a ‘domestic sensitive’ approach to adjudication seems to be an emerging compliance factor peculiar to the ECCJ. At least in the cases of *Ugokwe* (Election), *Habré* and *Ameganvi* (Parliamentarians), the fact that the ECCJ avoided making orders that expressly reversed decisions or processes by

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<sup>94</sup> *Ugokwe* case (not to swear any one in), *Habré* case (suspend a process which the government was not willing to undertake in the first place) and *Ameganvi Togolese Parliamentarians’* case (pay a total of US\$ 60 000).

<sup>95</sup> *Tandja* case (releasing former President Tandja was a too high a cost for political actors to pay at a particular point in time), *Habré* case (competing personal political interests did weigh greater than the benefits of obeying) and *Ameganvi Togolese Parliamentarians’* case (difficulty to reinstate parliamentarians who had already been replaced and risk to break a political alliance deal between the ruling party and main opposition group; eventually, the order was only to pay compensation).

<sup>96</sup> *Koraou Slavery* case (suspension by the regional intergovernmental organisation, international pressure, sanctions, quarantine, use of compliance to restore the government’s tarnished image).



domestic courts or other organs of the state seemed to have ensured full, partial or situational compliance. The behavior of other defendant states in subsequent cases appears to corroborate the growing relevance of the ECCJ's adjudicatory or jurisprudential policy in securing state compliance.<sup>97</sup> From that perspective, that factor could be considered as a 'shadow factor', which supports the political environment of the case and nature or *quantum* of the remedy. However, as reveals the discussion in chapter V on factors related to the respondent state, the 'legitimacy - judicial lawmaking' tandem is conclusively relevant to the ECCJ.

Non-compliance instances responded to different factors, the most important ones being the nature of the government of the day and the nature of both the right violated and the remedy provided. In fact, bad governance and lack of respect for the rule of law at the domestic level turned out to be the major likely reasons for non-compliance in 100 per cent of the non-compliance cases. The financial and governance issues associated with the nature of the right is relevant in only 25 per cent of the non-compliance instances.<sup>98</sup> As analysis of compliance factors have demonstrated, particularly in the cases involving The Gambia, the current state of the rule of law, independence of the judiciary, and the legal and judicial protection of human rights in particular states are not conducive to state compliance with the decisions of any international (human rights) body, let alone the ECCJ. In other instances, the social, legal and political environments also had some bearing as the *SERAP Education* and *Djotbayi* cases illustrate.

The compliance analysis also revealed other factors that can be said to be predictive of non-compliance with ECCJ's decisions. These include compliance with the decisions of domestic courts – and subsidiary of international human rights mechanisms, state sovereignty and the legal system adopted by the country.

A legitimate question arising from an observation of the conclusions on factors predictive of compliance is whether outcomes of this 'case-study' could be considered as the

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<sup>97</sup> See for instance *Kpatcha v Togo* (the ECCJ granted \$40 000 to the Complainant who was tortured, and ordered that the state immediately put an end to the violation; the Government was quick to release a communiqué stressing that the Community Court never found against the outcome of proceedings in domestic courts, and that the findings of the ECCJ could not retrieve processes conducted domestically).

<sup>98</sup> In the *SERAP Education* case.

general compliance trend in ECOWAS at large. Although theory and empirical scholarship on compliance suggest a prudent case-by-case approach to assessing state compliance, findings of this study reveal a potential for extrapolation from various perspectives.

Firstly, countries investigated include those adopting both dualist and monist legal traditions which are also used by all other 11 ECOWAS states not covered by the study. From that perspective, arguments developed in relation to direct application, supremacy (place of international law in municipal order, particularly vis-à-vis the Constitution), constitutional DPSP, and justiciability of socio-economic rights in the *SERAP Education* case could apply to ECOWAS dualist countries. The same applies to issues discussed under the *Habré* case, Senegal being a monist country just as all francophone and lusophone ECOWAS countries. Secondly, factors discussed in this study include the domestic political environment, which is mostly determined or influenced by the state of governance and democracy. Going by the same sources as those utilised for analysis, the credentials of other ECOWAS states do not differ significantly from those of the study countries. Conclusions reached in respect of the later could therefore also be extended to ECOWAS at large, at least as far as the relevant factors are concerned.

What is less well known at this point is why, despite the fact that it has the necessary means to do so, a country such as Nigeria has not complied with the pecuniary order in the case of unlawful arrest and detention for three years (at the time of writing). Nigeria's behaviour is all the more intriguing as it hosts the seat of the Court, has always supported the Court and closely collaborated with it. That country also stands as the 'big brother' in the region, which could be expected to lead by example. Another less known factor is why ECOWAS, or an individual member, namely 'big brother' Nigeria, have taken no action against The Gambia for failing to carry out the ECCJ's orders. Given that The Gambia and Nigeria are at odds from the standpoint of influence and power in the region, state sovereignty becomes the most plausible response to their respective behaviours towards judgments of the ECCJ. While allowing time and further studies to provide thorough empirical answers, it can be noted at this stage that given the political environment of the case, the nature of the remedy as well the prior involvement of domestic organs will be key to state compliance with the human rights judgments of the ECCJ in the future.

Although it has not been seen in full practice yet, the whole ECOWAS human rights regime had some bearing on the level of state compliance with ECCJ's decisions. So far, the ECOWAS Community Court has proved to be the quickest international court in the world in respect of the time to complete a case and has recorded compliance as fast as within a month. While the reasoning of the Court has attracted criticism in some cases, this study did not find any evidence of that factor having determined compliance. Compliance obligation is clear and ECOWAS laws provide for a detailed implementation procedure backed by sanctions. It remains to be seen how the judicial and political compliance-monitoring mechanisms will be used and run alongside.

As compared to the system which supports the African Commission, the ECOWAS regime exhibits differentiating features. These features make a difference to state compliance actually and potentially as the regime develops. They include the maturity and political will of ECOWAS as a sub-regional intergovernmental organisation, and of its political organs and mechanisms; the binding nature of the ECCJ's decisions, precision and detail of the orders, a well-formulated implementation procedure, the existence of nascent formal compliance-monitoring mechanisms and multiple provisions for monitoring and to move on to sanctions for non-compliance. Initial domestic proceedings have also influenced litigation in the ECCJ, a factor that has the potential of prompting compliance through legitimacy, although indirectly. This attractiveness of the ECOWAS human rights regime seems to be confirmed by the early 2010's trend of 'case flight' from the African Commission to the ECCJ. All things being equal, a striking illustration is the *Education* case, which SERAP first instituted in the Commission, before moving it to the ECCJ.

However, the impact of international litigation extends further than just a quantitative assessment of compliance with the orders in specific cases. Particularly, the final purpose of regional communities is the development of harmonised policies towards integration. This may be achieved only in a legal and institutional environment that is conducive to a constant dialogue between supranational or international and national actors. In other words, the success of international – human rights – systems is the extent to which they are able to impact on domestic systems and the other way around. The next chapter is therefore devoted to measuring such reciprocal impact or influence in respect of the ECOWAS human rights regime and the jurisprudence of its Court of Justice.



## **Chapter VII: Influence of the human rights jurisprudence of the ECOWAS Court of Justice**

### **1. Introduction**

The previous two chapters of this study were concerned with whether and how defendant states have complied with specific orders made by the ECOWAS Court of Justice (ECCJ) in cases to which they were parties. However, decisions of international bodies seek, and in fact have, wider effects than just satisfying particular claims brought in specific applications. International adjudication inevitably has various effects on the domestic system of states that are parties to the disputes settled and even beyond.

The purpose of the present chapter is therefore to investigate the actual or potential presence of some of these influence situations as prompted by the human rights jurisprudence of the ECOWAS Court of Justice. The primary reason for doing so lies in the fact that the compliance study dealt with in chapters V and VI was restricted to orders made in specific cases while inevitable far-reaching consequences of the judgments were not assessed. For instance, in cases studied, the ECCJ made no express order for specific legislative changes. As almost all the orders were directed to the Executive, there is therefore a need to interrogate derived or implicit changes falling under the competence of other state organs for a comprehensive ‘effects’ appraisal.

The next section sets out some theories on influence combined with illustrations borrowed from empirical works on regional regimes in Europe, the Americas and Africa. In line with this construction of influence, the following section investigates any effect, actual or potential, of the ECCJ’s judgments on the domestic systems of the defendant states. The impact analysis extends to reverse effects of domestic systems, namely municipal courts of study countries, on the ECCJ’s human rights jurisprudence. The chapter proceeds to interrogate the presence of ‘spill over’ effects in other ECOWAS countries that have not been party to any proceedings before the ECCJ. The final section discusses impact beyond ECOWAS.

## 2. Theoretical and empirical approach to influence

As explained in the preliminary chapter, ‘influence’ is used in this study as the impact or effect of the jurisprudence of the ECOWAS Court of Justice on domestic systems, including the Executive, Judiciary and Legislature and vice versa for courts.<sup>1</sup> Top-down or one way influence is concerned with actions of domestic organs to adjust national policy, legislation or adjudication with the findings of the ECCJ;<sup>2</sup> or the ECCJ’s jurisprudence prompting litigation on similar issues before domestic organs in both defendant states and other states. Bottom-up or two-way influence applies to cases in which there is direct evidence of domestic practices or decisions enlightening or shaping arguments in the ECCJ’s judgments. Finally, ‘spill over’ influence is illustrated by situations where domestic systems show signs of a systemic effect of the ECCJ’s jurisprudence which irradiates systems of other ECOWAS states and states beyond the ECOWAS geographic sphere.

Although domestic courts are the natural counterparts of international courts, the Executive and Legislature do not escape the influence of international adjudication as they all belong to a same addressee of international norms, the state. To begin with courts, the question has been posed whether domestic and international courts operate in complete normative isolation from each other or rather in interaction.<sup>3</sup> Studies have adopted at least two approaches to answering this question. Firstly, it has been suggested that, whether domestic or international, ‘a court is not a closed place where judges decide cases in camera, but rather a cross-road, a circular juncture where court pronouncements meet in an organised manner to build a dynamic law’.<sup>4</sup> Secondly, the destination of international decisions is the domestic system, where organs of the state, including courts, are better equipped to give effect to the outcome of international

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<sup>1</sup> See sections on clarification of terminology and literature on influence under chapter one. See also H Keller & AS Sweet *A Europe of rights: The impact of the ECHR on national legal systems* (2008).

<sup>2</sup> This could be either to facilitate compliance with the initial order or taking preventive measures to avoid being called before the regional court on future occasions.

<sup>3</sup> See Y Shany *Regulating the jurisdictional relations between national and international courts* (2007) 3.

<sup>4</sup> G Canivet ‘Les influences croisées entre juridictions nationales et internationales’ <http://www.ahjucaf.org/Les-influences-croisees-entre,7177.html> (accessed 16 April 2012). Mr Canivet is former President of the French Court of Cassation and member of the Constitutional Court of France.



adjudication.<sup>5</sup> An illustration of these propositions was given of ICJ judgments in USA<sup>6</sup> and Israeli<sup>7</sup> domestic courts.<sup>8</sup>

While relations between international and domestic courts are evident,<sup>9</sup> how they are shaped and create influence is central to the development of international law, especially to the success of regional – human rights – regimes. Influence may be inferred from statutory hierarchical relations, interaction, cooperation, and collaboration whether normative or jurisprudential. For instance, exhaustion of local remedies, complementarity, preliminary ruling mechanisms, and other *electa una via* rules are some of the inter-jurisdictional relations that have the potential of yielding influence.<sup>10</sup>

Even in instances where potential relations are prevented or limited by the adoption of the rule of non-exhaustion of local remedies, domestic and international courts may still interact through subsidiarity or complementarity.<sup>11</sup> Such interaction has been explained by the fact that despite the tremendous development of international adjudication, domestic courts remain ‘natural judges’ of international law.<sup>12</sup> In other words, the

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<sup>5</sup> See L Garlicki ‘Cooperation of courts: The role of supranational jurisdictions in Europe’ 6 (3 & 4) I.CON (2008) 521.

<sup>6</sup> See reference to *Medellín v Texas*, Appeal Judgment, No 06-984 ILDC 947 (US 2008) para 11 in the *LaGrand* and *Avena* cases.

<sup>7</sup> See H.C.J. 2056/04 *Beit Sourik Village v. Government of Israel* 58(5) P.D. 807 (2005) 38 (1-2), *Israel Law Review* 83 in the *Separation Barrier* and *Wall* cases.

<sup>8</sup> On the influence of domestic courts’ decisions on international adjudication, see in general, A Nollkaemper ‘The reception by the International Court of Justice of decisions of domestic courts’ *Federalismi* (29 July 2009) <http://dare.uva.nl/document/181641> (accessed 27 October 2013).

<sup>9</sup> On such relations and influence, see generally VM Kamto ‘Les interactions des jurisprudences internationales et des jurisprudences nationales’ in S.F.D.I. (ed) *La juridictionnalisation du droit international* Pédone (2003) 393-460 and VWA Schabas ‘L’influence de la Convention européenne des droits de l’homme sur la jurisprudence des Cours suprêmes des pays du Commonwealth’ in J-F Flauss (dir.) *L’influence de la Convention européenne des droits de l’homme sur les Etats tiers* Bruylant (2002) 29-53.

<sup>10</sup> See in general Shany (n 3 above).

<sup>11</sup> It is the case of the complementarity principle now legally established in the Rome Statute and the practice of the ICC. See JL de la Cuesta & A Eser ‘Concurrent national and international criminal jurisdiction and the principle ‘ne bis in idem’’ (2001) 72 *Revue Internationale de Droit Comparé* 753-764 and A-M Slaughter ‘A Global Community of Courts’ (2003) 44 *Harvard International Law Journal* 191.

<sup>12</sup> See A Tzanakopoulos ‘Domestic courts as the ‘natural judge’ of international law: A change in physiognomy’ Paper presented at the Workshop on the Use of International Law in Domestic Courts in West Africa 19<sup>th</sup> African Human Rights Moot Court Competition Cotonou – Benin (8 October 2010). The position of the author is supported by preliminary provisions of most international human rights conventions which lay implementation obligations primarily on states. Cases also abound of domestic courts decisions relying on international law or adjudication as available online under the International Law in Domestic Courts (ILDC) Project <http://www.oxfordlawreports.com/subscriber/articlesbycategory?module=ildc>

municipal system is ‘home’ to international law of which national courts are the primary enforcers. It is worth noting, that notwithstanding the adoption of the rule of non-exhaustion of local remedies, the large majority of ECOWAS Court cases discussed in the present study were examined by domestic courts at some point before ending up in the Community Court.<sup>13</sup>

The influence of international courts may also depend on vertical or horizontal relations regulated by international law such as is the case for preliminary rulings. In the horizontal situation, the two sets of courts have concurrent material, personal and local jurisdictions.<sup>14</sup> In the vertical situation, they are part of the same hierarchical system where international courts are positioned on the top either through a compulsory referral mechanism or the authority of the ‘supranational’ findings.<sup>15</sup> Similar relations are found in regional integration frameworks with the purpose of legal harmonisation.<sup>16</sup> In the particular framework of international human rights regimes, compliance means much more than just paying monetary compensation or releasing detainees. It ultimately implies drawing other implicit consequences of the decisions and undertaking necessary adjustments to bring domestic systems in line with regional norms.<sup>17</sup> In some instances, consequences to be drawn are explicit, the order being much broader such as known in the Inter-American system.<sup>18</sup>

Where courts have no legal requirement to collaborate, scholars defending a socialisation approach to judicial cooperation have investigated the role of democracy and communitarianism in shaping the influence of international courts on their municipal counterparts.<sup>19</sup> Yet, in those instances, influence is not envisaged without the authority

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<sup>13</sup> See compliance narrative in chapter four.

<sup>14</sup> See Shany (n 3 above) 27-39.

<sup>15</sup> In such instances, international courts play a ‘transnational’ or ‘supranational’ role vis-à-vis domestic courts. See Shany as above 33-34 and D Sloss ‘Treaty enforcement in domestic courts: A comparative analysis’ in D Sloss (ed) *The role of domestic courts in treaty enforcement: A comparative study* Cambridge (2009).

<sup>16</sup> This is relevant to West Africa, not only for ECOWAS but also the West African Economic and Monetary Union (UEMOA) and the Organisation of the Harmonisation of Business Law in Africa (OHADA).

<sup>17</sup> See Garlicki (n 5 above) 520.

<sup>18</sup> See for instance A Huneus ‘Courts resisting courts: Lessons from the Inter-American Court’s struggle to enforce human rights’ 44 (2011) *Cornell International Law Journal* 493-533.

<sup>19</sup> See for instance Shany (n 3 above) 99-104 and Slaughter (n 11 above) 191.

and ability of the influencing court on the one hand and the openness of the receiving court to be influenced on the other.<sup>20</sup> This may explain the argument that both national<sup>21</sup> and international<sup>22</sup> prominent human rights bodies mostly refer to the European Court of Human Rights (ECHR) case law for example than to the African Commission's jurisprudence.<sup>23</sup> It should be noted that the Commission has also decided far fewer cases.

There is equally evidence that relations between international and domestic courts are not only top-down but also bottom-up.<sup>24</sup> Illustrations abound of the ECHR reverting to domestic jurisprudence to understand social and political realities while adjudicating cases close to their original context.<sup>25</sup> Changes in domestic jurisprudence have also forced European judges to shift approach,<sup>26</sup> or reduce states' margin of appreciation depending on greater or lesser consensus at the domestic level.<sup>27</sup> As an interesting illustration of this, the ECHR has not hesitated to quote extensively the Polish Constitutional Court in resolving a case<sup>28</sup> which had been examined by domestic courts.<sup>29</sup> Similar influence has been demonstrated in the Inter-American Human Rights System.<sup>30</sup>

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<sup>20</sup> See Canivet (n 4 above) 5, the author singles out some factors for jurisprudential influence which include the authority of the issuing body, its notoriety, moral authority, force of conviction of arguments and the quality of the legal system. He argues that best elaborated decisions will therefore attract greater influence, because they build on values of universal scope. Alter considers persuasion of arguments as the dominant mode of diffusion. See KJ Alter 'The global spread of European style international courts' 35(1) *West European Politics* (2012) 135-154.

<sup>21</sup> For instance, the Benin and South African Constitutional Courts have not cited any African Commission decision in their judgments in years of adjudication.

<sup>22</sup> The ECOWAS Court of Justice has never substantively referred to African Commission's decisions in its human rights judgments.

<sup>23</sup> Out of the African context, even courts in very conservative jurisdictions such as the USA have reversed long established precedents to embrace international law not ratified by the US through controversial ECHR case law. In the same vein, ECHR case law has been widely cited Australia, Canada, New Zealand and South Africa. See Canivet (n 4 above) and Schabas (n 9 above).

<sup>24</sup> See Garlicki (n 5 above) 513, Canivet (n 4 above) 2-3 and Kamto (n 9 above).

<sup>25</sup> *Vo v France* No. 53924/00 19 (Eur. Ct. H.R. July 8, 2004) concerned with the recognition of the foetus.

<sup>26</sup> *Cossey v The United Kingdom* No. 10843/84 (Eur. Ct. H.R. September 27, 1990) concerned with homosexual marriages.

<sup>27</sup> *Mazurek v France* No. 34406/97 (Eur. Ct. H.R. February 1, 2000) concerned with children born out of wedlock; and *Fretté v France* No. 36515/97 (Eur. Ct. H.R. February 26, 2002) and concerned with parental rights and private and family life of homosexuals.

<sup>28</sup> *Hutten-Czapska v Poland* No. 35014/97 (Eur. Ct. H.R. June 19, 2006) concerned with property rights.

<sup>29</sup> See Garlicki (n 5 above) 514.

<sup>30</sup> See among others JL Cavallaro & SE Brewer 'Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-American Court' 102 *American Journal of International Law* (2008) 768-827 and A Huneus (2010) 'Rejecting the Inter-American Court: Judicialisation, national courts, and regional human rights' in J Couso et al (eds.) *Cultures of legality: Judicialisation and political activism in Latin America* Cambridge University Press (2010) 113-138.

The influence phenomenon has expanded far beyond the inter-jurisdictional realm, irradiating all sections of the state, shaping the behaviour of the Executive and prompting legislative changes. Studies provide an empirical indication that the Inter-American Court of Human Rights (IACHR) has contributed in shaping state behaviour by guiding legal and political reforms.<sup>31</sup> Furthermore, impact studies have established top-down and bottom-up approaches to socialisation of European human rights law under the auspices of the ECHR.<sup>32</sup> In the view of the authors of these studies, the ECHR has impacted wider national systems and has been instrumental in socialising a ‘pan European consensus’ on some key issues. Specific outcomes of the European ‘spill over’ impact model are both wide and varied.<sup>33</sup> Impact research demonstrated similar influence of the African<sup>34</sup> and Inter-American<sup>35</sup> human rights regimes on the domestic systems of state parties.

All in all, international adjudication inevitably influences all branches of domestic systems although within various parameters and in different ways. Influence also depends on the system of the country under consideration. The relativity of factors predictive of influence justifies an interest in case studies as undertaken in the following section.

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<sup>31</sup> See for instance F Basch *et al* ‘The effectiveness of the inter-American system of human rights protection: A quantitative approach to its functioning and compliance with its decisions’ 7 *Sur – International Journal on Human Rights* (2010) 9, Cavallaro & Brewer (n 30 above), and J Couso *et al* (n 30 above).

<sup>32</sup> As a major study in this line see H Keller & AS Sweet (eds.) *A Europe of Rights: The impact of the ECHR on national legal systems* (2008). See also Cavallaro (n 30 above) and D Shelton ‘The boundaries of human rights jurisdiction in Europe’ 13 *Duke Journal of Comparative and International Law* (2003) 95-153.

<sup>33</sup> These include Austria’s modified Code of criminal procedure; Belgium’s amended penal code, law on vagrancy, and civil code; Germany’s modified criminal code of procedure regarding pre-trial detention, gave legal recognition to transsexuals and took action to accelerate criminal and civil proceedings; the Netherlands’ modified code of military justice and law on detention of mental patients; Sweden introduced rules on expropriation and legislation on building permits; Switzerland amended military penal code and completely reviewed its judicial organisation and criminal procedure applicable to the army; and France strengthened protection of privacy of telephone communication.

<sup>34</sup> See for instance Centre for Human Rights *Celebrating the African Charter at 30: A guide to the African human rights system* (2011) 60-61. The guide demonstrates that ‘through its progressive interpretation of the [African] Charter, the [African] Commission has given guidance to states about the content of their obligations under the Charter, and its provisions have inspired domestic legislation’; on the other hand, ‘national courts are increasingly influenced by and use the Charter and the Commission’s findings to assist them in interpreting national law’. For an in-depth study of the impact of the African human rights system in 19 African states see Centre for Human Rights *Implementation of the African Charter and Women Protocol in selected African states* (2012).

<sup>35</sup> See Basch *et al* (n 31 above), Cavallaro & Brewer (n 30 above), and J Couso *et al* (n 30 above).

### **3. Influence of the ECOWAS Court judgments on the domestic systems of defendant states**

Despite its ‘decentralisation’, international law is said to suffer from a ‘chronic illness’ of under institutionalisation and under enforcement.<sup>36</sup> Yet, as discussed in previous chapters, the ECOWAS human rights regime was shaped differently. Judgments of its Court of Justice enjoy direct enforceability in the municipal sphere. The regime is therefore presumed, at least legally, to generate influence on domestic systems through the binding nature of ECCJ’s judgments on all branches of the defendant state, Executive, Legislature and Judiciary; their superiority and precedence over domestic courts’ decisions, and their direct enforcement.

Whether competent ECOWAS bodies will mete out sanctions against non-compliant states is another matter altogether and remains to be seen. For now, one may concur that there is room for an ‘orientation effect [to be] inevitable’,<sup>37</sup> although this may not be concluded before ascertaining that ECCJ’s judgments have prompted changes in the municipal sphere of defendant states, beyond the specific orders made in their operative parts. Both actual and potential changes are discussed only for instances where evidence existed of such influence or when the effect is demonstrated as unavoidable.

#### **3.1 Does the ECOWAS Court shape state policy by the Executive?**

Senegal will not be discussed under the present section as actions had been taken by all branches of the state to bring about the trial of former president Hissène Habré well before the ECCJ’s judgment. In fact, the case before the ECCJ was all about Senegal having undertaken the challenged changes.

##### **3.1.1 The Gambia**

As evidenced in the chapter on empirical compliance, The Gambia has demonstrated very little eagerness to bring its policies in line with the human rights jurisprudence of the ECOWAS Court of Justice. This is exemplified by the way law enforcement agencies and

<sup>36</sup> See Tzanakopoulos (n 12 above) 16.

<sup>37</sup> See LR Helfer & E Voeten ‘Measuring judicial influence: Does the European Court of Human Rights promote social and legal change?’ Conference on ‘Domestic consequences of human rights treaty ratification’ (15-16 October 2010) 4 NYU School of Law’s Centre for Human Rights and Global Justice.



state departments still deal with public freedoms and civil and political rights years after both the *Manneh* and *Saidykhan* decisions.<sup>38</sup>

On site investigation has, however, revealed that even such an unfriendly environment has allowed some penetration of ECCJ judgments. For instance, evidence suggests ongoing reforms in early 2012 to address unlawful detention and illegal arrest practices among law enforcement agents in The Gambia.<sup>39</sup> The move is part of a wider capacity-strengthening strategy implemented by the Ministry of Justice with the purported overall objective of ‘rebranding the human rights image of The Gambia’.<sup>40</sup> In line with this strategy, several meetings were called in January 2012 by the Director of the Civil Litigation and International Law Department within the Ministry of Justice. Courses were also organised to the attention of law enforcement personnel on how to handle arrest and detention cases in line with internationally accepted standards. The strategy and documents relating to various meetings made express reference to such a move being related to the ECCJ’s judgments against The Gambia which were mainly concerned with unlawful detention and illegal arrest.<sup>41</sup>

The effects of this strategy remain to be seen, namely through the frequency with which The Gambia is called before the ECCJ in the future.<sup>42</sup> For now, it appears that detention without trial has been replaced by expeditious proceedings. Unfair trials and outrageously unjust sentences are still the order of the day and the state has not

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<sup>38</sup> See Media Foundation for West Africa (MFWA) ‘Alerts’ [http://www.mediafound.org/index.php?option=com\\_content&task=blogcategory&id=27&Itemid=46](http://www.mediafound.org/index.php?option=com_content&task=blogcategory&id=27&Itemid=46).

<sup>39</sup> Information was mainly obtained during an interview with Martins U Okoi, Director of Civil Litigation and International Law Department, Ministry of Justice (Banjul, 27 January 2012).

<sup>40</sup> As reads the title of the main strategy document consulted by the author. Although he was not served with copies of the relevant documents, letters and invitations, the author had access to them in the DCLIL, Ministry of Justice, on 27 January 2012.

<sup>41</sup> As above.

<sup>42</sup> No later than in November 2011, The Gambia (the Executive) was called again before the ECOWAS Court in a case concerned with the assassination of well-known Gambian journalist Deyda Haidara, former publisher and editor of the Banjul-based newspaper *The Point*, and former president of the Gambian Press Union. Dayda Hydara was murdered in a drive-by shooting on 16 December 2004, as he drove home from *The Point* premises. In *Dayda Hydara Jr. & 2 Others v The Gambia* ECW/CCJ/APP/30/11 instituted by the children of the journalist and the Africa Regional Office of the International Federation of Journalists (IFJ-Africa), the plaintiffs complain that the investigation of the NIA is flawed and misleading and no diligent effort has been made to investigate the matter.



announced any changes regarding inhuman and degrading treatment suffered by individuals at the hands of police.<sup>43</sup>

### 3.1.2 Niger

Considering that Niger had criminalised slavery in its penal code<sup>44</sup> before the *Koraou Slavery* case in the ECCJ, one could assume the judgment did not require any preventive or forward-looking action from the Executive. This is because, in such a situation, the duty lies with domestic courts just to apply the law. However, despite the criminalisation of slavery from 2003, an estimated 43,000 people were believed to remain in slavery across Niger in 2010, two years after the ECCJ's *Koraou* judgment.<sup>45</sup> By 'promoting public debate on an issue sustained under the code of silence',<sup>46</sup> the judgment therefore provided an opportunity for the Government of Niger to take measures with the effect that the law is better implemented. Above all, it was Niger's Government that was condemned for having failed to protect *Koraou* from violation by a third party.

Accordingly, one would have expected sensitisation and other public measures by the Government to ensure a greater and effective implementation of the law. In 2011, three years after the judgment, the picture was rather mixed. Upon the proposal of the Directorate of Civil Litigation, the Ministry of Justice issued a *circulaire* to judges with express instruction to handle cases, and more specifically slavery related matters, with greater diligence.<sup>47</sup> However, the *circulaire* has not been effectively enforced if it has been at all. In the same vein, police officers have not addressed long delays in investigating slavery matters.<sup>48</sup> Investigating officers are believed to lack a good knowledge of the 2003 anti-slavery legislation while an accurate characterisation of the facts is key to fighting slavery as a crime through law enforcement.<sup>49</sup> The problem is that police or gendarmerie officers fail to properly characterise the facts of the case either by

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<sup>43</sup> See MFWA (n 38 above).

<sup>44</sup> See Loi N° 2003-025 du 13 juin 2003 modifiant la loi N° 61-27 du 15 juillet 1961, portant institution du Code Pénal, Journal Officiel spécial N° 4 du 7 avril 2004.

<sup>45</sup> H Duffy 'Implementation of an ECOWAS Court judgment: Hadijatou Mani Koraou v The Republic of Niger' (2010) 6 *Interights Bulletin* 66.

<sup>46</sup> As above.

<sup>47</sup> Interview with Hamani Abdou, Magistrate, former Head of Litigation, Ministry of Justice (Niamey, 16 May 2011).

<sup>48</sup> Interview Hamani as above.

<sup>49</sup> Interview Habibou.

not properly applying the law or due to their cultural or religious bias.<sup>50</sup> As a consequence, several legal suits that involved slavery were just thrown out by the judges.

With regard to awareness and capacity-building initiatives expected for a greater enforcement of the law, they were instead undertaken by non-governmental organisations. Civil society organisations also openly complained of the Government's failure to design and implement such initiatives as 'zero tolerance' programmes. Instead of the support that would have been expected, officials initially demonstrated little interest in campaign programmes initiated by international organisations. An illustration is provided by the reluctance of the Government to support a two-year pilot project initiated by the International Labour Organisation to the attention of civil servants to tackle 'forced labour' in Niger.<sup>51</sup> In fact, slavery was denied at the highest level of the state. In his time, former Nigerien President Mamadou Tandja was quoted to have, on various occasions, publicly denied that slavery still existed in Niger and had anti-slavery activists arrested.<sup>52</sup>

The Government of Niger should have also initiated policy measures to ensure that all its branches discharged their duty to enforce anti-slavery provisions more effectively after the ECCJ's judgment. Importantly, prefects vested with administrative authority at provincial level play an important role in law enforcement. In fact, the prefect of Konni, the town where Koraou lived, triggered Niger's responsibility in the case by failing to act upon Koraou's initial complaint. Niger's obligation to protect was thus established through the omission of a state official. At least two years after the judgment, there was no evidence that the Government had instructed prefects to the effect of drawing full consequences from the ECCJ's judgment.

The same situation seems to apply to Niger's obligation to promote non-discrimination and zero tolerance to slavery as a consequence of the ECCJ's judgment. Indeed, even if the ECCJ did not find discrimination on the basis of sex, it addressed the issue and found

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<sup>50</sup> As above.

<sup>51</sup> As above.

<sup>52</sup> See interview with Ilguilas Weila, former President of Nigerien anti-slavery NGO Timidria (Niamey, 16 May 2011). See also G Sanda 'L'esclavage a évolué. Y a-t-il eu des progrès? Pas vraiment!' Anti-Slavery Cesep (2010) 13 <http://www.cesep.be/ETUDES/ENJEUX/esclavage.pdf> (accessed 26 April 2012).

that the factual elements existed that pertain to such discrimination.<sup>53</sup> Accordingly, it should have appeared to the Nigerien Government that persisting slavery practices despite legislative measures demanded a change of mindset towards implementation. In her submissions, the complainant has abundantly demonstrated that her dual situation of wife and slave was discriminatory as compared to other legitimate free wives of her master. In addition and by extension, categorisation of people enslaved in Niger might include gender, ethnicity and others. Arguments made in the ECCJ's judgment and a poor implementation of the law should have drawn the Government's attention to the need to interrogate these considerations.

### 3.1.3 Nigeria

In the *SERAP Education* judgment, the ECCJ ordered the Federal Government of Nigeria to replace embezzled public funds to allow an adequate continuation of universal basic education programmes in the concerned states of the federation.<sup>54</sup> It is important to mention that the Court ordered that the money be replaced 'whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be'.<sup>55</sup> Therefore, an implied request followed for the Federal Government of Nigeria to investigate allegations of embezzlement and have the accused officials prosecuted to recover the diverted public funds.<sup>56</sup>

As a positive development in this case, Nigeria's anti-corruption body has pursued the matter and taken legal action against Basic Education Commission officials involved.<sup>57</sup> In fact, the lack of transparency in the management of funds dispatched by the Federal Government also amounted to a violation of provisions of the Independent Corrupt Practices Commission (ICPC) Act. With regard to legislative impact, one would have expected the government to realise the consequences of ECCJ's declaration that socio-

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<sup>53</sup> See G Badet 'Un nouveau pas franchi dans la mise en œuvre de la responsabilité des Etats membres de la CEDEAO pour violation des droits de l'homme commise sur leur territoire par des particuliers : commentaire de l'arrêt *Koraou c. Niger*' (2010) 23 *Revue Béninoise de Sciences Juridiques et Administratives* 158.

<sup>54</sup> *SERAP (Education) v Nigeria* ECW/CCJ/JUD/07/10, 30 November 2010, para 25.

<sup>55</sup> As above, relief 3, para 28.

<sup>56</sup> See compliance narrative under chapter four, and the nature of the rights violated and duty imposed on the state under chapter six.

<sup>57</sup> See interview with Adetokumbo Mumuni, Executive Director of SERAP (Abuja, 6 September 2012).

economic rights are justiciable in the African Charter, and by implication in Nigeria, and initiate necessary changes. If the common view was to be followed that, because of the provisions for many of them under Directive Principles of State Policy, socio-economic rights are not justiciable in Nigeria, the Federal Government should have submitted a bill to Parliament to effect changes in the Constitution or any other relevant laws. However, as discussed later in this chapter, the issue is rather one of a purposive interpretation of the Constitution in the light of the domestication of the African Charter and powers of the Parliament to give effect to DPSP's provisions concerned with socio-economic rights.<sup>58</sup>

Having said that, the Nigerian Executive has not demonstrated a prime interest in granting full and effective attention to these rights. Such fact is exemplified by the poor or limited level of implementation of scarce domestic courts' judgments.<sup>59</sup> The same may apply to recommendations of the African Commission in the landmark *SERAC* decision.<sup>60</sup> Reasons for this state of affairs hark back to issues relating to governance, corruption and impunity discussed under the section on the ECCJ as a promoter of legislative reforms later in this chapter.

With respect to the *Djotbaya* case,<sup>61</sup> the ECCJ's judgment brought some change although apparently not sustainably. It was mainly expected that the Government would take action against parading suspects which is frequently part of the practice of law

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<sup>58</sup> See also discussion on the nature of the rights and duty of the state under chapter five.

<sup>59</sup> See CA Odinkalu 'The impact of economic and social rights in Nigeria: An assessment of the legal framework for implementing education and health as human rights' in V Gauri (ed.) *Courting social rights: Judicial enforcement of social and economic rights in the developing world* Cambridge University Press (2008) 183-223.

<sup>60</sup> Investigations did not lead to any evidence suggesting the implementation of the main findings of the African Commission's decision *SERAC (Ogoni Land) v Nigeria* AHRLR 60 (ACHPR 2001). In any case, even if recommendations like stopping attacks or providing information to victims could have seen some beginning of implementation, prosecution of security officials and compensation of victims have certainly not seen any compliance. However, according to a SERAC representative, significant action has been taken in the matter including: 1) Establishment of a Ministry of Niger Delta to address the problems of the region; 2) withdrawal of Shell from oil exploration and exploitation in Ogoni Land; and 3) setting up of a technical committee on Niger Delta to monitor the implementation of the African Commission's decision. The same source confirms that the Federal Government has taken over on the cleaning. See interview with Kalu Obuba, Executive Director of SERAC (Abuja, 6 September 2012).

<sup>61</sup> *Djotbaya and Others v Nigeria* ECW/CCJ/JUD/01/09, 28 January 2009 concerned with the parading of ECOWAS nationals accused of stealing crude oil. The ECCJ's 2009 judgment condemned Nigeria for violating the complainants' right to be presumed innocence.

enforcement personnel in Nigeria. The ECCJ's judgment was followed with a huge outcry from civil society and the media.<sup>62</sup> As local police experts decried the practice,<sup>63</sup> the Federal High Court in Lagos heard that parading suspects in the media must be stopped.<sup>64</sup>

In early 2012, at long last, Nigeria's Inspector-General of Police took a step by officially 'ordering police units to end with immediate effect a long-held [parading of suspects] practice of the Nigerian police'.<sup>65</sup> Whether the call will be followed with sustainable compliance is to be seen and local practitioners believe the practice is still deeply entrenched in police behaviours.<sup>66</sup> Parading suspects in clear violation of the presumption of innocence was still common practice among Nigerian State Security Service at the time of this writing.

### 3.1.4 Togo

The Togolese parliamentarians' case was politicised to the extent that observers warned that negative interference of the Executive will 'annihilate the expected effects of the ECCJ's judgment on domestic courts and state agencies'.<sup>67</sup> As a matter of fact, refusal to reintegrate the parliamentarians left the impression that the government may allow similar violations in the future as long as it is prepared to pay compensation. This belies

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<sup>62</sup> See Punch 'Mr. President, parading of suspects is wrong' (Feb 2012) <http://www.punchng.com/opinion/mr-president-parading-of-suspects-is-wrong/>; HollerAfrica 'Should Suspects Be Paraded?' [http://www.hollerafrica.com/showArticle.php?artId=413&catId=1](http://www.hollerafrica.com/showArticle.php?artId=413&catId=1;); and U Majau 'Guilty until proven innocent: A tale of parading suspects in Nigeria' The Lawyers Chronicle [http://thelawyerschronicle.com/index.php/index.php?option=com\\_content&view=article&id=50:guilty-until-proven-innocent&catid=35:focus-on-the-law&Itemid=53](http://thelawyerschronicle.com/index.php/index.php?option=com_content&view=article&id=50:guilty-until-proven-innocent&catid=35:focus-on-the-law&Itemid=53) (accessed 26 April 2012).

<sup>63</sup> See National Daily Newspaper 'Security expert decries SSS' parade of suspects' [http://www.nationaldailyng.com/index.php?option=com\\_content&view=article&id=3488:security-expert-decries-sss-parade-of-suspects-&catid=308:crime&Itemid=596](http://www.nationaldailyng.com/index.php?option=com_content&view=article&id=3488:security-expert-decries-sss-parade-of-suspects-&catid=308:crime&Itemid=596) (accessed 26 April 2012).

<sup>64</sup> See K Odunukan 'Judge tells Sanusi to stop parading suspects in the media' Nairaland Forum (2010) <http://www.nairaland.com/418915/judge-tells-sanusi-stop-parading> (accessed 26 April 2012).

<sup>65</sup> See Sharpedgenews 'Continuing with reforms, acting police IG ends parading of suspects' (11 March 2012) <http://www.sharpedgenews.com/index.php/news/recent-news/960-continuing-with-reforms-acting-police-ig-ends-parading-of-suspects> (accessed 26 April 2012).

<sup>66</sup> Interview with Advocate Falana (Abuja, 10 May 2011).

<sup>67</sup> Interview with Advocate Zeus Ajavon, Counsel for the complainants in *Ameganvi v Togo* (Lome, 18 January 2012). In the chapters dealing with compliance, the interviewee had recalled that the government of Togo had developed the behaviour of not complying with domestic courts' decisions, especially monetary judgments. See also interview with Prof Wolou Komi, Faculty of Law, University of Lome (Lome, 18 January 2012).

the principle that, besides restoring the victims in their rights, the purpose of adjudication is to prevent future violation.

However, there is evidence that upon being served the ECCJ's judgment, Togo's Minister for Justice instructed prosecuting authorities to act promptly in cases involving the state.<sup>68</sup> Especially in criminal cases, the same orders were reported to have been issued with the purpose of having domestic courts either release the suspects or complete proceedings to close the case. Stakeholders believe such instructions were given with regard to cases pending before domestic courts to render new proceedings before the ECCJ moot.<sup>69</sup>

The previous discussion shows some trends of the ECCJ's work influencing state policy at least in the countries indicated. Despite these trends it must be stressed that the political environment of the country and circumstances of the particular case remain the ultimate trend setter. In any case, there is evidence that actions of governments were arguably informed by findings of the ECCJ.

### **3.2 The ECOWAS Court as a promoter of legislative reforms?**

As pointed out in chapter five and chapter six on compliance, the ECCJ did not make any order for legislative reforms. However, it is suggested that practical difficulties in implementing anti-slavery legislation and the limited impact of the *Koraou Slavery* judgment demanded additional normative action in Niger. The same applies to the *SERAP Education* judgment, which has inevitable implications both for courts and state policy in Nigeria which is not the case in other study countries. This section will therefore discuss Niger and Nigeria.

#### **3.2.1 Niger**

As pointed out earlier, Niger already had anti-slavery provisions at the time the ECCJ condemned the state in the *Koraou Slavery* judgment.<sup>70</sup> The law had entered into force and had even been used by courts as illustrated later in this study. Hence, the *Koraou*

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<sup>68</sup> Interview with Advocate Ajavon.

<sup>69</sup> As above.

<sup>70</sup> See discussion in previous section of this chapter on whether the ECCJ shapes state policy in Niger.



Slavery judgment had no legislative implications in Niger in terms of repealing existing laws or adopting a new one. Although a major legislative intervention was not needed, proceedings in the Community Court revealed the need for Niger to assess its anti-slavery law adopted five years earlier in 2003. Against the background of enforcement problems, such assessment could include interrogating possible practical inadequacies, shortcomings, and the need for further regulations or implementing decrees to ensure effectiveness.

Practical issues facing an effective implementation of the 2003 law are discussed under sections dealing with influence on the executive and domestic courts. In this section, it must simply be stressed that, as the main promoter of legislative reform at the domestic level, the Government of Niger had a duty to take further necessary actions to ensure the law is fully implemented.

The failure of the Government to enforce its *circulaire* is illustrative of the lack of political will to enforce penal code anti-slavery provisions to their fullest. In fact, one may wonder why there was a *circulaire* but not an implementing presidential decree, which, signed by the head of the Executive, would have demonstrated greater commitment and willingness to seriously address the issue. A decree also carries greater legal weight and binding force than a *circulaire*, which is merely an administrative document issued at directorate level. This is not to ignore the fact that the main stakeholders or primary addressees of any such acts are municipal judges, hence the question arises whether executive acts would violate the separation of powers. However, the boundaries of separation of powers are becoming blurred in the domestic systems of many countries. Niger is not an exception. Prosecuting judges and authorities whose intervention is central to law implementation and enforcement, are placed within the hierarchical authority of the minister of justice who is a sitting member of the Cabinet.

Niger's approach to the criminalisation of slavery is not exempt from criticism either. The 2003 amendment to the Nigerien Penal Code criminalises slavery as both a felony and misdemeanor depending on certain conditions.<sup>71</sup> Basically, felony applies to acts involving

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<sup>71</sup> See Loi N° 2003-025 du 13 juin 2003 modifiant la loi N° 61-27 du 15 juillet 1961, portant institution du Code Pénal, Journal Officiel spécial N° 4 du 7 avril 2004, arts 207(1), 207(2), and 207(3).

sexual engagement and placement of under 18-year-old persons, and attracts 10 to 30 years imprisonment and US\$2 000 to US\$11 000 penalty. Misdemeanor deals with enslavement for lucrative purposes, including forcing one's slave to work or engage in prostitution. Such acts attracts 5 to 10 years' imprisonment and US\$1 000 to US\$2 000 penalty. This categorisation seems to have allowed enforcement officers to qualify acts of felony mostly under misdemeanor and, consequently, impose more lenient penalties.

On the other hand, Nigerien law did not proscribe other forms of trafficking in persons until 2010. Because non-criminalisation of human trafficking provided a window for slavery practices to escape the scrutiny of the 2003 amendment to the Penal Code, a law on trafficking was welcomed. The December 2010 Law<sup>72</sup> is largely inspired by the UN 2000 Convention,<sup>73</sup> which Niger ratified in 2004. According to that law, trafficking is punishable with 5 to 10 years' imprisonment and \$1 000 to \$10 000 penalty. Severe sentences and penalties apply to aggravated circumstances, including trafficking in children.

However, the pace at which Niger acts in the fight against slavery and human trafficking was slow. It was only on 21 March 2012 that the Government discussed a draft decree to implement the anti-trafficking law and create a National Agency to oversee its enforcement as well as compensation funds for victims.<sup>74</sup> Despite these efforts further action was needed to bolster domestic legislation and policy implementation considering the trans-border nature of human trafficking in West Africa. Regional legislation and multilateral cooperation under the auspices of ECOWAS should be considered.<sup>75</sup>

Niger's numerous reservations to CEDAW support the idea that there should be a more effective use of regulation-making powers of the executive to foster the implementation

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<sup>72</sup> See Ordonnance n° 2010-86 du 16 décembre 2010 relative à la lutte contre la traite des personnes.

<sup>73</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000.

<sup>74</sup> See Relevé of the Cabinet's meeting, para 4(3), Info Niger 'Au Conseil des ministres: le gouvernement adopte plusieurs projets de textes' <http://217.19.227.146.static.hosted.by.combell.com/presse/societe/au-conseil-des-ministres-le-gouvernement-adopte-plusieurs-projets-de-textes/> (6 July 2012).

<sup>75</sup> The relevance of cooperation is illustrated by the inter-country investigation organised by Niger with Mali and Togo that led in 2009 to the arrest of traffickers. See US Department of State '2009 Niger trafique des personnes' [http://photos.state.gov/libraries/niger/885/french/report\\_006.pdf](http://photos.state.gov/libraries/niger/885/french/report_006.pdf) (accessed 6 July 2012) 2.

of existing laws. This is the more so where the CEDAW Committee has declared many of Niger's reservations to CEDAW contrary to the object and purpose of the Convention.<sup>76</sup> The Committee equally singled out the need to address legal and regulatory provisions that discriminate against women in Niger. These are, to cite but a few, the application of three different sources of law, a patriarchal ideology with firmly entrenched gender stereotypes, and deep-rooted culture, customs and traditions that prevent the enjoyment of women's rights.<sup>77</sup>

In the light of the foregoing, tackling slavery practices in the specific environment of Niger requires more than just adding anti-slavery provisions to the penal code. Further regulation and legal harmonisation are apparently wanting. In the presence of a penal code that criminalises slavery practices, it falls within the duties of the executive to take complementary legal measures such as those alluded to above. In a presidential system of government like the one adopted in Niger, legislative and other exceptional powers afforded to the President should not be considered as a personal privilege. They should rather be used to address issues that are of prime importance to the country and society. The President and Government of Niger therefore have a duty to have recourse to their law and regulation making powers to ensure that anti-slavery provisions in the penal code translate into reality. In late 2013, five years after the judgment, these authorities had yet to fulfil the immense promises brought by the ECCJ's *Koraou* judgment. With the Government, domestic courts were the two addressees of the ECCJ's condemnation in the *Koraou* judgment. Domestic courts seem to have been better followers of the ECCJ as discussed later in this chapter.

### 3.2.2 Nigeria

In the *Ugokwe* case, even if the provisional order not to swear any one in until the ECCJ decided the case on the merits was directed to the Executive, the Federal Government of Nigeria did not have the power to suspend the electoral process. As noted in the compliance analysis, the Attorney General of the Federation wrote to the Speaker of the

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<sup>76</sup> See CEDAW Committee, Concluding Comments: Niger, CEDAW/C/NER/CO/2 (11 June 2007), para 9.

<sup>77</sup> As above paras 15-17.

House of Representative who was responsible for the process. The express instruction was to abide by the judgment of the ECOWAS Court.

While the *Ugokwe* judgment did not expressly instruct that any legislative change be made, the case provided an opportunity to test the ability of the Executive to file a request with other state organs, in this instance the Legislature, with a view to enforcing the main order.<sup>78</sup> Yet, instructing the Parliament to suspend an electoral process is not as difficult as initiating legislative reforms with a view to giving full effect to socio-economic rights. The express order to replace the embezzled funds has been discussed in chapter five and chapter six on the analysis of compliance factors. Here, the two implicit consequences are discussed. The first issue deliberated upon by the ECCJ was the justiciability of socio-economic rights (education) which the Court said were justiciable. The second issue was whether non-aggrieved parties have standing in socio-economic rights litigation to which the Community Court equally gave a positive answer by opting for *actio popularis*.

As far as justiciability is concerned, a legal argument could be made that socio-economic rights in the African Charter are also justiciable in Nigeria by virtue of that judgment for different reasons. The finding that socio-economic rights are justiciable is contained in the operative part of the judgment. By granting jurisdiction to the ECCJ, participating in its proceedings and accepting its judgment, the Government of Nigeria has committed the country to give effect to the findings of the Court.

An issue could be whether ECCJ's judges declared socio-economic rights justiciable in the Community Court or in Nigeria. In its ruling on preliminary objections by Nigeria that SERAP lacked standing and that socio-economic rights are not justiciable in Nigeria, the ECCJ had in fact declared that 'the matter is justiciable in this Court'.<sup>79</sup> The Court made itself clearer in the final judgment that it meant the rights were justiciable 'under the African Charter'.<sup>80</sup> The question of justiciability under Nigerian law has been discussed

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<sup>78</sup> *Ugokwe v Nigeria* ECW/CCJ/JUD/03/05, 7 October 2005. As compliance narrative in chapter four reveals, the Federal Government of Nigeria wrote to the Speaker of the Parliament with the instruction that no one should be sworn in until the ECCJ decided on the merits of the case.

<sup>79</sup> As above, para 19.

<sup>80</sup> *SERAP (Education) v Nigeria* Judgment No ECW/CCJ/JUD/07/10 of 30 November 2010 relief 1, para 26.

under the nature of the rights violated in chapter six. The main legal arguments are that decisions of the ECCJ are enforceable in Nigeria, the African Charter is Nigerian law by an Act of Parliament, and DPSP in the Constitution are wrongly interpreted as implying that individuals cannot claim those rights in Nigerian courts.

Having said this, and as a consequence of the foregoing, the ECCJ's *SERAP Education* judgment did not inaugurate the justiciability of socio-economic rights in Nigeria considering municipal law, and to some extent judicial practice, at the time of the judgment. Indeed, Nigeria's Parliament had already made the African Charter domestic law thus recognising socio-economic rights of the Charter, including education, applicable in domestic courts just as any ordinary law. The perception of non-justiciability of socio-economic rights in both Nigerian law, including the Constitution, and jurisprudence has also been discussed under analysis of compliance factors under chapter five and chapter six.

At this point, it is crucial to shed the light particularly on what the Constitution actually provides for in respect of the justiciability of socio-economic rights and other issues covered by DPSP. Article 6(6)(c) of the Constitution of Nigeria provides that

The judicial powers vested in accordance with the foregoing provisions of this section shall not *except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.*<sup>81</sup>

A first reading of these constitutional provisions suggests that all the issues covered by the DPSP, including a number of socio-economic rights, are not justiciable, which is they cannot be adjudicated by courts. However, this study suggests that the wordings of the provisions rather mean that Chapter II – DPSP – issues may not be *questioned* in a court of law. The fact that such issues, which include several governance principles such as democracy, regional integration, and international cooperation, are not questionable in courts should not in any way imply or mean that individuals cannot institute legal action for the breach of their personal rights.

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<sup>81</sup> Emphasis of the author.

The actual interpretation of Article 6(6)(c) should only be that DPSP objectives are set by the state as its own targets to meet. As a matter of fact, Article 18(3)(a) of the DPSP, relating to the right to education, states that ‘Government shall *as and when practicable* provide ... free, compulsory, and universal primary education’.<sup>82</sup> The very purpose of such limitation is to avoid individuals or groups taking the state to court for having not complied with these objectives as general pledges. Judicial avenues therefore remain open for denial of those rights in specific cases. The next section of this chapter exemplifies how domestic courts have adjudicated those rights in several instances prior to the ECCJ’s judgment despite the DPSP contained in the Constitution.

In the light of the above, and contrary to the common position, the most relevant effect of the ECCJ’s *SERAP Education* judgment on Nigerian law would have been not necessarily an amendment of the Constitution or any other municipal law. A more appropriate approach could be for the Parliament to enforce relevant provisions of the Constitution, especially the DPSP, to put an end to the wrong common perception of non-justiciability of socio-economic rights. Namely, the Nigerian Legislature should revert to its powers to enforce socio-economic rights under the DPSP, exert tighter control over Government’s actions and fight impunity in corruption instances to ensure that those rights are given due consideration.<sup>83</sup> Socio-economic rights could then be moved from the shadow of Directive Principles of State Policy to the light of living constitutional rights in order to prevent them from receiving little if no enforcement at all. As at November 2013, three years after the ECCJ’s judgment, there was no evidence that such action has been taken. Again, the Nigerian Legislature has already addressed the implementation of socio-economic rights through the African Charter domestication Act.

The ECCJ’s judgment in the *SERAP Education* case also shed the light on another important issue, which is one of *locus standi* in cases of individual rights, including socio-economic rights. If the concerned rights are justiciable, as says the ECCJ, and as is actually the case as suggested earlier, Nigeria should adapt its individual legal entitlement and *locus standi* rules. This is because, in that decision, the ECCJ also confirmed its previous

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<sup>82</sup> Emphasis of the author.

<sup>83</sup> See discussion on the justiciability of socio-economic rights under the Constitution of Nigeria under the section on the nature of the rights violated and duty imposed on state in chapter six.



position that, according to *actio popularis*, a plaintiff need not show any personal connection but only establish that public rights exist and have been breached for a court to assume jurisdiction.<sup>84</sup> Prior to the ECCJ's judgment, fundamental rights enforcement rules in Nigeria were not very friendly to individuals in respect of standing. Adoption of new fundamental rights enforcement rules in 2009, which was less than a year before the ECCJ's judgment, was believed to have the potential of facilitating effects of the *SERAP Education* decision.<sup>85</sup>

To sum up, contrary to the common view, socio-economic rights were already justiciable as per Nigerian law prior to the *SERAP Education* judgment. Non-justiciability, especially by virtue of limitations imposed by DPSP, was equally only perceived. As seen in the next section, courts have adjudicated those rights in many instances in the pre *SERAP Education* judgment era. However, the ECCJ's judgment can be seen as having revived the debate on both the justiciability of socio-economic rights and individual standing in human rights cases in Nigeria. Whether activist municipal judges have taken a leaf from the precedent set by the ECCJ is discussed below.

### **3.3 Are domestic courts of defendant states influenced by the ECOWAS Court?**

As was alluded to in the introduction to this chapter, relations between international and domestic courts proceed from either legal requirements, for instance preliminary rulings mechanisms, or jurisprudential influence, depending on the authority of the issuing body and the openness of the receiving one. This section thus first discusses any obligation for domestic courts to refer to the ECCJ's jurisprudence before examining actual and potential jurisprudential influence.

#### **3.3.1 ECOWAS and domestic courts: Jurisdictional relationship or co-operation?**

Examining the relationship between the ECCJ and domestic courts implies investigating the nature of such a relationship. More specifically, any question raised will eventually seek to clarify whether the relationship, if established, is one that shapes cooperation and

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<sup>84</sup> *SERAP v Nigeria* (Ruling on preliminary objection) ECW/CCJ/APP/08/08, 27 October 2009, paras 31-33.

<sup>85</sup> See Fundamental Rights (Enforcement Procedure) Rules 2009, made on November 11, 2009 and entered into force on December 1, 2009, later referred to as Nigeria FREP Rules 2009. See also discussion of relevant provisions of the Rules in the next section on the influence of the *SERAP Education* judgment on domestic courts in Nigeria.

collaboration; as well as whether established relationships are potentially conducive to influence both ways.

Reading from the law, two types of relations are possible between the ECCJ and domestic courts.<sup>86</sup> The first possible channel of legal and jurisdictional relationship is the mechanism of preliminary ruling introduced by the 2005 Community Court Protocol. Article 10(f) of the Protocol provides that ‘where in any action before a court of a Member State, an issue arises as to the interpretation of a provision of the Treaty, or the other Protocols or Regulations, the national court *may* on its own or at the request of any of the parties to the action refer the issue to the Court for interpretation’.<sup>87</sup>

Sticking to the letter of the provision, while a window is open for relationship, one may argue that, *prima facie*, such relationship does not seem to have the potential of yielding any influence of the Community Court on domestic courts. A first reason for this is that the preliminary ruling mechanism refers only to the interpretation of the ECOWAS Treaty and other laws enacted in the framework of the Community and which can be termed as ‘community law’ also hereafter referred to as ECOWAS ‘original law’.<sup>88</sup> It follows that, strictly speaking, the mechanism does not apply to the interpretation of provisions of the African Charter which mainly forms the normative basis of the ECCJ’s human rights jurisprudence.

Another reason, certainly the most important, is the fact that the preliminary ruling mechanism provided under article 10(f) is only optional. Domestic courts may therefore

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<sup>86</sup> In reference to the rules that apply in the two other main regional integration regimes in the region – UEMOA and OHADA – these relations are known as ‘jurisdictional authority’; the regional court’s authority ensues from an horizontal relationship that is exerted through the preliminary ruling mechanism and a vertical relationship exerted through the bindingness of the community court’s decisions on domestic courts, through the state. On the relationship between UEMOA and OHADA Courts and domestic courts of their member states, see A Zinzindohoué ‘Autorité juridictionnelle des cours internationales à l’égard des cours nationales: le cas de la Cour de justice de l’UEMOA’ in AHJUCAF (ed) *Internationalisation du droit, internationalisation de la justice Actes du 3<sup>e</sup> Congrès de l’AHJUCAF* (21-23 juin 2010) 22-28.

<sup>87</sup> Emphasis of the author.

<sup>88</sup> Original ECOWAS law includes the Revised Treaty, Protocols, Regulations and any other treaties adopted by member states under the aegis of the Community, as opposed to what could be called ‘imported’ or ‘borrowed’ law, among which is the African Charter on Human and Peoples’ Rights, which is an African Union human rights instrument, ratified by all ECOWAS member states, included by the 1993 reforms as a principle of the Community and added to its 2001 Protocol on Democracy and Good Governance as a principle common to the Constitution of all member states.

choose not to refer interpretation of ECOWAS law to the ECCJ. The use of this opportunity to strengthen relationships that will give rise to potential influence therefore appears far-fetched. The relationship will also eventually depend mainly on the ‘spirit of cooperation’ of domestic courts. As a matter of fact, as at November 2013, not a single preliminary ruling request has been filed before the ECCJ in ten years of operation.<sup>89</sup>

Such a state of affairs is not helped by the modest development of economic and commercial interaction between ECOWAS countries. As a consequence, the regime has yet to reach the level of ‘original’ ECOWAS law-based activity that is likely to boost Community law litigation in domestic courts, and eventually lead to the growth of Community law jurisprudence in the ECCJ.<sup>90</sup> Besides, as a result of the 2005 reform, the ECCJ’s caseload has been overwhelmed by human rights matters, inevitably to the detriment of ‘original’ ECOWAS law disputes.<sup>91</sup>

Despite these limitations, the preliminary ruling has a strong potential to create indirect influence. A first advantage is that the mechanism will help regulate the division of labour when domestic courts or their litigants decide to seize the ECCJ.<sup>92</sup> In other words, the Community Court will interpret and domestic courts will apply community law. More importantly, despite the impression that the relationship is horizontal and therefore puts

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<sup>89</sup> The situation may be attributed mainly to the limited economic interaction among ECOWAS countries which in turn explains the poverty of related litigation; and by human rights matters overwhelming the ECCJ’s docket following the 2005 reform. See A Sall *La justice de l’intégration: réflexions sur les institutions judiciaires de la CEDEAO et de l’UEMOA* CREDILA (ed) (2011) 36. The situation is no better in other sub-regional courts. In ten years of operation, the EAC Court has received one referral from the High Court of Kenya. See JE Ruhangisa ‘The East African Court of Justice: Ten years of operation, achievements and challenges’ Paper presented during the sensitisation workshop on the role of the EACJ in the EAC integration (Kampala, 1-2 November 2011) 22-23. Conversely, arguably due to the fact that individuals and legal persons can initiate suits against states for non-compliance with original community law, such cases have made up the majority of matters adjudicated in the East African Court of Justice and SADC Tribunal. However, the lack of an express jurisdiction to hear individual human rights complaints certainly explains such a trend.

<sup>90</sup> On the low trade flow and related little trade related litigation, see K Alter *et al* ‘A new international human rights court for West Africa: The ECOWAS Community Court of Justice’ (2013) 108 *American Journal of International Law* 2.

<sup>91</sup> Arguably due to the fact that individuals and legal persons can initiate suits against states for non-compliance with original community law, such cases have made up the majority of matters adjudicated in the East African Court of Justice and SADC Tribunal.

<sup>92</sup> See HN Donli ‘The law, practice and procedure of the Community Court of Justice: Meaning and implication’ Paper presented at the Workshop on law practice and procedure of the Community Court of Justice – ECOWAS, organised by the West African Human Rights Forum (Bamako, Mali, 7-9 December 2006) 10.

the two categories of courts on the same level, domestic courts cannot set aside the interpretation given by the Community Court in its preliminary rulings.<sup>93</sup> Harmonisation, and indeed regional integration, comes at that price. Influence thus becomes unavoidable.

In addition to the indirect, and currently dormant, potential of the preliminary ruling mechanism, there is a second possible channel for influence between the ECCJ and domestic courts. Indeed, the binding nature of ECCJ's decisions extends to domestic courts as state organs. The 'direct enforceability' and precedence of ECCJ's decisions should therefore apply to domestic decisions.<sup>94</sup> It follows that as for any other judgment of the Community Court, its human rights judgments enjoy a certain authority over the pronouncement of domestic courts. Whether domestic courts concede such authority and actually respect it is a different issue.

In that respect, one may argue that the legal basis of the ECCJ's human rights jurisdiction does not form part of ECOWAS 'original' law per se, i.e. legislation enacted under the auspices of the Community. The judicial part of the problem and, indirectly, its legal part have been resolved by the Community Court right from its first human rights pronouncement. In *Ugokwe v Nigeria*, though it eventually threw out the case for lack of jurisdiction, the ECCJ asserted that

The distinctive feature of the Community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law; and if the obligation to implement the decision of the Community Court lies with the national courts of member states, the kind of relationship existing between the Community Court and these national courts of member states is not of

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<sup>93</sup> As above. As the author, then President of the ECOWAS Court, stated, the 'ECCJ's role here is to give preliminary ruling as to the interpretation or validity of the Treaty provision or community Act, while the National Courts shall apply the ruling to the facts of the case. In other words, the Court's role is to interpret, while the national Court's role is to apply'. The permissive language used in the ECOWAS Court Protocol may be misleading; although the same wording is used in the relevant laws, the municipal judge may not depart from the UEMOA and OHADA Courts' rulings on validation or interpretation. The labour is shared, interpretation being left to the supranational court while domestic courts will only apply the ruling originating from 'above'.

<sup>94</sup> The same rules apply to decisions originating from the UEMOA Court of Justice and the OHADA Community Court of Justice and Arbitration, which have jurisdiction over several ECOWAS member states. See Zinzindohoué (n 86 above).

vertical nature between the Community and member states, but demands an integrated Community legal order. The ECOWAS Court is not a Court of Appeal or a Court of Cassation'.<sup>95</sup>

Some provisions of Community law seem to support the position of the Court. The African Charter, which forms the legal basis for the human rights jurisdiction of the ECCJ, is part of the municipal law of member states because the Charter has been incorporated, directly or indirectly, through many ECOWAS instruments. For instance, the 1993 ECOWAS Revised Treaty adopts the African Charter's human rights as community principles on which the Court has established its jurisdiction in the *Ugokwe* case. In addition, the 2001 ECOWAS Protocol on Democracy and Good Governance reinforces the adoption of African Charter human rights as a 'common' body of law to the respect of which ECOWAS member states are obligated to the Community. The principle thus adopted by ECOWAS is known as *convergence constitutionnelle*.<sup>96</sup> The argument can be made that since the Charter provisions have been made part of ECOWAS law through these instruments, ratification of the latter makes those provisions directly applicable in member states.

Whether on original ECOWAS law or the African Charter, the overlapping jurisdiction of the ECCJ with national courts has the potential of conflicting interpretations. It goes without saying that the integrated Community legal order for which the ECCJ advocates will need to be tempered by a necessary reception or acceptance<sup>97</sup> of the Community Court jurisprudence by domestic courts to enable harmonisation. To avoid clashes that are detrimental to its authority, the ECCJ will therefore have to use caution in adjudicating cases that have been examined by domestic courts before making their way to Abuja formulated otherwise. Case law and compliance analysis in the previous chapters suggest that the Court has succeeded so far.<sup>98</sup>

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<sup>95</sup> *Ugokwe v Nigeria*, para 32.

<sup>96</sup> See article 1(h) of the ECOWAS Protocol on Democracy and Good Governance (2001) which provides that 'The following shall be declared as constitutional principles shared by all member states ... The rights set out in the African Charter on Human and People's Rights and other international instruments shall be guaranteed in each of the ECOWAS member states'.

<sup>97</sup> Through the 'binding' effect.

<sup>98</sup> However, as discussed in the chapter on empirical compliance, the Court should not equate 'pro-cooperation' caution with excessive self-restraint, which may also lead to a loss of confidence and authority.



The problem with the ‘judicial monism’ and ‘integrated Community legal order’ which the ECCJ strongly calls for is its ‘ostrich’ approach to legal harmonisation in regional integration. In fact, as the situation stands, domestic norms and courts’ pronouncements inconsistent with the ECCJ case law can subsist because the position of the Court is confusing. Actually, the Court may be said to be embracing caution to avoid adversity from states, especially when it decides not to make findings that risk contradicting precedent of domestic courts. The current trend consists of finding in its arguments and motivation that domestic law and practice fall short of international standards but failing to draw consequences and making corresponding orders in the operative part of the judgments.<sup>99</sup> However, objectively, the Community Court cannot be blamed for adopting prudence in sending judicial signals to domestic courts by sticking to its express prerogatives under the law. The ECCJ cannot grant itself the authority to directly reverse national courts’ decisions while it has no such prerogatives under the law.

Having said this, the status of ECCJ’s decisions in the domestic order suggests an implied jurisdictional superiority deriving from supranationality and jurisprudential authority. One important part of the relevant provision is that ‘only the Community Court may suspend a writ of execution issued in enforcement of its decisions’.<sup>100</sup> As a consequence of the foregoing, it will be difficult to sustain an argument that there is no potential for influence from the ECCJ through the superiority ensuing from the binding power of its decisions on states, including their courts. As explained earlier in this section, even preliminary rulings are binding on domestic courts.<sup>101</sup>

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<sup>99</sup> See discussion on reasoning of the ECCJ in the *Ameganvi (Togolese Parliamentarians)* case under compliance factors in chapter five.

<sup>100</sup> Article 15 of the ECOWAS Treaty provides that ECCJ’s judgments are binding on member states, which include domestic courts. Article 24 of the 2005 ECCJ Protocol confirms that judgments of the Court are binding and further provides that execution shall be in the form of a writ of execution issued by the Registry of the Community Court. The only condition for reception and enforcement is that the national authority designated by Member States will verify that the judgment is from the ECCJ.

<sup>101</sup> See Donli (n 92 above) 10. According to Justice Donli, ‘where the Court rules on a preliminary reference it is binding on the National Court which referred the question for consideration. If the same issue arises again in a latter case, then under the doctrine of *acte clair*, there is no need to make a further reference and if the National court is unhappy with the previous ruling, it can make an additional reference, even if the matter is *acte clair*’. See *Costa v ENEL* Judgment of the European Court of Justice, Case 6/64 (15 July 1964).



The refusal of national courts to recognise that ECCJ's judgments are enforceable despite contrary domestic decisions may attract non-compliance sanctions on the defendant states.<sup>102</sup> More importantly, such superiority is indispensable to ensure consistent interpretation of African human rights law and the same applies to the need for a constant dialogue between African Union human rights bodies, the ECCJ and domestic courts.<sup>103</sup> Generally, a different approach would prejudice the realisation of ECOWAS objectives, among which is legal harmonisation.

The fact that the ECCJ has made initial use of some relevant provisions of its Protocols will facilitate jurisprudential cooperation on the part of domestic courts. For instance, in the early years of its operation, the Community Court has taken the lead in that line by organising frequent visits to Member states during which judges and senior staff of the ECCJ interacted with state organs, namely domestic courts. Note that the ECCJ has also used the possibility provided by the 1991 Court Protocol to hold deliberating sessions in the premises of the highest court of the defendant state.<sup>104</sup> A factor that also militates for cooperation and influence is the reform introduced by the 2006 Court Protocol which established the Judicial Council of the Community. Among others, the Council is established to oversee the process for recruiting professional judges from domestic courts that will serve on the ECOWAS Court. As they are only on a temporary posting for the duration of their term in the regional court, the judges will return to the Judiciary in Members States with new experiences on international procedure and adjudication, on ECOWAS law and jurisprudence. The return effect will certainly enhance cooperation and produce influence.

All in all, there is room for the ECCJ to influence domestic courts through judicial cooperation and legal implications on the one hand. Influence is possible through the mechanism of referral. On the other hands, the binding status of ECCJ's decisions on states applies to domestic courts and creates further opportunities for influence.

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<sup>102</sup> See ECOWAS Revised Treaty, art 77.

<sup>103</sup> See F Viljoen *International human rights law in Africa* (2012) 494-497 and ES Nwauche 'Enforcing ECOWAS law in West African national courts' 55 *Journal of African Law* (2011) 181-182.

<sup>104</sup> For instance, in the *Koraou Slavery* case, the ECCJ held its sessions at the Supreme Court of Niger; the same was done at the Supreme Court of Benin in October 2011, where the Court held its sessions in cases involving Benin but also the parliamentarians' case involving neighbouring Togo. The Court has also held a session at the Supreme Court of Mali.

However, the relevance of these two channels is subject to the readiness of domestic courts to cooperate. The reason is that there is no legal hierarchical relationship between the ECCJ and domestic courts. The Court itself has conceded that the relationship is not vertical, thus not of superiority. Having said that, the promotional activities of the Court have the potential of enhancing cooperation and facilitating influence.

### **3.3.2 Influence of the ECCJ's human rights jurisprudence on domestic courts of defendant states**

There was no potential for 'indirect' talks between Gambian domestic courts and the ECCJ as both the *Manneh* and *Saidykhan* cases were instituted before the Community Court without attempting to resolve them in national courts.<sup>105</sup> As opposed to the Gambian cases, the *Habré* case had made its way through to the highest domestic court. The ECCJ's judgment actually ordered Senegal to abide by the decisions of its domestic courts to decline jurisdiction over the trial of former Chadian President Habré. This section therefore discusses only the three other study countries.

#### **3.3.2.1 Niger**

As a preliminary point, it is important to recall that Niger's responsibility in the *Koraou Slavery* case was triggered mainly by the failure of domestic courts to deal with her complaints in a timely and effective manner.<sup>106</sup> Instead of protecting the complainant through an interdict order and charging the accused, the criminal court charged the complainant with bigamy. The primary responsibility of domestic courts in proceedings that preceded the hearing of the case in the ECCJ demands a corresponding assessment of the attitude of municipal judges in the post-*Koraou* era.

In view of the wide publicity given to the case, its hearing in Niger and the relatively speedy compliance on the part of the state, one would have expected the ECCJ's *Slavery* judgment to impact on the work of domestic Nigerien courts in several ways. For

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<sup>105</sup> However, one should point out the *Haidara* case mentioned in the discussions on whether the ECCJ 'shapes state policy by the Executive' earlier in this chapter. The *Haidara* case was instituted following the ECCJ condemning The Gambia in the cases of *Manneh* and *Saidykhan* who are journalists like the late *Haidara*.

<sup>106</sup> See Badet (n 53 above) 158.

instance, the Community Court judgment had the obvious potential of leading domestic courts to drop all charges pending against the complainant. One would have additionally expected that domestic judges would become more sensitive to slavery related matters by expediting such proceedings and embracing a more appropriate application of the Nigerian anti-slavery law. Particularly, domestic courts should have taken a more ECCJ-oriented approach to post-Koraou domestic slavery proceedings.

Although the remaining charges pending against Koraou in domestic courts were eventually dropped, a connection with the ECCJ's judgment is difficult to ascertain. In fact, at the time the ECCJ was seized of the matter charges were already dropped in the main proceedings.<sup>107</sup> The challenge for domestic courts therefore laid in demonstrating openness vis-à-vis the Community Court pronouncement in dealing effectively with future slavery cases.

As an illustration of domestic courts' openness to the ECCJ's *Slavery* jurisprudence, one could cite a case that had a direct connection with the Koraou case. On 31 March 2009, the Correctional Tribunal of Konni charged Koraou's master Naroua with slavery. The court sentenced Naroua to one year imprisonment and a CFA 500 000 (US\$1 000) penalty. Prior to the Government initiating the *circulaire* referred to earlier, judges are believed to have changed their approach to slavery cases on the grounds of ECCJ's judgments.<sup>108</sup> They were said to have become more sensitive to new cases to which they reacted promptly.<sup>109</sup> In fact, it must be pointed out that domestic courts had demonstrated willingness to make anti-slavery pronouncements in the implementation of the 2003 law prior to the October 2008 ECCJ judgment. One such instance is with no doubt the August 2008 landmark case of *Prosecutor v Tafane Abouzeidi*,<sup>110</sup> in which the Abalak Tribunal charged the defendant with slavery, sentencing him to one year's suspended imprisonment and a CFA 100 000 (\$200) penalty. The court further granted CFA 2,5 million (\$5 000) damages to the two victims.

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<sup>107</sup> Duffy writes that while the case was still pending before the ECOWAS Court, the criminal case against Koraou was lifted. See Duffy (n 45 above) 66. The complainant won four of the seven cases pending before courts while the ECCJ was still busy hearing the matter. See interview with Hamani.

<sup>108</sup> See section on how the ECCJ shapes executive policy in Niger under this chapter.

<sup>109</sup> Interview with Hamani.

<sup>110</sup> See *Prosecutor v Tafane Abouzeidi* Tribunal of Abalak, Judgment No 45 of 5 August 2008.

Even if cases similar to the *Abouzeidi* judgment are very few and application of the anti-slavery law remained limited in the years following the judgment, the developments of the case in domestic courts after the ECCJ's judgment seem to suggest a direct impact. Indeed, the Appeal Court of Niamey<sup>111</sup> reversed the *Abouzeidi* judgment in early 2009 after the ECCJ had passed judgment. The Appeal Court found that the slavery offence was not properly constituted while the defendant had admitted exercising property attributes and perpetrating degrading treatment on the victims. Having won the *Koraou Slavery* case in the ECCJ, local anti-slavery NGO Timidria was well aware of the return it could draw from the wide popularisation of the case. It challenged the Appeal Court's decision before the *Cour d'Etat*, the highest court in Niger under the military rule between February 2010 and March 2011. The *Cour d'Etat* reversed the Appeal Court decision, confirming that slavery was constituted.<sup>112</sup> Arguably, the decision of the then Niger's court of cassation was no stranger to the fact that the state had just, a first in its history, paid \$20 000 damages to an individual for slavery. Moreover, one could also suggest that the country was under close regional and international scrutiny and ECOWAS had maintained political pressure to ensure the military junta behaved.

Actually, the social and religious perception of slavery in Niger imposes a more critical and dialectical approach to the potential influence of the ECCJ *Slavery* judgment on domestic judges. Like ordinary citizens, Nigerien judges are subjected to the pro-slavery social and religious environment of Niger. For instance, the judge who heard the first domestic criminal case is said to be of a 'traditional obedience' which could have explained his making such a decision without serious legal reasoning.<sup>113</sup> Moreover, investigations revealed that due to the fact that slavery widely remains a taboo in the country, awareness is still weak and judges have released slavery suspects in some instances without properly investigating the case.<sup>114</sup>

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<sup>111</sup> See *Tafane Abouzeidi v Prosecutor and Others* Appeal Court of Niamey, Judgment No 11 of 9 February 2009.

<sup>112</sup> See *Assibit Wannagara and Others v Prosecutor and Tafane Abouzeidi* Cour d'Etat, Judgment No 11-119/P of 5 May 2011.

<sup>113</sup> See interview with Ibrahim Habibou, President of anti-slavery NGO Trimidria (Niamey, 18 May 2011).

<sup>114</sup> See interview Habibou as above.

As pointed out earlier in this chapter, the government *circulaire* for domestic courts to expedite slavery-related matters was not adequately enforced. A proper enforcement could have mitigated the bias problem. While they are said to have definitely been impacted by the ECCJ's judgment, judges' bias is exposed through the way they perceive slavery. Being from a certain tribe or sitting as traditional chiefs, judges hearing slavery cases barely denied the very existence of the plague and do not consider related complaints as 'extraordinary' matters. The case of *Adamou Aboubacar et al v Mani Algoumarat* already illustrated this position adopted by domestic courts in the pre-ECCJ Slavery judgment era.<sup>115</sup> Even in the post-*Koraou* era, judges do not approach slavery as a 'violent' or outrageous crime<sup>116</sup> because, as defendant masters contend in frontline instances, slaves now receive food;<sup>117</sup> they are remunerated and the terminology for naming them has even changed to 'domestic workers'.<sup>118</sup> This approach to such a heinous crime as slavery shows a complete disconnection with the rejection of slavery in international jurisprudence right from the Nuremberg trials. Indeed, there can be no 'good slavery'.<sup>119</sup>

Stakeholders agree that the main problem is not with the law but all about an attitude and perception shift namely on the part of judges. However, there is also a need to ensure that both judges and investigating officers acquaint themselves with the law. Years after its adoption, the application of the law was still marred with difficulties of properly categorising slavery cases involving associated offences such as expropriation and assault. In several instances, the problem lies with the way in which the charges were

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<sup>115</sup> See *Adamou Aboubacar et al v Mani Algoumarat* Délégation judiciaire of Bouza, Customary Law Judgment No 15, 26 February 2004. In this case concerned with an alleged land expropriation, the claims of the complainants that the expropriation was based on their status as slaves were rejected by the court as 'sensational' from which the Judicial Delegation (the domestic court) said it decided to distance itself.

<sup>116</sup> In application of the 2003 anti-slavery law, domestic courts have never qualified slavery as a crime but only an offence. See interview Advocate Chaibou, counsel for the complainants in the *Koraou*, *Aboubacar* and *Abouzeidi* cases (Niamey, 18 May 2011).

<sup>117</sup> See *Abouzeidi* judgment.

<sup>118</sup> See interview Advocate Chaibou (n 116 above).

<sup>119</sup> See Badet (n 53 above) 158.

formulated.<sup>120</sup> Among other consequences, this has resulted in the word slavery not being mentioned even once in some domestic slavery cases.<sup>121</sup>

### 3.3.2.2 Nigeria

If one is to go by both Nigerian municipal law and international law standards, the ECCJ *SERAP Education* judgment should have had at least two effects on Nigerian courts. On the one hand, some rules concerning standing and justiciability must be read in a purposive manner. On the other hand, municipal judges should take the lead and adopt a more purposive approach to adjudicating the issues at stake.

To begin with, the condition of personal injury in *locus standi* for public rights should no longer be tenable in Nigerian courts. For long, namely by following precedents in the cases of *Adesanya v The President*<sup>122</sup> and *General Sani Abacha v Chief Gani Fawehinmi*,<sup>123</sup> Nigerian courts have largely denied *locus standi* in individual rights litigation. Standing was refused unless the litigants could establish sufficient interest or prove they had suffered a personal injury.

As far as enforcement of Chapter II provisions are concerned, Nigeria's highest judicial authorities have supported the common view of their non-justiciability by holding, in the case of *Attorney-General of Ondo State v Attorney-General of the Federation and 35 Others* (IPCP case), that the DPSP can only be enforced through the promulgation of laws.<sup>124</sup> Despite such trends, commentators have criticised a wrong understanding of the rule particularly as applied in the *Adesanya* judgment<sup>125</sup> and several courts, including the Supreme Court, had already granted *locus standi* under the previous 1979 rules.<sup>126</sup> As

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<sup>120</sup> Interview Advocate Chaibou (n 116 above).

<sup>121</sup> As above.

<sup>122</sup> *Adesanya v The President* Supreme Court [1981] 2 NCLR 358.

<sup>123</sup> *General Sani Abacha v Chief Gani Fawehinmi* Supreme Court [2000] 6 NWLR 229.

<sup>124</sup> See *Attorney-General of Ondo State v Attorney-General of the Federation & 35 Others* (2002) 6 SC Pt I 1 (179), decision of the Supreme Court of Nigeria.

<sup>125</sup> See for instance GC Odo 'Expanding the frontiers of human rights litigation in Nigeria, A study of the New Fundamental Rights (Enforcement Procedure) Rules 2009' in C Nweze *et al* (Jnr) *Beyond bar advocacy: Multidisciplinary essays in honour of Anthony Okoye Mogboh SAN Umuahia: Impact Global Publishers* (2011) 375-393; TI Ogowewo 'The problem with standing to sue in Nigeria' *Journal of African Law* 39 (1995) 9.

<sup>126</sup> See for instance *Badejo v Ministry of Education & Others* Nigeria Court of Appeal Lagos [1990], 4 NWLR 254; *Adediran v Interland Transport Ltd* Supreme Court [1991] 9 NWLR 155; and *Owodunni v Registered Trustees of the Celestial Church of Christ* Supreme Court [2000] 10 NWLR 315.



discussed in the previous section on the Legislature, the issue is therefore less one of legal limitations than one of purposive interpretation and adjudication.

The advent of the 2009 new Fundamental Rights (Enforcement Procedure) Rules could be of some help in respect of the issues under discussion.<sup>127</sup> Major novelties of the Rules seem to have addressed procedural issues in a way that has the potential of facilitating the legislative impact of the ECCJ's *SERAP Education* judgment.<sup>128</sup> Their introductory 'overriding objectives' speak in favour of a more liberal approach to standing and, indirectly justiciability, in socio-economic rights litigation. As the objectives read: 'The Constitution, especially Chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended in them'.<sup>129</sup>

As the provisions pertinently pursue, 'for the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form part of larger documents like constitutions'.<sup>130</sup> An additional call for Nigerian courts to 'proactively pursue enhanced access to justice for all classes of litigants, (...) the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unrepresented'<sup>131</sup> constitutes an undeniable potential for pro-*SERAP Education* judgment changes concerning the place of socio-economic rights in the Nigerian legal order. Such liberal provisions prompt the question whether and how lawyers will use the leeway of the new rules to improve the enjoyment of socio-economic rights long perceived to be trapped by constitutional DPSP.<sup>132</sup>

Again, one of the reasons that has led Nigerian courts to be reluctant towards the justiciability of socio-economic rights and individual standing is the lack of a purposive

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<sup>127</sup> Nigeria FREP Rules 2009.

<sup>128</sup> For a comprehensive analysis of the Rules see Odo (n 122 above).

<sup>129</sup> Nigeria FREP Rules 2009, para 3(a), preamble.

<sup>130</sup> As above, para 3(b).

<sup>131</sup> As above, para 3(d).

<sup>132</sup> The Nigerian Human Rights Commission could be another avenue for the *SERAP Education* judgment to yield greater benefits for socio-economic rights litigation in Nigeria.

interpretation of relevant provisions of the Constitution. The alternative of directly referring to the African Charter as domesticated international law is equally inhibited by the debate on its relationship with the Constitution. For instance, Nigerian courts have generally placed the African Charter above ordinary law but below the Constitution just as is the case in most common law countries.<sup>133</sup> Because DPSP are perceived as proscribing adjudication of socio-economic rights, judges consequently consider such constitutional limitation as applying to African Charter rights even when they have gained the status of ordinary municipal law.<sup>134</sup>

What is required from Nigerian judges is to use relevant municipal law, the new rules and the ECCJ's judgment as stepping stones for judicial activism in the enforcement of socio-economic rights in Nigerian courts. The role of lawyers will be instrumental in that line.<sup>135</sup> Although in still very few cases, some judges have taken bold steps in recent years. A landmark decision in that vein is the judgment of the Lagos State High Court in the case of *Georgina Ahamefule v Imperial Medical Center and Dr. Alex Molokwu*.<sup>136</sup> The Court found that the forced HIV testing and dismissal of the applicant on the grounds of her positive status constitute a 'fragrant violation of the right to health guaranteed under article 16 of the African Charter on Human and Peoples' Rights ... and article 12 of the International Covenant on Economic, Social and Cultural Rights'. The plaintiff further obtained N7 million in damages.<sup>137</sup>

<sup>133</sup> In civil law countries, although international law is said to be above municipal law, the debate is still alive about whether the law referred to includes the Constitution. In many countries, international law is afforded the same rank with the Constitution. See in general M Killander & H Adjohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed.) *International law and domestic human rights litigation in Africa* Pretoria University Law Press (2010).

<sup>134</sup> See for instance, *Okogie v Attorney General of Lagos State* (1981) 2 NCLR 350; and *Oronto Douglas v Shell Petroleum Development Company Limited* (1999) 2 NWLR 466. See also Nwauche (n 101 above); S Ibe 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' 7 *AHRLJ* (2007) 225.

<sup>135</sup> In fact some authors are of the view that there is no lack of clarity in the Nigerian Constitution as to the justiciability of socio-economic rights; that section 6(6)(c)'s bar to bringing Directive Principles of State Policy under judicial scrutiny is to be understood as an impossibility to litigate these rights on the sole basis of socio-economic rights provisions in the Constitution, namely chapter II. See O Agbakoba & W Mamah *Towards a people's Constitution in Nigeria: A civic education manual for the legal community* Human Rights Law Service (ed.) (2002) 43.

<sup>136</sup> Suit No ID/1627/2000 Judgment of 27 September 2012.

<sup>137</sup> The equivalent of \$43 000.

Despite existing avenues for the *SERAP Education* decision to enhance the enforcement of socio-economic rights in Nigeria, limitations and challenges remain real and various. Commentators agree that the challenge is ‘multi-faceted: constitutional, judicial and social’.<sup>138</sup> Apart from the fact that the most progressive provisions of the new fundamental rights rules are also confined within the boundaries of a preamble the legal power of which is disputed, a number of other FREP rules are believed to leave too wide a margin of manoeuvre to domestic courts in applying the new rules.<sup>139</sup> Having been made by the Chief Justice of Nigeria, the rules are not beyond criticism either as to their force and value in the face of both ordinary legislation and the Constitution which are commonly interpreted as being clear about the non-justiciability of socio-economic rights and mainly precondition standing to direct interest and personal injury.<sup>140</sup> Such criticisms do not preclude the provision by Article 46(3) of the Constitution that ‘The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section’.

In any case, it appears that human rights law still suffers in the hands of the Nigerian judge. As the *Georgina forced HIV testing* case referred to earlier illustrates, it took 12 years for the plaintiff to navigate through the very conservative Nigerian socio-economic rights justiciability system, the case having first been instituted in 2000. In other words, it will take more than random judicial activism to deal with the blind loyalty of Nigerian judges to their Constitution rather than to international law.<sup>141</sup>

In response to the fact that the African Commission’s *SERAC* decision did not bring much change to the position of Nigerian courts, it could be argued that the ECCJ has the potential of carrying stronger authority than the African Commission. The maturity, proximity and effectiveness of both systems were discussed under chapter six of this study. The question is whether domestic courts in Nigeria will decide to choose resistance

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<sup>138</sup> A Sanni ‘Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples’ Rights in Nigeria: The need for far-reaching reform’ (2011) 11 *AHRLJ* 511-531 and E Nwauche ‘The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?’ (2010) 10 *AHRLJ* 502-514.

<sup>139</sup> See Sanni as above 524-530.

<sup>140</sup> As above.

<sup>141</sup> See ST Ebobrah ‘International human rights law in the hands of the Nigerian judge: A critique of current practice’ (2011) 1 *Nigerian National Human Rights Commission Journal* 98-135.

or embrace cooperation with the ECCJ by playing their expected role in giving effect to international domesticated law, here the African Charter. The question is more relevant if one recalls that, as directly enforceable in Nigeria, the *SERAP Education* judgment will have the impact of overruling, or at least contradicting, landmark domestic cases.<sup>142</sup> In that respect, as discussed earlier under the nature of the rights violated under chapter six, initiating domestic proceedings for implementation or seeking the registration of the ECCJ *SERAP Education* judgment in Nigerian courts, is certainly not the productive stand to take. Doing so could lead to offering an opportunity to domestic courts to defeat the ECOWAS direct enforcement rules.

### 3.3.2.3 Togo

Even if the position is wrong in international law, resistance of domestic systems, namely their courts, to binding international adjudication as coming from ‘above’ or ‘abroad’ remains a reality. In several instances, domestic courts have rejected cooperation and permeability when compliance fell within their realm. Executives could not do much about it and are even believed to have supported such a course of action on occasion.<sup>143</sup> Togolese domestic courts, in particular its Constitutional Court, seemed to have chosen adversity, at the very least resistance or exercise of sovereignty.

The ECCJ’s *Ameganvi (Togolese parliamentarians)* judgment was a clear rejection of the decision by the Constitutional Court of Togo to endorse the dismissal of the parliamentarians without ensuring that they were heard at all in the process. The intervention of the Constitutional Court at all stages of the domestic process attested to the carelessness with which the domestic court treated the case. To begin with, the decision of the Constitutional Court to allow the Parliament to proceed and replace the complainants was fraught with irregularities and contested from within the domestic

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<sup>142</sup> See Nwauche (n 138 above) 198.

<sup>143</sup> One may generally refer again to US Courts’ behaviour in respect to ICJ judgments in *Breard* and *LaGrand* cases; both the European and Inter-American human rights systems also faced similar situations from domestic courts and systems, see Canivet (n 4 above), Garlicki (n 5 above) and Huneeus (n 19 above).

court.<sup>144</sup> The Constitutional Court had also thrown out the parliamentarians' petition seeking its intervention to declare their replacement in violation of the Constitution and the Rules of Procedure of the Parliament.<sup>145</sup> The petitioners mainly supported their case with a demand that Togo respected the decision of the Inter-Parliamentarian Union to conduct the process afresh and afford them a fair hearing.<sup>146</sup>

After the ECCJ delivered its judgment, the Constitutional Court did not significantly depart from its initial position. In fact, the domestic court publicly rejected the ECCJ's pronouncement by posting a communiqué on its website with the very evocative title of 'No reinstatement for UFC [the complainants' opposition party] MPs'.<sup>147</sup> As they lacked a judicial opportunity to interact directly with Abuja judges, Togolese Constitutional Court judges apparently used the institutional and political channel of their website to give a quite biased understanding of the ECCJ's judgment. While the Community Court specifically ordered that Togo 'remedied' the violation of fair hearing rights and 'paid' \$6 000 damages to each of the parliamentarians, the Constitutional Court chose to merge the two orders. As it explained in the communiqué, the domestic court took the position that the ECCJ's order instructed that the violation be remedied by paying the compensation indicated. Most importantly, the Court was quick to point out that 'the ECCJ did not reverse the decision of the Constitutional Court of Togo' as it has never ordered the reinstatement of the MPs.

Prior to the Constitutional Court communiqué and its own official communiqué, the Government had, through an earlier communiqué, taken the position that the Community Court decided that it did not and could not reverse the decision of the Constitutional Court. In fact, the Government had declared that the ECCJ had 'recognised the decision of

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<sup>144</sup> See interview with Advocate Ajavon, counsel for the complainants; the facts as presented in the ECCJ's judgment also provide greater details about the process conducted in the Constitutional Court.

<sup>145</sup> See Decision No E-002/2011 of 22 June 2011, Constitutional Court of Togo <http://www.courconstitutionnelle.tg/>. It is important to recall that just as in the wide majority of Francophone African countries, individuals cannot initiate human rights suits in the Constitutional Court of Togo.

<sup>146</sup> See Union Inter-Parlementaire *Décision confidentielle adoptée par le Comité à sa 133ème session* (Panama, 15-19 avril 2011).

<sup>147</sup> See Cour constitutionnelle du Togo 'Pas de réintégration pour les députés UFC' (26 October 2011) <http://www.courconstitutionnelle.tg/> (accessed 25 April 2012).



the Constitutional Court as final and irrevocable'.<sup>148</sup> There is no need to emphasise that the Constitutional Court subsequently endorsed the government's communiqué. Called to interpret its decision, the ECCJ embraced caution. It maintained all of its initial findings but declined to make an express order that the parliamentarians be reinstated, thus aligning with the domestic court's position. The Community Court, however, reaffirmed that while reinstatement should be a consequence of the previous order to 'remedy the violation', a specific order to remedy would amount to revising the Constitutional Court's decision to endorse the process that unseated the parliamentarians.<sup>149</sup>

Despite the fact that it ended in some disappointment for the complainants and their counsel, the parliamentarians' case had its positive effects. Catalytic effects are suggested in Togolese courts in the form of investigating judges being instructed to hasten the proceedings in domestic cases likely to end up in the ECCJ.<sup>150</sup> This preventive approach did not prevent a flow of cases in the ECOWAS Court against Togo. It is a notorious fact that Togo has become a frequent defendant in the ECCJ following the *Parliamentarians'* case.<sup>151</sup> The most prominent of such cases is probably *Kpatcha and Others v Togo*, in which the ECCJ found the state in violation of the right not to be tortured and ordered a payment of \$40 000 in damages.<sup>152</sup>

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<sup>148</sup> T Kossi 'TOGO: la notification de l'affront à l'Etat togolais attendue dans le courant de la semaine' Togosite.com <http://www.togosite.com/?q=node/1699> (accessed 25 April 2012).

<sup>149</sup> See *Ameganvi v Togo (Requête en omission de statuer)* Judgment No ECW/CCJ/JUG/06/12 of 13 March 2012.

<sup>150</sup> See interview Advocate Ajavon (n 144 above).

<sup>151</sup> The author had the opportunity to attend the 13 March 2012 session of the ECCJ during which the Court heard cases against Togo. Interview of the same date with Advocate Ajavon for complainants and Advocate Edah N'djelle, agent for the Government of Togo, confirmed pending cases against Togo; the interviewee also indicated that the Government of Togo adopted caution in responding to request from the ECCJ in relation to new suits brought against the state. Some of the pending cases include *Kpatcha Gnassingbé & 25 Others v Togo* ECW/CC/APP/19/11, concerned with an attempted coup following which the complainant, the President's brother, was detained and subjected to torture as confirmed by a report of the National Human Rights Commission; *Hermès da Silveira & 5 Others v Togo* ECW/CC/APP/20/11, concerned with an alleged attempted coup following which the complainants were arrested in 2005 and detained for more than three years without trial; and *Aziagbede Kokou* ECW/CC/APP/21/11; *Atsou Komlavi & 34 Others* ECW/CC/APP/22/11; *Tomekpe Abra Lanou & 29 Others* ECW/CC/APP/23/11; and *Assima Kokou Innocent & Another v Togo* ECW/CC/APP/24/11, all concerned with the unduly prolonged detention, unfair trial, and torture of political activists said to have connections with political opposition.

<sup>152</sup> See *Kpatcha Gnassingbé & 25 Others v Togo* ECW/CC/APP/19/11 Judgment of 5 July 2013. The case involved the brother of the President arrested for an alleged coup attempt. Investigations conducted by the National Human Rights Commission revealed evidence of torture my high ranking



Although there is evidence of the ECCJ sending signals to domestic courts, influence is yet to reach a wide scale and operate on a systemic basis. In addition, the picture is mixed. In some countries, issues adjudicated by the ECCJ had already been addressed by national law and the question was rather one of an effective application of the law and openness of municipal judges and law enforcement officers as illustrated in the cases involving Niger and Nigeria. In fact, in the same situations, domestic courts had already used municipal law to address issues considered by the ECCJ. Finally, the influence of the post-ECCJ jurisprudence is limited even if there is evidence that the executive can instruct prosecuting authorities to take preventive action as a result of proceedings in the ECCJ as was exemplified by the Parliamentarians' case involving Togo.

### 3.4 Development of the ECCJ's jurisprudence: Any influence from domestic courts?

Writers have discussed the influence of domestic courts on international counterparts. Case law has illustrated how complex international law questions may be addressed by referring to domestic jurisprudence.<sup>153</sup> Examples abound of international courts assessing cases presented to them through the knowledge of national judges, counsel and other litigants in their submissions and pleadings.<sup>154</sup> Compliance has been facilitated by reliance on domestic courts' findings.<sup>155</sup> Conversely, international courts have suffered rejection for their lack of ability to remain in touch with on-the-ground realities while locally informed proceedings have proved to maximise the impact of international adjudication.<sup>156</sup> The ECCJ's judgments discussed in this study illustrate the overall

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officials of the Government security forces. The publication of the report forced the Chair of the national institution to flee to France. See West African Democracy Radio 'Togo : Prosecution rejects appeal for President's brother release' <http://www.wadr.org/en/site/news-en/3852/Togo-Prosecution-rejects-appeal-for-President's-brother-release.htm>; Jeune Afrique 'Torture au Togo : les brûlantes vérités de Koffi Kounté' <http://www.jeuneafrique.com/Article/JA2668p012-013.xml2/> (accessed 29 October 2013)

<sup>153</sup> See for instance Canivet (n 4 above). The author argues that international bodies have mainly been established on the model of domestic courts, and the trend of domestic judicial mechanisms taking from international ones is more of a recent occurrence. International courts also recruits judges from domestic systems. The interpretation by the ICJ of article 38 of its statute as prescribing reference to both international and national decisions is in support of the bottom-up influence. See for instance the *Yerodia* (Arrest Warrant), *Tadic* and *Furundzija* cases.

<sup>154</sup> See Garlicki (n 5 above) 517.

<sup>155</sup> See Cavallaro (n 31 above) 794.

<sup>156</sup> As above 818.

conclusion that international courts never operate in a vacuum but mostly on the basis of domestic applications of the law.<sup>157</sup>

Despite the adoption by the ECCJ of non-exhaustion of local remedies, the majority of cases adjudicated by the Community Court were previously heard by domestic courts at some stage. As a consequence, not only the facts but also the legal arguments presented at domestic and international levels were nearly the same. In fact, the complainants did not differ either, and it became unrealistic to expect that the ECCJ could avoid the influence of the deliberations and decisions made in domestic courts or other processes.

Actually, the Community Court further had to bear the influence of the domestic socio-political dynamics brought by the cases. In the process, as it transpires from a close reading of the decisions, the ECCJ was influenced by domestic courts from at least two perspectives. First, through prior discussions of the issues involved, domestic courts made the facts easier for the ECCJ to apprehend and understand, namely from the social and political context of the specific country. Second, ECOWAS member states being of both civil and common law traditions, the need for the Community Court to benefit from the legal argumentation already built up during domestic proceedings was satisfied and hastened the work of the ECCJ.<sup>158</sup>

A dissection of the judgments discussed reveals evidence of influence from domestic courts in most of the cases studied. Right from the very beginning, the ECCJ avoided reversing the findings of Nigerian courts in the *Ugokwe* case by pointing out that it is not a regional court of cassation and that it will not re-adjudicate matters that have been properly examined by domestic courts.<sup>159</sup> The Federal Government effectively supervised the enforcement of the provisional suspension ordered by the Community Court. In the *Djotbayi* judgment, the ECCJ strengthened the finding of the Federal High Court of Nigeria by affording compensation to the complainants.<sup>160</sup> In fact, the order of the domestic

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<sup>157</sup> See Cavallaro (as 31 above) 819, Tzanopoulos (n 12 above) 15 and Garlicki (n 5 above) 512.

<sup>158</sup> As discussed in the chapter on empirical compliance, this might explain why the Court is currently one of the fastest international bodies. It takes the Court a rough average of 1,25 years to complete one case. It has completed a case within four months and the lengthiest proceedings have lasted three years.

<sup>159</sup> *Ugokwe v Nigeria* ECW/CCJ/JUD/03/05, 7 October 2005, para 32.

<sup>160</sup> *Djotbayi and 9 Others v Nigeria* ECW/CCJ/JUD/01/09, 28 January 2009.

court that the complainants be released had been executed by the Federal Government before the case reached the Community Court.<sup>161</sup>

In the *Koraou Slavery* case,<sup>162</sup> the findings of the Community Court were in line with some previous or concomitant decisions of domestic courts to drop charges against the complainant in the majority of the proceedings.<sup>163</sup> In addition, the ECCJ relied on the domestic proceedings in reaching its own decision. There is equally evidence that the ECCJ has received the influence of the matters having been examined by domestic organs at some stage.

There could have been greater bottom-up influence if the ECCJ had adjudicated more slavery cases with express reference to domestic courts judgments. It is noteworthy that, in the five years of the *Koraou Slavery* judgment, the ECCJ did not received any slavery related case despite continuing slavery practices in Niger and neighbouring countries. This could mean either that Nigerien courts are dealing with domestic cases effectively, which does not appear to be the case, or the absence of cases from other countries is an evidence of the ECCJ's impact. The absence of slavery cases in the ECCJ in the post-Koraou era could also mean that there was no impact at all. However, that hypothesis can be ruled out by evidence of influence discussed earlier.<sup>164</sup>

In the *Habré* case, the ECCJ even went further to endorse the *res judicata* of the Senegalese Appeal Court and Court of Cassation which it ordered the defendant state to respect, while it was not bound by related findings.<sup>165</sup> The *Togolese Parliamentarians* judgment is a step further as the Community Court, while denouncing the decision of the Constitutional Court of Togo in its reasoning, did not have the audacity to draw the consequences by ordering otherwise.<sup>166</sup> A new suit requesting for an interpretation of the first judgment could do very little about such a state of affairs. The domestic court

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<sup>161</sup> For both cases, see compliance narrative under chapter four of the present study.

<sup>162</sup> *Koraou v Niger* ECW/CCJ/JUD/06/08, 27 October 2008.

<sup>163</sup> See discussion under chapter five of compliance factors in respect of proceedings before domestic courts prior to instituting the matter in the ECCJ.

<sup>164</sup> See previous sections of this chapter discussing influence on the executive, judiciary and legislature.

<sup>165</sup> *Habré v Senegal* ECW/CCJ/JUD/06/10, 18 November 2010, para 61(2) and 61(3).

<sup>166</sup> *Ameganvi and 8 Others v Togo* ECW/CCJ/JUD/09/11, 7 October 2011.

had already used all public means of communication to ‘warn’ the ECCJ of the consequences of reversing the ‘final and irrevocable’ decision of a domestic court.<sup>167</sup>

There are advantages to such influence which is likely to benefit the cooperation between the ECCJ and its domestic counterparts. The influence or orientation of domestic courts will prevent the Community Court from making pronouncements that set confrontational relationships, with the potential of jeopardising the authority of the ECCJ. On the contrary, as a result of its current adjudication policy, the ECCJ has been able to strike a balance between individual rights and state socio-political contingencies. The major consequence is that decisions of the ECCJ have been widely accepted by respondent states and political organs of ECOWAS so far.<sup>168</sup>

Such acceptance is central to the development of the authority of the Community Court in the region particularly because states and their organs have traditionally been reluctant to adhere to the principle of non-exhaustion of local remedies. Using domestic courts as its ‘eyes and ears’ in ECOWAS countries will stand as an indirect exhaustion of local remedies and legitimise ECCJ’s decisions nationally. It may be argued that because the executive has been the main addressee of ECCJ’s condemnations in the early years of the ECOWAS human rights regime, domestic courts did not feel it necessary to react. The first reaction of domestic courts was in the *Parliamentarians* case and the signal sent by the Constitutional Court of Togo appeared to be one of a ‘threatened’ state organ.

In essence, ECCJ’s decisions have received some influence from domestic courts in the sense that whenever the matter was previously dealt with domestically, the Community Court declined jurisdiction unless it was not properly adjudicated at the national level. Influence can also be derived from the fact that the ECCJ has always avoided reversing judgments of domestic courts in an express manner, and therefore has upheld such decisions. Finally, legal argumentation in the judgments of the Community Court have

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<sup>167</sup> See compliance narrative in chapter four.

<sup>168</sup> However, as discussed under the connexion between legitimacy and judicial lawmaking in chapter V, too timid reactions in the face of clear violations can weaken the legitimacy and authority of a court. See also See L Helfer and K Alter ‘Legitimacy and lawmaking: The tale of three international courts’ (2013) 14 *Theoretical Inquiries in Law* 499.

been informed either by prior proceedings in domestic courts or submissions of counsel, some of them having participated in domestic proceedings.

#### **4. ‘Spill-over’ influence of the ECCJ’s human rights judgments on other ECOWAS countries**

Spill-over effects require time to develop. Such effects are not perceptible on a large scale yet because the ECOWAS Court has exercised its human rights mandate for less than a decade at the time of this study. However, there is evidence of irradiating effects which embed the potential of wider effects over time as the system develops. Effects discussed are therefore both actual and potential.

As one of the landmark decisions of the ECCJ, the *Koraou* judgment has also brought the Court fame in the region as a whole. The most visible impact of the *Koraou* judgment has been on Mali, another country in the region where the ignominy of slavery is current. Although slavery is said to have officially ended at independence in 1960, thousands of individuals were still enslaved in Mali in the 2000s to 2010s.<sup>169</sup> Even if Mali had yet to enact a law criminalising slavery in 2013, the country’s Constitution guaranteed equal protection under the law which can in many respects be interpreted as prohibiting slavery. According to an interviewee, NGO members of the wide anti-slavery regional network in Mali have used the ECCJ’s *Koraou* pronouncement to push the Malian Government to tackle the phenomenon more seriously.<sup>170</sup>

In 2011, nearly four years after the ECCJ’s *Koraou* judgment, Mali’s Ministry of Justice has supported the establishment of a law clinic within a local anti-slavery organisation Temedt with the support of the American Bar Association. The clinic provides free legal services to enslaved persons seeking their freedom and trains lawyers, police, prosecutors and judges on handling slavery cases. Its mandate extends to providing psychological assistance and vocational training to victims visiting the clinic as well as an

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<sup>169</sup> See IRIN ‘Thousands still live in slavery in Northern Mali’ (14 July 2008) <http://worldpress.org/Africa/3198.cfm> (accessed 26 April 2012).

<sup>170</sup> See interview Weila.

outreach awareness campaign. An on-going process includes the finalisation of a draft law criminalising slavery and advocacy for its adoption.<sup>171</sup>

Investigations also revealed that the ECCJ's jurisprudence has a great potential of irradiating domestic systems by attracting more cases which share similarities with matters already decided by the Community Court. For instance, after ascertaining that the ECCJ had dealt with cases involving national criminal law and procedure, Senegalese litigants have seized the Court with the matter of political opposition leader Barthélémy Dias. Just as some of the cases discussed in this study, the *Dias* case has strong political connotations and is concerned with detention without trial and undue delay in domestic proceedings.<sup>172</sup>

In the same vein, domestic lawyers are considering bringing suits against Senegal before the ECCJ in several cases where members of the Parliament and local councillors have been unseated in controversial proceedings.<sup>173</sup> For now, the ECCJ has rather received high profile political cases involving opposition figures as was the case in *Dias v Senegal* referred to earlier. Another prominent case is *Karim Wade v Senegal*, involving former President Abdoulaye Wade's son who was charged with illicit enrichment by the new Government of former opponent Macky Sall. In a 2013 judgment, the ECCJ dismissed the complainant's claims of illegal detention by the Government of Senegal.<sup>174</sup>

Considering the variety and importance of issues that are, notwithstanding the ECCJ's burgeoning influence, common to ECOWAS countries for diverse reasons, one should expect a higher potential for spill-over effects. One of such questions is the justiciability of socio-economic rights in West African countries which include DPSPs in their constitutions. There is a possibility of further socio-economic rights cases coming from

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<sup>171</sup> See American Bar Association 'Anti-Slavery program launched in Mali' (June 2011) [http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/africa/mali/news/news\\_mali\\_antislavery\\_program\\_launched\\_0611.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/mali/news/news_mali_antislavery_program_launched_0611.html) (accessed 26 April 2012).

<sup>172</sup> See *Barthelemy Dias v Senegal* Application ECW/CCJ/APP/01/12 of January 2012.

<sup>173</sup> See interview with Advocate Assane Dioma Ndiaye, counsel for some of the applicants in the case of *Ameganvi v Togo* (parliamentarians) (Dakar, 24 January 2012).

<sup>174</sup> See Seneweb 'Décision de la CEDEAO Affaire Wade – Etat du Sénégal : tout le monde gagne et perd' [http://www.seneweb.com/news/Justice/decision-de-la-cedeao-affaire-karim-wade-etat-du-senegal-tout-le-monde-gagne-et-perd\\_n\\_101065.html](http://www.seneweb.com/news/Justice/decision-de-la-cedeao-affaire-karim-wade-etat-du-senegal-tout-le-monde-gagne-et-perd_n_101065.html) (accessed 7 November 2013).



DPSPs countries especially if litigants establish that their governments are more economic-governance friendly, such as Ghana.<sup>175</sup>

Other issues that are currently alive in public debate in the region include election-related disputes, post-electoral violence, constitutional revision, presidential term extension, and political governance. The trend has already been set. After the missed opportunity in the *Ugokwe* case, the ECCJ was given another opportunity to consider matters related to elections in the early 2012. Issues brought before the Community Court involve electoral questions together with constitutional revision and presidential terms' extension in the case of *RADDHO v Senegal*.<sup>176</sup>

The same issues have led to unconstitutional change of government and political crisis in Niger and Mali between 2010 and 2012. These issues have been on the top of the political agenda in Benin, Burkina Faso, and Nigeria since 2004. In the specific case of Benin, the Constitutional Court has been reluctant to quantify damages for human rights violations, and is facing growing criticism in its adjudication of several cases involving political disputes, political representation in Parliament and power sharing among states' organs.<sup>177</sup> Bearing in mind the *Togolese parliamentarians* case, the ECCJ's forum may become quite attractive to Beninois litigants if trends are maintained in the domestic court.

As the African Charter is part of the municipal law of ECOWAS member states, the extent to which the ECCJ's authority and influence impact on the wider region will depend on how effective domestic systems prove to be in tackling human rights issues covered by the Charter. It is arguable that in countries such as Benin, Ghana and Nigeria where the application of the Charter has been brought to bear the most in litigation, there will be a tendency to be attracted by the burgeoning ECOWAS human rights regime.

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<sup>175</sup> See United Nations Economic Commission for Africa *African Governance Report* (2005) 56; and African Peer Review Mechanism Secretariat 'Country Review Report of the Republic of Ghana' (2005) iii.

<sup>176</sup> See *RADDHO (with the support of the Centre for Human Rights) v Senegal*, Application ECW/CCJ/APP/03/12. After a first hearing on 13 March 2012, the case was further heard on 4 May and a preliminary ruling was delivered in July 2012.

<sup>177</sup> See H Adjolohoun 'Benin' *Constitutions of the countries of the world* Oxford University Press (2012).

## 5. Impact beyond ECOWAS

The jurisprudence of the ECOWAS Court has had an impact beyond the Community frontiers. The *Koraou Slavery* judgment has impacted on human rights systems and mechanisms. The closer the countries, the faster the impact. Despite its geographic proximity to ECOWAS, Mauritania is not one of the Community's members. In any case, slavery figures are much more alarming in Mauritania than in Niger and Mali. Anti-slavery organisations estimate that nearly a fifth of Mauritania's 3,1 million people were slaves as of 2009.<sup>178</sup> The fact that Mauritania criminalised the practice in 2007,<sup>179</sup> a year before the ECCJ delivered judgment in the *Koraou Slavery* case, could have bolstered implementation, but Mauritania authorities have apparently neglected the popularisation of the 2007 Law under which no conviction occurred and tens of slavery suits were dismissed in 2008.<sup>180</sup>

However, all anti-slavery organisations in the region belong to a regional anti-slavery network and a former executive of a Nigerien coalition believed the case of Niger has advanced the same cause in Mauritania.<sup>181</sup> Since the new law was passed, Mauritanian anti-slavery lawyers have been involved in at least seven reported slavery cases which have resulted in the release of more than a dozen people from their masters. Despite the fact that all of these cases were reported to the authorities, there was not a single prosecution or any significant investigation into individuals responsible for crimes of slavery. Anti-slavery activists have also been imprisoned for staging demonstrations pointing to the challenges of implementing the law.<sup>182</sup>

At a different level, the ECCJ's *Koraou Slavery* judgment has impacted on the work of international mechanisms. Apparently, the decision has contributed strongly to bringing Niger in the spotlight during the United Nations Human Rights Council's session

<sup>178</sup> See IRIN 'Mauritania: Activists' trial puts spotlight on anti-slavery law' <http://www.irinnews.org/Report/91528/MAURITANIA-Activists-trial-puts-spotlight-on-anti-slavery-law> (accessed 26 April 2012).

<sup>179</sup> See Loi 2007-048 of 8 August 2007.

<sup>180</sup> See SN Zelezeck 'Researching the legal system and laws of the Islamic Republic of Mauritania' Globalex New-York University (2009).

<sup>181</sup> See interview Habibou.

<sup>182</sup> See Anti-Slavery 'SOS esclaves' [http://www.antislavery.org/english/whatwedo/antislavery\\_internationaltoday/award/2009awardwinner/default.aspx](http://www.antislavery.org/english/whatwedo/antislavery_internationaltoday/award/2009awardwinner/default.aspx) (accessed 26 April 2012).

examining the country's report under the Universal Periodic Review in 2011.<sup>183</sup> The number of recommendations filed by third states with regard to slavery and related issues attest to the importance and relevance of the ECCJ's pronouncement. Many of the recommendations spoke directly to major issues raised by the ECCJ in the *Koraou Slavery* judgment, including lack of effective enforcement of the law and of effective domestic remedies; and undue delay in proceeding slavery related cases.<sup>184</sup> Similarly, the *Manneh* case was raised during the UPR of The Gambia in 2010. One of the recommendations of the Report was to 'allow independent investigations into the death of Deyda Haydara and the disappearance of Chief Ebrima Manneh, including publication of findings'.<sup>185</sup>

Similarly, the ECCJ's *Habré* judgment was brought to bear in the case of *Belgium v Senegal* heard by the International Court of Justice.<sup>186</sup> Although the ICJ case was filed in February 2009, which is prior to the November 2010 judgment of the ECCJ, the ICJ did not hear the merits of the case before 2011-2012. On 20 July 2012, the ICJ ruled that Senegal should immediately prosecute Habré or execute Belgium's extradition request.<sup>187</sup> Although the ICJ reversed the ECCJ's *Habré* decision in its main substantive proposition, namely by making it clear that Senegal had a duty to try or extradite Habré irrespective of the time when changes to the domestic system occurred, the world court made several references to the sub-regional court's judgment.<sup>188</sup> Substantive arguments in the ICJ judgment were consequently based on argument and findings of the ECCJ.

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<sup>183</sup> See M Mubiala 'L'application de la Charte africaine des droits de l'homme et des peuples par la Cour de justice de la CEDEAO' Unpublished conference paper on file with author (2011) 6-7.

<sup>184</sup> Of total 81 recommendations filed at the session, 11 were addressed to Niger. See Mubiala as above; and Global Observatory on Human Rights 'Universal Periodic Review: Niger' <http://upr-epu.com/ENG/country.php?id=215> (accessed 2 July 2012).

<sup>185</sup> Refworld 'Report of the Working Group on the Universal Periodic Review: Gambia' UN Human Rights Council (2010) <http://www.refworld.org/country,,UNHRC,,GMB,456d621e2,4c3195672,0.html> (accessed 6 November 2013) paras 12, 47.

<sup>186</sup> See Questions relating to the obligation to prosecute or extradite (*Belgium v Senegal*) Application of 19 February 2009.

<sup>187</sup> See Questions relating to the obligation to prosecute or extradite (*Belgium v Senegal*), Judgment, 20 July 2012.

<sup>188</sup> In the ICJ case of *Belgium v Senegal*, the defendant state argued that a decision that it should try Habré or extradite him would be at odds with its obligation to give effect to the ECOWAS Court's decision. However, the ICJ dismissed this argument and took the position that Senegal's duty to comply with CAT 'cannot be affected by the decision' of the ECOWAS Court. In any case, both courts agree that Habré must stand trial.

The impact of the *Habré* decision on the African Union has been discussed in chapters four, five and six of the present study. Such impact is more perceptible in the draft statute of the ad hoc tribunal proposed to try former president Habré. Indeed, article 1 of the draft proposed statute reads: ‘The purpose of this Statute is to establish an ad hoc international Court with international character for the prosecution of crimes committed in Chad during the period from 7 June 1982 to 1 December 1990, consistent with the decisions of the Assembly of the African Union (...), the judgment of the Court of Justice of ECOWAS (...) of 18 November 2010 and the United Nations Convention against Torture (...)’.<sup>189</sup>

As mentioned earlier in this study, the Inter-Parliamentarian Union has made a decision following the ECCJ’s judgment involving the Togolese parliamentarians, calling the Government of Togo to afford a fair hearing to the complainants.

The African human rights system is also likely to receive the influence of the ECCJ’s human rights jurisprudence because the sub-regional court ‘presents the clearest risk of jurisprudential divergence with the African Court’.<sup>190</sup> If the notoriety of the Community Court and its emerging authority continue to grow, it will therefore have a huge potential of becoming a reference in the field of human rights adjudication in Africa. Having had the primacy of handling cases from almost all 15 ECOWAS countries, the ECCJ will certainly enlighten the African Court in dealing with similar matters from the same or other African countries where the African Charter is part of the municipal law.

In the same vein, the ECCJ should develop a greater institutional cooperation with both the African Court and African Commission to ensure smooth jurisprudential encounters. Cooperation will be crucial to jurisprudential influence as, in 2012, ECOWAS member states were said to provide 40% of African Commission cases.<sup>191</sup> In addition, the three

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<sup>189</sup> African Union, ‘Draft Statute of the Ad Hoc International Court for Senegal’, Addis Ababa, 24 March 2011 Unpublished document as quoted by Mubiala (n 183 above) 9. See also Habré’s Survivors’ Fight for Justice ‘Progress report of the Commission on the Hissène Habré case – African Union’ (July 2011) <http://www.facebook.com/notes/hiss%C3%A8ne-habr%C3%A9-justice-pour-les-victimes-justice-for-the-victims/progress-report-of-the-commission-on-the-hissene-Habré-case-african-union/248799398468710> (accessed 26 April 2012). Emphasis of the author.

<sup>190</sup> F Viljoen ‘The African Human Rights Court: A newcomer to the African judicial family’ Paper presented at the iCourts inaugural conference University of Copenhagen (14-15 September 2012) 11.

<sup>191</sup> As above.

bodies are connected by both procedural and substantive ties including principles of *judicata* and *lis alibi pendens*.<sup>192</sup>

There was no evidence of use or reference to the jurisprudence of the ECCJ by other regional human rights bodies in Africa in the first decade of the Community Court's operation. First references are made by the African Commission in decisions of 2013.<sup>193</sup> However, the ECCJ has the potential of influencing the work of those bodies at both sub-regional and continental levels. On the sub-regional plane, the ECCJ's human rights jurisprudence has the potential of influencing other sub-regional courts in Africa, namely the East African Community Court of Justice and the SADC Tribunal. The main basis for such influence is the place of the African Charter in the EAC and SADC instruments.

As the SADC Tribunal is now defunct, any influence on the human rights regime once entertained by the Tribunal can be discussed only for academic and informational purposes.<sup>194</sup> Had the Tribunal still been in existence, influence would have been enhanced by the additional presence of a number of African Charter and international human rights in the SADC Social Charter. As a matter of fact, while it was still in operation, the Tribunal did utilise a human rights mandate, though inferred, and adjudicated related cases with the peculiarity of an openness to international human rights jurisprudence, including from other African bodies. For instance, the Tribunal cited decisions of the African Commission in the *Campbell* case.<sup>195</sup> Arguably, the Tribunal would have cited ECCJ's judgments if the latter had already made any significant and relevant pronouncements at the time of the *Campbell* case. This argument is reinforced by the fact that, in the same judgment, the

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<sup>192</sup> For instance, in application of article 56(7) of the African Charter, the African Court may be able to hear matters pending before the ECOWAS Court but not the other way round. In a similar way, a case decided by the ECOWAS Court cannot be heard by the African Court while the sub-regional court may well adjudicate matters unsuccessfully raised by its continental counterpart.

<sup>193</sup> The African Commission used the definition and criteria of the right to an equal pay for an equal work set out by the ECCJ in *Essien v The Gambia* to found its analysis in the case of *Dabavorivhuma Patriotic Front v South Africa* Communication 335/07 34th Activity Report (2013). In *Interights and Others v DRC* Communication 274/03 and 282/03 (2013), the Commission refers to the ECCJ's judgments in the *Koraou* and *Manneh* cases to establish an existing right to monetary compensation under the African Charter.

<sup>194</sup> See discussion of the SADC Tribunal in section on sub-regional experiences on compliance and enforcement under chapter two

<sup>195</sup> See *Campbell v Zimbabwe* (merits) paras 42 and 43. The SADC Tribunal cited *Constitutional Rights and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1997) and *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006).

Tribunal has extensively cited UN human rights treaty bodies whose decisions in principle carry lesser weight than decisions of international courts.

As at November 2013, one could make a case for a limited influence of the ECCJ's jurisprudence on the EAC Court of Justice, mainly due to the lack of human rights jurisdiction of the EAC Court. The lack of jurisdiction has explained the EAC Court's consistent jurisprudence of adjudicating human rights-related matters through its interpretation and application mandate to avoid 'forcing' the yet to-be-conferred human rights jurisdiction.<sup>196</sup> However, in the *Katabazi* case, its most prominent human rights related judgment, the EAC Court made a comparative use of the African Commission's jurisprudence in the determination of the matter.<sup>197</sup> It is noteworthy that the African Commission was the only body referred to despite the fact that other international human rights bodies have decided similar cases. Although the EAC Court had not had a wider platform to strengthen its jurisprudential practices in respect of human rights, the above is evidence that the Court will not hesitate to refer to authoritative, significant and relevant ECCJ's judgments should the need and opportunity arise.

At the continental level, as mentioned earlier in this section, neither the African Court nor the African Commission had referred to the work of the ECCJ in their decisions, save for one decision of the Commission in 2013. However, nothing prevents these bodies from referring to the human rights jurisprudence of the ECCJ. Furthermore, the same argument that interaction is only a matter of time, opportunity and relevance is supported by a resolution of the African Commission. In 2008, the Commission adopted a Resolution on The Gambia in which it called The Gambia to 'immediately and fully comply with the 5th June 2008 judgement of the ECOWAS Community Court of Justice in respect

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<sup>196</sup> See discussion on positive trends of compliance in the EAC Court of Justice under sub-regional experiences on compliance and enforcement in chapter two.

<sup>197</sup> See *Katabazi & 21 Others v Secretary General of the East African Community and Uganda* East African Law Society Law Digest (2005-2011) 39-40. Citing *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999), the EAC Court concluded that the Government of Uganda had attempted to violate the rule of law and independence of the Judiciary by refusing to release Katabazi and others just as the Government of Nigeria did in respect of Chief Abiola despite courts' orders.



of the release of Chief Ebrima Manneh from unlawful detention and pay the damages awarded by the Court'.<sup>198</sup>

While the authority and binding nature of its judgments bear promises of influence, the ECCJ will need to embrace a more consistent approach to its jurisprudence. If this is done, the same potential is relevant to an influence on other courts applying the African Charter and other international human rights instruments at both national and regional levels in other regions of the continent as demonstrated above. There is no specific reason why the work of the ECCJ would not influence regional courts in the Americas and Europe as well as United Nations human rights treaty bodies and mechanisms. Elements of the maturity of the ECOWAS human rights regime as discussed in previous chapters mainly provide for such possibilities.

## 6. Conclusion

In addition to the specific remedies provided by the execution of orders made in its judgments, the ECOWAS Court of Justice has also impacted on various organs and mechanisms within and beyond the borders of the Community. In this chapter, the influence of the ECOWAS Court of Justice on domestic legal systems was investigated. Some major conclusions may be drawn from the discussion.

First, it appears that influence is clearer in compliant than in non-compliant states, even if the socio-political environment is also a determinant for influence. Second, Executives have been the poorest drivers of influence and, as they are mostly at the forefront of legislative initiative, governments have limited the potential for Legislatures to adjust municipal norms with the findings of the ECCJ. It is worth noting that in several cases, the issue was less about the need for legal reform than for a more effective application and interpretation of the law. Domestic courts have certainly proved to be the most productive channels for influence. This was done by feeding the Community Court with locally informed material thus helping the ECCJ prevent confrontation through balanced pronouncements. Besides serving as local intermediaries, domestic courts have influenced the ECCJ by bringing 'ready-made' legal argumentation and application of

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<sup>198</sup> African Commission on Human and Peoples' Rights 'Resolution on the human rights situation in the Republic of The Gambia' (24 November 2008) para 7.

national law or sending a warning to the Community Court. As the analysis revealed, Abuja judges navigated between audacity and caution to build authority and confidence in the early years of an infant human rights mandate.<sup>199</sup>

An active civil society and legal practitioners have also enhanced the ECCJ's influence. These two sections of national systems have made significant inputs in the work and impact of the Court. Most notable is the case of the Media Foundation for West Africa (MFWA) which was at the forefront of Gambian journalists' cases before the ECCJ. The Accra-based NGO not only conducted the litigation in the cases but also organised huge publicity along with advocacy. In an interesting way, the MFWA made an effective use of all legal means available to ensure a timely follow-up of the initial judgments. There is no doubt that the action of MFWA increased the non-compliance cost for The Gambia. The strategy has paid off, leading to final judgments and attracting new suits before the Community Court against the same state. The challenge remains that domestic courts continue to enter unjust judgments and that access to justice is gravely hampered.

In the *Education* case, SERAP has reinforced the ECCJ's potential to revive dialogue on and resolution of issues that are relevant to the vast majority of citizens in Nigeria and the rest of the region. A wide-ranging campaign and advocacy initiated by SERAP both prior to and following the judgment has stressed the need urgently to address the restrictive rules of standing and limited socio-economic rights protection in one of the richest oil producers but also poorest countries in Africa and the world. Clearly, SERAP's contribution has revived the justiciability debate in Nigeria and the region.

Of the ECCJ's cases discussed, the *Koraou Slavery* judgment has made a significant impact. Stakeholders suggested catalytic effects of the decision following which 'approximately 30 women came forward to anti-slavery organisations seeking their own 'liberation''.<sup>200</sup> In this case as well, anti-slavery NGOs played the central role with the collaboration of lawyers. The role of Timidria, a frontline Nigerien anti-slavery organisation, with the notable support of Anti-Slavery International proved to be

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<sup>199</sup> See in general L Helfer and K Alter 'Legitimacy and lawmaking: The tale of three international courts' (2013) 14 *Theoretical Inquiries in Law* 479.

<sup>200</sup> See Duffy (n 45 above) 66; and interviews with Habibou and Advocate Chaibou.

instrumental to the impact of the case in Niger as well as in and beyond ECOWAS. These stakeholders intervened right from the decision to bring a suit to the Community Court through to the propaganda and publicity around the judgment.

As indicated earlier, the *Togolese Parliamentarians'* judgment has also benefited from the expertise of domestic lawyers who have opened an avenue for more cases to make their way to the ECCJ. The ECCJ has received a significant number of cases against Togo following the *Parliamentarians'* judgment as exemplified earlier in this chapter under the section on the impact of the Court's decisions on its domestic counterparts. The judgment has also offered an opportunity for public debates on issues that have remained 'politically sensitive' in Togo where the justice system is reported to be unreliable and where torture is rampant in prisons and among the ranks of the intelligence unit.<sup>201</sup>

All in all, although it has not reached the level of the European irradiating model, there is evidence that the ECOWAS human rights regime has impacted on other ECOWAS countries which are strangers to the cases discussed. Beyond the Community, the ECCJ's jurisprudence has begun to break through international mechanisms at both the African Union and United Nations' levels.

While it could be rightly argued that the ECCJ, and in fact the whole regime, have been doing reasonably well so far, implementing well-designed systems is not enough to ensure their effectiveness.<sup>202</sup> The question therefore remains whether the ECOWAS human rights regime will be sustainable and how the Community Court will maintain its current trends and strengthen its credibility and authority in the region. This will no doubt depend mainly on how the fragile West African democracies develop and whether the

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<sup>201</sup> The 2012 disputed report by the National Human Rights Commission of Togo details evidence of burning issues in the justice and prison systems. See Jeune Afrique 'Togo: l'étrange rapport sur la torture qui embarrasse le gouvernement' (23 February 2012) [http://www.jeuneafrique.com/Article/ARTJAWEB\\_20120223131951/](http://www.jeuneafrique.com/Article/ARTJAWEB_20120223131951/) (accessed 11 May 2012).

<sup>202</sup> Alter suggests that the success of European style courts will be real only under the two main conditions that the law applied by international courts is part of domestic law; and international and domestic courts dialogue. See Alter (n 20 above) 2.

rule of law engrains itself domestically.<sup>203</sup> For this to happen, ECOWAS political organs and leading member states will have to take strong stances<sup>204</sup> against recalcitrant states that still make the system stammer.<sup>205</sup> The 2012 Supplementary Act is an encouraging trend of political commitment in that line. However, only time<sup>206</sup> will tell whether ECOWAS member states have firmly decided to establish a human rights regime and if they have put in enough commitment to become part of an ‘ECOWAS of rights’.

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<sup>203</sup> Domestic government’s institutions that are committed to the rule of law and remain responsive to individual rights claims constitute a strong favourable precondition for effective supranational adjudication. See Keller & Stone (n 32 above) 333.

<sup>204</sup> The weakness of the highest political authority and lack of state commitment to the integration process have been demonstrated to be the main hindrances of the European Court of Justice’s ability to develop a ‘regional’ rule of law. See S Scheingold *The rule of law in European integration* Yale University Press (1965) as quoted in Alter (n 20 above) 5.

<sup>205</sup> In the European example, the entries of Russia, Poland, and Turkey have biased the outcome of litigation. See Keller & Stone (n 32 above); and LR Helfer ‘Redesigning the European Court of Human Rights: Embeddedness as a deep structural principle of the European human rights regime’ 19 *European Journal of International Law* (2008) 125.

<sup>206</sup> It took years for the European human rights system to become stronger and most current copies have faced similar situation as the European model in 1950. See Alter (n 20 above) 5.

## **Chapter VIII: Conclusions and recommendations**

### **1. Conclusions**

This chapter takes a question by question approach to accounting for the major issues raised in the introductory chapter. The two main questions were whether and how states have complied with the human rights judgments of the ECOWAS Community Court of Justice; and, after a decade of adjudication, what has been the influence of the Court's jurisprudence on the domestic systems of defendant states, on other ECOWAS member states, and beyond the Community.

#### **1.1 State compliance with the judgments of the ECOWAS Court of Justice**

##### **1.1.1 Normative and institutional framework for compliance**

The present study reveals that compliance with the judgment of the ECOWAS Court is a duty for ECOWAS member states. This duty arises not only from general international law but also from the 1993 ECOWAS Revised Treaty, the 1991 and 2005 Court Protocols, and the 2012 Supplementary Act.

In addition to the norms providing for state compliance as a duty, ECOWAS has established institutions to see to the enforcement of that obligation. The mechanism seems to be two-fold, judicial and political, with the political process as final. First, the Court may entertain non-compliance suits. Such suits may be brought not only by the victims and their counsel but the ECOWAS Commission and the Authority of Heads of States and Government may also seize the Court regarding states' failure to comply with its decisions.

Second, the Council of Ministers may initiate a non-compliance reporting procedure under which it has the power to have non-compliance cases investigated and make recommendations to the Authority as to what sanctions should be meted against non-compliant states. The process begins with either individuals, legal entities, member states, the President of the Commission or any other institutions of the Community seizing the President of the Commission with a non-compliance report. The state is given 30 days to comply or reply before the Commission undertakes another 30-day investigation into the reasons for non-compliance as the case may be. The President of

the Commission submits the findings of the investigation to the Council Ministers who afford a final opportunity to the state to comply. In a case in which the state still fails to comply, recommendations are made to the Authority for sanctions.<sup>207</sup>

Despite the facts that the Court may still be seized of non-compliance instances, there is a little doubt that ECOWAS has taken a political approach to compliance monitoring. This approach is manifest through the provision that once the political monitoring process is activated, the Court loses jurisdiction for compliance monitoring over that particular case. The 2012 Supplementary Act thus provides that sanctions for non-compliance cannot be appealed before the Community Court or any other tribunal.

At the domestic level, the general rule is that decisions of non-national courts should receive the blessing of a municipal judge before they can be of effect in the territory of the state. However, ECOWAS law, international law and practice show that these rules do not apply to decisions of the ECOWAS Court of Justice, which are meant to enter the domestic sphere without the help of any municipal measure. The 2005 Court Protocol is clear that municipal actors will only verify that the judgment is from the Community Court and must then proceed to enforce it as a domestic judgment.

Notwithstanding their direct enforceability and the fact that non-compliance constitutes a violation of an obligation owed to the Community, judgments of the ECOWAS Court may yet have to undergo the same difficulties as decisions of domestic courts. The problem is that, in some ECOWAS countries, respect for human rights, the rule of law, and good governance is wanting. Actually, the fate of decisions made by domestic courts remains very dependent on the nature of the government of the day and the interest of the executive in the case at stake. Political and democratic instability at the domestic level therefore have a great bearing on state compliance. As revealed in cases where study countries were involved in international litigation, state compliance appeared to be a reality only under governments that are friendly to the rule of law. In any case, it is clear

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<sup>207</sup> See ECOWAS, Supplementary Act A/SA13/02/12 on Sanctions Applicable for Failure to abide by Community Obligations. *Acte additionnel A/SA13/02/12 portant régime des sanctions à l'encontre des Etats membres qui n'honorent pas leurs obligations vis-à-vis de la CEDEAO' Abuja, 17 February 2012.* For detailed discussion on the procedure, see section on compliance obligation in ECOWAS under chapter two.



that legally speaking, judgments of the ECOWAS Court are directly enforceable in member states and domestic laws do not provide for any particular immunity for a state to shy away from compliance with courts' orders.

### **1.1.2 Overview of state compliance**

An overview of compliance reveals that states have generally been sensitive to the decisions of the ECOWAS Court. Defendant states complied in the majority of cases studied. Importantly, in none of the cases has a state expressly rejected any judgment of the Court. The compliance picture is positive as six of the nine cases studied, which is 66 per cent, recorded full or situational compliance. Although non-compliance instances consequently make up about 34 per cent of the cases discussed, this figure needs to be considered in context.

At least two of the three non-compliance cases, which represent 22 per cent of all the cases, may be considered as cases in progress. Cases in progress are those that have either gone under review, there are new proceedings in the follow-up of the initial cases, the decisions are recent or stakeholders have given an assurance of government readiness to comply as at June 2013. The two cases referred to involve one particular country, which cannot be used as a trend setter.

All compliance cases, including full and situational compliance, involved civil and political rights, while non-compliance instances were concerned with both civil and political rights and socio-economic rights. An important finding is that non-compliance cases dealing with civil and political rights involve states where respect of the rule of law and democratic stability is not the order of the day. However, compliance has responded to a range of other more complex factors, which are summed up below.

### **1.1.3 Factors influencing compliance**

The political environment of the case and the nature of the remedy take the lead in all compliance instances. Compliance was driven by the low cost of the order in about 60 per

cent of the compliance cases,<sup>208</sup> while, conversely, refusal to implement the other part of the same decisions, or the decision to defer compliance, was the result of too high a cost of obeying the orders in 60 per cent of the overall compliance instances.<sup>209</sup> In 20 per cent of the cases, compliance was arguably determined by the fact that external pressure appeared to be higher than domestic interests, or in fact because the latter were eventually reorientated by the former.<sup>210</sup> As far as the nature of the remedy is concerned, one may quantitatively conclude that compensation and administrative measures attract more compliance – than orders to release or reinstate – as they account for 80 per cent of the relevant instances. However, both categories of orders were made in compliance and non-compliance cases almost evenly. Eventually, the political environment of the case seems to have taken the lead irrespective of whether the judgments were complied with or not.

Non-compliance instances responded to different factors, the most important ones being the nature of the government of the day and the nature of both the right violated and the remedy provided. In fact, bad governance and lack of respect for the rule of law at the domestic level are the major reasons for non-compliance in 100 per cent of the non-compliance cases. The financial issue associated with the nature of the right is relevant in only 25 per cent of the non-compliance instances.<sup>211</sup>

Some factors have turned out to be either less relevant or not relevant at all, at least under the current circumstances. For instance, the time lapse within which the case is completed has less relevance as proceedings in the ECCJ are in any case much faster compared to other international courts. Although the complainant has requested for review of judgment for lack of an explicit order in only one case,<sup>212</sup> there were also issues

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<sup>208</sup> *Ugokwe* case (not to swear any one in), *Habré* case (suspend a process which the Government was not willing to undertake in the first place) and *Ameganvi Togolese Parliamentarians'* case (pay a total of US\$ 60,000).

<sup>209</sup> *Tandja* case (releasing former President Tandja was too a high cost for political actors to pay at a particular point in time), *Habré* case (competing personal political interests did weigh greater than the benefits of obeying) and *Ameganvi Togolese Parliamentarians'* case (difficulty to reinstate parliamentarians who had already been replaced and risk of breaking a political alliance deal between the ruling party and main opposition group).

<sup>210</sup> *Koraou Slavery* case (suspension by the regional intergovernmental organisation, international pressure, sanctions, quarantine, use of compliance to restore government's tarnished image).

<sup>211</sup> In the *SERAP Education* case.

<sup>212</sup> See *Ameganvi Togolese Parliamentarians'* case, and compliance narrative section in chapter four.

as to the way the operative part of certain other judgments of the Court were couched.<sup>213</sup> The Court has also had reasoning issues which should, however, not be generalised as they were limited to few cases.<sup>214</sup> The idea that compliance increases as the regime becomes more mature was not conclusive at least from the perspective that the ECOWAS human rights regime was born with some of the features of maturity such as the binding nature of decisions, the political will of the umbrella organisation and well elaborated monitoring mechanisms.<sup>215</sup> However, the maturity of the regime could be relevant *a contrario* particularly if compared with the one supporting the African Commission.

Civil society organisations and the media have played an important role in raising awareness about the Court and promoting its work. These groups have also been at the forefront of litigation in the Court. Having said this, the picture is mixed when it comes to concluding whether pressure by NGOs is predictive of compliance. In fact, it appears that these organisations have mounted pressure in both compliance and non-compliance cases evenly.

A question that is still pending is why states that have a manifestly stronger economic, political and military standing in the Community have failed to use pressure against less influential members to comply with judgments of the Court. The most striking example is Nigeria's failure to require of The Gambia that it comply with orders of the Court. A tentative answer in this study is that Nigeria itself has failed to obey some judgments of the Court in cases to which it was party. However, the answer would be incomplete in the light of the consistent practice of the Community, namely with regard to its systematic 'zero tolerance' actions against Niger, Guinea Bissau, Côte d'Ivoire and Mali when unconstitutional changes of government occurred in recent years. This question therefore needs to be investigated further, particularly in the light of the 2012 Act on sanctions for non-compliance, which equates ECCJ's decisions with Community law.

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<sup>213</sup> See for instance *Habré* and *SERAP Education* cases, and discussion on compliance factors relating to the formulation of orders in chapter five.

<sup>214</sup> See for instance *Habré* case, and discussion on compliance factors relating to the reasoning in chapter five.

<sup>215</sup> See relevant discussion under the section on the maturity of the body and regime in chapter five.

## 1.2 Influence of the ECOWAS Court jurisprudence

### 1.2.1 Influence on domestic systems of defendant and proxy states

This study revealed evidence of influence of the ECOWAS Court on the domestic systems of states that were parties to the cases considered. First, it appears that influence is clearer in compliant than in non-compliant states, even if the socio-political environment is also a determinant for influence. Second, Executives have been the poorest drivers of influence and, as they are mostly at the forefront of legislative initiative, Executives have limited the potential for Legislatures to adjust municipal norms with the findings of the ECCJ. Domestic courts have certainly proved to be the most productive channels for influence. This was done by providing the ECCJ with the realities on the ground thus helping the Community Court prevent confrontation through a balanced jurisprudential policy. Besides serving as local intermediaries, domestic courts have influenced the ECCJ by bringing ‘ready-made’ legal argumentation and application of national law or, in the worst cases, by sending warnings to the Community Court. As the analysis revealed, Abuja judges navigated between audacity and caution to build authority and confidence in the early years of a young human rights regime. There is also evidence that, as the result of its judgments, the ECCJ is attracting more litigation from defendant countries.

An active civil society and legal practitioners have also enhanced the ECCJ’s influence. These two sections of national systems have made significant inputs into the work and impact of the Court. They acted at the forefront of litigation but also organised huge publicity along with advocacy. In an interesting way, they activated implied follow-up processes by filing non-compliance suits in the Court. The same organisations reinforced the ECCJ’s potential to revive dialogue on and resolution of issues that are relevant to the vast majority of Community citizens such as poor governance and socio-economic rights. The challenge remains that domestic systems have yet to respond through judicial activism but also through the work of other activist forces in ECOWAS countries, most importantly in places such as The Gambia and Nigeria.

The jurisprudence of the ECOWAS Court also impacted on member states that were not party to any of the disputes settled by the Court. The main illustration in that line is the *Koraou Slavery* judgment. Indices of impact were revealed in Mali and Mauritania, where

either anti-slavery laws were passed or provisions of the Constitution were used to launch anti-slavery campaigns and support programmes. In the same vein, there is evidence that domestic lawyers in Senegal have considered litigating in the Community Court, cases that share similarities with the *Togolese Parliamentarians* case.

### 1.2.2 Influence beyond ECOWAS

An illustration of the ECOWAS Court generating influence beyond the frontiers of the Community first involves the work of international mechanisms. The best example is provided by the identity of a number of recommendations made under Niger's UPR Report with findings of and issues pointed out by the ECCJ in the *Koraou* case. Another illustration is provided by connections between the ECCJ's *Habré* judgment and the ICJ decision in the case of *Belgium v Senegal*.<sup>216</sup>

The ECOWAS Court jurisprudence has also impacted on the work of African Union political bodies as seen through the express reference of the Draft Statute of the Ad Hoc International Court for Senegal to the ECCJ *Habré* judgment. The decision of the Inter-Parliamentarian Union similarly called on Togolese authorities to abide by the judgment of the Community Court.

The Court equally has an evident potential to impact on the work of other regional human rights courts in Africa. The main factors in favour of such impact are the common use of the African Charter, the advantage of automatic recognition of jurisdiction and non-exhaustion of local remedies, the greater level of litigation from ECOWAS countries, and the political will of the umbrella organisation backing the ECOWAS regime. The two main conditions are, however, that the ECOWAS Court maintains a qualitative jurisprudential development and develops a greater level of cooperation with domestic institutions, most importantly courts. In addition to their adoption of the African Charter, both the SADC Tribunal and EAC Court of Justice have shown explicit signs of eagerness to receive the influence of authoritative international human rights jurisprudence, even from non-judicial bodies. The study concludes that there is therefore no reason why they should disregard authoritative jurisprudence from the ECOWAS Court.

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<sup>216</sup> See Questions relating to the obligation to prosecute or extradite (*Belgium v Senegal*), Judgment, 20 July 2012.

## 2. The ECOWAS regime as an alternative to the African system?

One of the findings of this study is that, between 2009 and 2013, the number of cases against study countries appeared to be dropping in the African Commission while litigation against the same countries is growing in the ECOWAS Court. The answer could be found in the attractiveness of the ECOWAS regime, which this study exemplified well. The binding authority of the ECCJ's decisions and the situation of the African Commission on the same territory could be some of the main factors at play in favour the Court. In other words, proximity, the nature of the body and of its findings, and, implicitly, costs will be relevant to why a well advised litigant should chose either of the Abuja Court and the Banjul Commission. The same could apply to why an informed counsel should advise her West African client to go to the East Africa-based continental Court in Arusha (Tanzania) rather than seek an ECCJ's judgment in Abuja (Nigeria). Those questions deserve further investigation.

Because of its limited access and remoteness vis-à-vis ECOWAS countries, the African Court may share the same fate as the Commission, at least under the current state of affairs. It is worth noting that, as in November 2013, four of the seven states whose nationals and institutions may directly access the African Court are from ECOWAS. All four states, namely Burkina Faso, Côte d'Ivoire, Ghana and Mali have been taken to the ECOWAS Court in the past. Conversely, the potential of the political umbrella organisation backing the two regimes may have a greater bearing at the time of forum shopping. In the light of the strong legal and institutional mechanisms put in place by ECOWAS, the West African Court seems to stand a greater chance of success than its continental counterpart.

However, authority, independence, legitimacy and public perception could similarly play a great role in deciding which body attracts preference. An illustration is given of the case of *Norbert Zongo and Others v Burkina Faso*<sup>217</sup> which the litigants chose to file with the African Court in Arusha, while the Abuja-based ECCJ presented differential advantages alluded to earlier in this section. One of the lawyers for the complainant raised the

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<sup>217</sup> *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v Burkina Faso*, Application No 013/2011.



complexity of the case, and the lengthy domestic proceedings with a dismissal of the charges, as the main reasons for the African Court's option.<sup>218</sup> With regard to the complexity of the case, the present study has discussed the lack of a sound analysis of international – human rights – law issues in some decisions of the ECCJ.<sup>219</sup> As far as proceedings in domestic organs, mainly courts, prior to the ECCJ's suit are concerned, the Abuja Court had made it clear, in the case of *Ugokwe v Nigeria*, that it is not an appeal court vis-à-vis national courts. One more justification for not taking such a highly politically sensitive case to the ECCJ could be the jurisprudential posture adopted by the West African Court in some politically sensitive cases such as the *Parliamentarians* one.<sup>220</sup> With no doubt, a myriad of factors both constant and dynamic will determine which body is preferred at the time of litigation. At present, and obviously within its jurisdictional scope, the ECOWAS Court enjoys a number of factors that make it an alternative to the African Commission and Court.

### 3. Recommendations

#### 3.1 Litigants

In the first decade of its existence, one of the most critical ingredients for the development of the ECOWAS Court's human rights jurisprudence is a greater litigation, advisory and referral activity. Individuals should therefore be advised to take more cases to the Court. However, strategy matters. For instance, despite the current rule of non-exhaustion of local remedies, it is rather advisable that litigants strive to compile a minimum of proceedings data prior to undertaking the Abuja 'trip'. First, providing a minimum of such information has proved central to the determination of the cases by the Court in a proper, quicker, and informed manner. Second, the Court has declared cases

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<sup>218</sup> See Interview with Advocate Ibrahima Kane, Counsel for the complainant in the *Zongo* case (Banjul, 27 October 2013). The *Zongo* case is a very politically sensitive one, which involves the assassination of a journalist openly critical of the Executive. The case has been in domestic proceedings for over a decade with no outcome and the Executive is believed to have used all means for it to be so.

<sup>219</sup> See for instance discussions on the reasoning in a particular finding, particularly in the *Habré* case, under chapter V.

<sup>220</sup> See for instance discussions on the formulation of the remedy or order, particularly in the *Ameganvi (Parliamentarians)* case, under chapter V. This matter similarly involved highly political elements. Bearing in mind the refusal of the ECOWAS Court to make specific reinstatement orders in both its initial and revision judgments, an informed litigant would have rightly been reluctant to choose the Community Court.

inadmissible almost *de plano* where it became satisfied they were attempts to utilise it as a first instance tribunal.<sup>221</sup> In other words, ‘non-exhaustion’ should not be construed and applied as ‘no-exhaustion’ but rather as an unfinished attempt to exhaust local remedies.

The cases studied also proved that the use of civil society channels carries a great potential of success in individual litigation. As opposed to individuals, civil society organisations have greater means to provide technical expertise but also a stronger network to mount pressure in case of non-compliance.

Follow-up and the use of compliance monitoring processes by litigants is also crucial because the Court cannot proactively demand enforcement after it has delivered judgment. Even where it is keen to activate its non-compliance monitoring powers through either judicial or political mechanisms, the Court still needs feed-back from litigants. As they are henceforth empowered to do under the 2012 Supplementary Act, litigants should also put the political monitoring process to the test. The propriety of filing non-compliance suits first, before activating the non-compliance reporting process should be decided according to the case at hand.

### **3.2 Individual lawyers and counsel**

At present, it is clear that ECOWAS law, and the opportunity of vindicating rights in the Court are still unknown to the vast majority of legal practitioners in the region. A better knowledge of ECOWAS instruments and procedural rules by counsel is crucial to successful litigation and in turn to a coherent development of the jurisprudence of the Court. The same applies to lawyers’ recourse to the precedents of the Court in cases that bear trite similarities with the matter at hand. As the Community Court cannot by itself make up arguments out of the pleadings of the parties, counsel must bring more jurisprudential arguments from other regional bodies in Africa, namely the African Commission and Court. The African human rights jurisprudence has developed extensively over the past years and very few African Charter rights have not been adjudicated by the continental bodies.

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<sup>221</sup> See for instance *Ugokwe* and *Dias* cases.

One important piece of advice for lawyers is to shape remedies that make more sense and speak to the domestic and regional environment of the case. As demonstrated in this study, it may be detrimental to a case to ask for remedies that will obviously not be awarded by the Court, or which the environment of the case renders materially impossible. This is not to say lawyers must forfeit their clients' rights but simply that alternative remedies should be preferred especially where they are available and have a greater chance of success. Finally, the Court needs friendship among legal practitioners. Lawyers therefore have a role in filing *amicus curiae* requests to avail their expertise to the Court and help it shape its jurisprudential policy.

### **3.3 Civil society organisations, NHRIs and the media**

Civil society's engagement with the ECOWAS Court requires to be taken to the next stage. Most importantly, civil society organisations need to embark on a greater and more coordinated strategic litigation and advocacy campaign. The current engagements appear to be limited and sparse. The choice of issues to litigate is also important as well as the need to adequately brief the media, and undertake joint venture litigation. Joint strategic litigation may be central to the ECOWAS system as most of the current organisations involved with the Court specialise in very specific human rights issues. Some public interest issues rather require a multidisciplinary approach. In addition, joint ventures mean greater resources, sharper expertise, and potential for stronger pressure.

Communication between CSOs, NHRIs and the Court is also limited. In many instances, those organisations are not aware of activities of the Court that, yet, require their active participation. The same applies to engagement with and use of both judicial and political monitoring mechanisms. CSOs also have the same awareness limitations as lawyers regarding ECOWAS law, procedures, jurisprudence, and compliance-monitoring mechanisms.

Another important issue is the lack of litigation on 'original' ECOWAS law. It is commendable that human rights matters are receiving a crucial and legitimate attention from civil society in the ECOWAS Court. However, this has happened on a case-by-case and individual basis. At such a level of litigation, cases should rather seek a wider impact, namely issues that are central to regional integration and development as a

comprehensive project. One key recommendation is therefore for CSOs to initiate strategic litigation of community law issues under the umbrella of human rights cases. Freedom of movement and rights of establishment, electoral rights, and the fight against corruption and money laundering are issues that have seen very limited implementation by member states so far. Litigating such issues in connection with related African Charter rights has the potential of developing the community law jurisprudence and boosting implementation.

Civil society organisations and academic institutions should also undertake joint awareness and training activities covering the ECOWAS regime, and the jurisprudence of the Court. Most importantly, those institutions must initiate research and publication to support the work of the Court and educate legal practitioners and the wider public.

### **3.4 The Court**

#### **3.4.1 Reasoning**

The ECOWAS Court has an important role to play in its own success and the success of the whole regime. The Court has to embrace a better use of both the law and jurisprudence. The *Habré* precedent is clearly a controversial one which the Court should absolutely avoid in the future. Such a trend may cause a loss of interest and confidence among litigants, particularly at the time of forum shopping. Reasoning being central to gaining authority, the Court should equally avoid inconsistencies from one case to the other but also in the same case. Instances where the Court finds a violation but fails to make the subsequent order may be detrimental to its authority.

The same applies to unclear reasoning which embeds the risk of weakening the Court's legitimacy. Some of the main issues for which the Court needs to set clear benchmarks include standing, and namely the question of allowing non-governmental organisations to initiate public interest litigation on an *actio popularis* basis, but also the determination of the quantum of damages, the differentiation between declarations and orders, and the clarification of criteria upon which different conclusions are reached in cases sharing very trite similarities.



### 3.4.2 Jurisprudential policy

The current jurisprudential policy of the Court is to avoid addressing directly the organs of the state involved and rather send its orders to the Executive. Thus, it has proved easier for the Court to make orders for the payment of damages and administrative actions than to reverse decisions made by municipal institutions. It became evident that the Court sought to avoid clashing with the sovereign powers of state organs, namely its domestic counterparts.

However, it would be partial to only preserve the sovereignty of state organs to the detriment of the good administration of justice and victims' rights. In other words, the Court should avoid sacrificing the interests of litigants just to avoid clashing with domestic courts and other institutions. An alternative could be preventive cooperation and persuasion; greater awareness and training directed at domestic actors to prepare them to receive signals sent by the Community Court.

### 3.4.3 Judicial compliance monitoring mechanism

The project of establishing national registries should be completed as a matter of urgency. Another urgent matter is to ensure that the ECOWAS Commission uses its powers to demand that member states designate national enforcement authorities. The Court could contemplate using the political monitoring process to ensure that enforcement authorities be appointed.

The setting up of the Court's Monitoring Committee, the *Comité de surveillance*, is crucial to an effective use of both the judicial and political compliance-monitoring mechanisms. The Committee should involve CSOs, individual lawyers, litigants, and representatives of the ECOWAS Commission. A comprehensive and step-by-step process should also be drawn up for the judicial monitoring mechanisms in order to provide the Committee with clear guidelines. The guidelines should state expressly what the time frames are for compliance, or how the Committee should determine such deadlines and at what point non-compliance reports should be filed with the President of the Commission. Of course, this should be done in close consultation with the state involved.

Unless it is seized of non-compliance, the Court should prefer a judicial or para-judicial approach to compliance monitoring. Either of the processes would start with sending writs of execution to defendant states as the Court already does. Writs must be addressed to the enforcement authority designated by the state or to the Executive without delay and on a consistent basis. While the monitoring process begins from the date the writ is sent, time lapses between each step of the process will depend on the nature of the order and commitments obtained through engagement with the state concerned. For instance, administrative orders could warrant less time for steps to be taken than monetary orders involving substantial amounts of resources due to budget planning. However, engagement-based commitments should remain the main indicator as some administrative orders could involve the Judiciary, which is a separate organ of the state. State undertakings in the framework of this process should be backed by a road map designed by the Court in consultation with the state.

For the sake of raising awareness about the process and strengthening the monitoring authority of the Court, the process should be made public. In that regard, the Court should improve its annual reporting procedure. An independent section on compliance monitoring should be included in annual reports and be published as a systematic practice. The monitoring report should be well detailed and comprehensive to allow an effective activation of the political process by both the political organs of the Community and other stakeholders.

A public launch and presentation of the Court's monitoring reports could be envisaged for the judicial monitoring process to gain publicity and familiarity. In any case, the Court itself should engage in political monitoring only in cases that warrant expedited action, for instance when lives are at stake or there is risk of irreparable harm. The same option should also apply to cases that appear to have been prolonged under the judicial compliance -monitoring procedure.

#### **3.4.4 Communication and external affairs**

The Court has already put a lot of effort into improving its communication by working on its website, publishing reports and newsletters, and undertaking national sensitisation visits. In addition, it must upgrade its website to higher technological standards and keep



it up to date. For instance, a comprehensive status of cases is still unavailable online and litigants sometimes receive notification of a judgment months after the decision is read in Court. Obtaining general information, case law statistics, and copies of judgments either online or directly from the registry has also proven difficult in some instances, namely for those who do not have points of entry into the Court.

Publicity and openness is important if the Court is to be better known in West Africa and beyond. Only awareness of the Court and its work will bring about more engagement and support from outsiders. As far as its engagement with the media is concerned, the Court has done very well so far and needs to maintain the current trend.

### **3.4.5 Training, research and publication**

The Court has a very dedicated, qualified and talented research team. However, the role of that team seems to be limited to undertaking research for the judges and contributing to the preparation of workshops, conferences and colloquiums. The work of a regional court's research team should expand to prospective, comparative and innovative research. Such research should aim at providing the Court with most current knowledge in its fields of interest but also showcasing the work of the institution.

The Court's publications also need to be improved, including the current content of its bulletin and the presentation of the information contained in its annual reports. An idea could be to open up its publications to external contributors, including non-governmental organisations, individual lawyers, scholars and academic institutions. The Court could, for instance, contract legal experts, practitioners and academics to undertake research and submit papers or reports on very specific issues of interest to its work.

Finally, the Court should harness expertise by entering into partnership with CSOs and academic institutions to include the ECOWAS human rights regime in their curricula. The same should apply systematically to laws schools, faculties, judicial training schools, and other similar academic institutions in all ECOWAS countries. More incentives should also be introduced to yield interest in the work of the Court, for instance by launching an ECOWAS Court award for research, advocacy, litigation and publication.

With regard to the feasibility of these specific recommendations, the question of the resource constraints of the Court arises. Details of the budget of the Court were difficult to obtain. However, the working conditions of the staff, including judges, appear to be good. Informal consultation within the Court also revealed that it does not always exhaust budgetary allowances made available by the Commission. In addition, activities of the Court show that it enjoys interest and cooperation from donors. The feasibility of these recommendations should therefore depend on how much ambition and vision inform strategies of the Court.

### **3.5 ECOWAS political organs and political monitoring mechanism**

The President of the Commission should submit non-compliance reports of the Court to the Council of Ministers on an automatic basis. This should be done either through an incorporation of the Court's annual reports into the Commission's own report or by starting off the political monitoring process on the basis of non-compliance information contained in the report submitted by the Court. As discussed earlier under the section on judicial compliance monitoring, reporting should therefore become a regular and systematic practice in order to establish a culture of accountability and compliance among member states.

The Council of Ministers should act promptly after it receives the Commission's report. More importantly, the margin of appreciation left to the Council to decide how much time the non-compliant state should be given in the final stage should not exceed the 30-day period already provided for in the 2012 Supplementary Act. In other words, it should not take longer for the Council to conclude on non-compliance than it takes the state not to comply or the Commission to investigate non-compliance. Sanctions proposed by the Council should be proportional to the urgency, weight and importance of the orders disobeyed. Again, as discussed earlier in this chapter under the section on judicial compliance monitoring, follow-up procedures should be based on state undertakings obtained through consultation and laid down in a compliance road map.

Given that, under the Act, non-compliance with decisions of the Court is equated with non-compliance with ECOWAS law or decisions of any other institutions of the Community, the Authority should not distinguish especially when it comes to adopting

sanctions. The Authority should also avoid diminishing the persuasive force of the political monitoring process by nullifying the findings of the Commission or disregarding recommendations of the Council once the mechanism is operationalised. Therefore, the Authority should act in cases of non-compliance with decisions of the Court as swiftly as it has consistently done in a number of cases of non-compliance with ECOWAS law, namely when unconstitutional changes of government occurred or in instances of armed conflicts.

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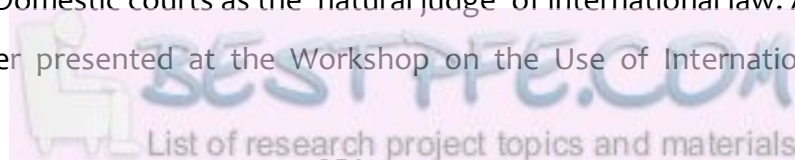
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## **Interviews**

Advocate Abdoulaye Bane, Researcher, ECOWAS Court of Justice (Abuja, 10 May 2011)

Advocate Abdourahaman Chaibou, Counsel for Hadijatou (Niamey, 18 May 2011)

Advocate Assane Dioma Ndiaye, counsel for some of the applicants in the Togolese Parliamentarians case (Dakar, 24 January 2012)

Advocate Athanase Atannon, Deputy Registrar, ECOWAS Court of Justice (Abuja, 10 May 2011)

Advocate Athanase Atannon, Deputy Registrar, ECOWAS Court of Justice (Abuja, 11 May 2011)

Advocate Edah N'djelle, agent for the Government of Togo (Abuja, 13 March 2012)

Advocate Ibrahima Kane, former member of the Senegalese Human Rights Committee in charge of the *Famara Kone* case, Counsel for the complainant in the *Zongo* case (Pretoria, 21 August 2011; Banjul, 27 October 2013)

Advocate Ousainu Darbo, Counsel for complainants in several cases against the state and opposition leader in The Gambia (Banjul, 27 January 2012)

Advocate Zeus Ajavon, Advocate of the Appeal Court of Lome (Lome, 18 January 2012)

Honourable Judge Clotilde Médégan-Nougbodé, Judge of the ECOWAS Court of Justice (Abuja, 11 May 2011)

Honourable Judge President Awa Nana Daboya, President of the ECOWAS Court of Justice (Abuja, 11 May 2011)

Justice Emmanuel Nkea, Judge President, Special Criminal Court of The Gambia (Banjul, 27 January 2012)

Mr. Abdou Hamani, Magistrate, Director of the *Contentieux d'Etat* between 2007-2010 (Niamey, 16 May 2011)

Mr. Adetokumbo Mumuni, Executive Director of SERAP (Dakar, 11 October 2011; Abuja, 6 September 2012; Cotonou, 11 June 2013)

Mr. Edward Gomez, Attorney General of The Gambia (Dakar, 13 October 2011)

Mr. Eyesan Okorodudu, Principal Programme Officer, Democracy and Governance, Department of Political Affairs, Peace & Security, ECOWAS Commission (11 May 2011)

Mr. Gaye Sowe, Senior Legal Officer, Institute for Human Rights and Development in Africa (Banjul, 26 January 2012)

Mr. Hamani Abdou, Magistrate, former Head of Litigation, Ministry of Justice (Niamey, 16 May 2011)



Mr. Iguilas Weila, former Executive Director, Timidra NGO (Niamey, 16 May 2011)

Mr. Kalu Obuba, Executive Director of SERAC (Abuja, 6 September 2012)

Mr. Martins U Okoi, Director of Civil Litigation and International Law Department,  
Ministry of Justice (Banjul, 27 January 2012)

Mrs. Blanche N'do Pabozi, Legal Expert, Assistant to the President of ECOWAS Court of  
Justice (Dakar, 12 October 2011)

Mrs. Fatou Kama, Vice President of the Senegalese NGO RADDHO (Dakar, 19 August 2011)

Prof Wolou Komi, Faculty of Law, University of Lome (Lome, 18 January 2012)

**Table A: Overview of the status of compliance with ECCJ judgments**

Judgments	Compliance		Non-compliance		
	Full compliance	Situational compliance	Non-compliance	In progress	Application for review
Ugokwe v Nigeria (PM) ECW/CCJ/JUD/03/05	X				
Manneh v The Gambia ECW/CCJ/JUD/03/08			X	X <sup>1</sup>	
Koraou v Niger ECW/CCJ/JUD/06/08	X				
Djot Bayi v Nigeria ECW/CCJ/JUD/01/09			X	X <sup>2</sup>	X <sup>3</sup>
Tandja v Niger ECW/CCJ/JUD/05/10	X	X			
Habré v Senegal ECW/CCJ/JUD/06/10	X	X			
SERAP v Nigeria ECW/CCJ/JUD/07/10 Education	X				
Saidykhan v The Gambia ECW/CCJ/JUD/08/10			X		X <sup>4</sup>
Ameganvi v Togo ECW/CCJ/JUD/09/11	X				X <sup>5</sup>
<b>Total: 5 state parties - 9 decisions</b>	<b>6</b>	<b>2</b>	<b>3</b>	<b>2</b>	<b>3</b>

<sup>1</sup> The Gambia has never rejected the fact that Manneh was in its custody but has constantly failed to put forward evidence that it has released the plaintiff at any point in time since the matter was presented before the ECOWAS Court of Justice. In addition, the ECCJ having subsequently decided that the NGO representing Manneh could not claim the \$100 000 compensation on behalf the victim's family in no way absolves The Gambia from its obligation to comply.

<sup>2</sup> There is indication that the political will exists to implement the order. See interview with Advocate Falana.

<sup>3</sup> The Court confirmed its judgment.

<sup>4</sup> The Court confirmed its judgment. The arguments of the respondent state in support of review clearly sought to 'nullify' the order thus suggesting an intention not to comply.

<sup>5</sup> The Court confirmed its judgment.

**Table B: Overview of factors related to the treaty body**

Judgment	Period <sup>1</sup>	Time Lapse <sup>2</sup>	State Involvement <sup>3</sup>	Reasoning			Formulation of Remedy			Follow-up		
				Brief	Limited	Substantial	None	Vague	Specific	Parties/ NGO	ECOWAS Organs	Court
Compliance <sup>4</sup>												
PM Ugokwe v Nigeria	07/10/05	0.6	Yes			X			X	X		
Koraou v Niger Slavery	27/10/08	0.11	Yes			X			X	X		X
Tandja v Niger	08/11/10	0.4	Yes			X			X	X		X
Habré v Senegal	18/11/10	1.11	Yes			X			X	X		X
SERAP v Nigeria	30/11/10	3	Yes			X			X	X		X
Ameganvi v Togo	07/10/11	0.9	Yes			X			X	X		X
Non-compliance <sup>5</sup>												
Manneh v The Gambia	05/06/08	0.11	No			X			X	X		X
Djot Bayi v Nigeria	28/01/09	2.2	Yes			X			X	X		X
Saidykhan v The Gambia	16/12/10	2.9	Yes			X			X	X		X

<sup>1</sup> Date of the judgment.

<sup>2</sup> Number of years between the date the case was filed and the date of judgment. Source: ECOWAS Court, List of cases filed, 2003-2013.

<sup>3</sup> ‘Yes’ means that the judgment contains evidence that the state was involved in the proceedings, submitted both written and oral replies in response to the Court’s request. ‘No’ means that the state responded to none of the notifications made by the Registrar and signifies that the Court decided the case solely on the facts provided by the complainant.

<sup>4</sup> Including full and situational compliance.

<sup>5</sup> Including clear non-compliance, cases in progress, application for review, and recent (1-2 years) judgments.

**Table C: Overview of factors related to the case**

Judgment	Nature of Right			Nature of State Obligation			Scale of Violation			Remedial Action Required		
	Civil/ Political	Socio/ Economic	Collective/ Solidarity	Respect	Protect	Fulfil	Single	Multiple	Massive	Compensation	Legislation	Administrative Action
Compliance												
Ugokwe v Nigeria PM	X			X			X					X
Koraou v Niger Slavery	X			X	X <sup>1</sup>		X			X		
Tandja v Niger	X			X			X					X
Habré v Senegal	X			X			X					X
SERAP v Nigeria Education		X		X	X	X			X			X
Ameganvi v Togo	X			X	X			X		X		
Non-compliance												
Manneh v The Gambia	X			X			X			X		X
Djot Bayi v Nigeria	X			X				X		X		
Saidykhan v The Gambia	X			X			X			X		

<sup>1</sup> The ECCJ’s judgment did not clarify the state’s obligation to protect in the case. The Court found that the right not to be enslaved was violated. Despite its findings that such violation was not attributable to the state, the Court still ordered the state to pay compensation. Because the victim did not suffer slavery at the hands of state officials, but by a third party, it is clear that compensation was ordered for failure to protect against that third party. However, the Court held that failure of domestic courts to act promptly in the case was attributable to the state.

**Table E: Overview of factors related to respondent state**

Judgment	Corruption <sup>2</sup>	Type of Government <sup>3</sup>			Change of Government After Finding <sup>4</sup>		Level of Stability		
		Free	Partly Free	Not Free	Yes	No	Civil War	Relatively Stable	Stable
Compliance									
PM Ugokwe v Nigeria	1.9(2005)		X			X			X
Koraou v Niger Slavery	2.8(2008)		X			X		X	
Tanja v Niger	2.6(2010)		X		X			X	
Habré v Senegal	2.9(2010)		X		X				X
SERAP v Nigeria Education	2.4(2010)		X		X				X
Ameganvi v Togo	2.4(2010) <sup>5</sup>		X <sup>6</sup>			X			X
Non-compliance									
Manneh v The Gambia	1.9(2008)		X			X			X
Djot Bayi v Nigeria	2.5(2009)		X		X				X
Saidykhan v The Gambia	3.2(2010)		X			X			X

<sup>2</sup> Year of the judgment or following year if the country was not scored in the year when the Court delivered its judgment. Ranges from ‘very clean, 0-0.9’ to ‘highly corrupted, 9.0-10’. Transparency International.

<sup>3</sup> Freedom House Freedom in the World Country Reports.

<sup>4</sup> Means before compliance took place for compliance instances.

<sup>5</sup> The 2011 Report was not available.

<sup>6</sup> Freedom House Report 2011.

**Table F: Overview of factors related to civil society actors**

Judgment	NGO Involvement in Submission & Proceedings		NGO Involvement in Follow-Up		Media Involvement	
	Yes	No	Yes	No	Yes	No
Compliance						
PM Ugokwe v Nigeria		X		X		X
Koraou v Niger Slavery	X		X		X	
Tanja v Niger		X		X	X	
Habré v Senegal		X		X		X
SERAP v Nigeria – Education	X		X		X	
Ameganvi v Togo		X		X	X	
Non-compliance						
Manneh v The Gambia	X		X		X	
Djot Bayi v Nigeria		X		X		X
Saidykhan v The Gambia	X		X		X	



**Table G: Overview of factors related to international pressure**

Judgment	International Pressure		
	Yes	No	Unclear
Compliance			
PM Ugokwe v Nigeria		X	
Koraou v Niger Slavery	X		
Tandja v Niger			X <sup>1</sup>
Habré v Senegal	X		
SERAP v Nigeria Education		X	
Ameganvi v Togo	X		
Non-compliance			
Manneh v The Gambia	X		
Djot Bayi v Nigeria		X	
Saidykhan v The Gambia	X		

<sup>1</sup> There is clear indication from interviews that the political pressure from domestic quarters was more determinative than international pressure in this case.

