AFRICAN HUMAN RIGHTS LAW JOURNAL

(2013) 13 *AHRLJ* 178-213

Human rights developments in African sub-regional economic communities during 2012

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Summary

In 2012, the abolition of individual access to the Southern Africa Development Community Tribunal all but put a final nail to the budding human rights regime that was growing in the region. However, the two other main sub-regional human rights regimes in Africa continued to grow from strength to strength: in East Africa under the East African Community framework and in West Africa under the Economic Community of West African States framework. With the increasing involvement of these sub-regional regimes in the field of human rights, the African Charter is being applied in an unprecedented way in a manner that penetrates the shield of national sovereignty and in areas where continental human rights structures may have taken time to reach. Taking the view that this trend calls for stakeholders to pay more attention to the work of these sub-regional human rights regimes in order to ensure quality control and maintain legitimacy of the overall African human rights system, this contribution undertakes a descriptive analysis of the most significant judicial and non-juridical human rights developments that occurred in these sub-regions during 2012.

1 Introduction

The idea that human rights can be, and actually are, promoted and protected within the framework of regional economic integration in Africa is no longer disputed. Even the most ardent opponents of the idea would have accepted by now that there is no going back in this regard. In fact, human rights realisation in sub-regional frameworks

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on the continent has become so entrenched that, in addition to its recognition in regional human rights strategy-development activities, it is beginning to attract serious scholarly interest within and outside the continent.[1] Civil society has also begun to cherish the nascent but important contributions that sub-regional regimes make to the protection of human rights in Africa. This perhaps explains the reaction to the suspension and eventual abolition of the human rights work of the Southern Africa Development Community (SADC) Tribunal. Very significantly, during 2012, lawyers and civil society in Southern Africa brought two important actions before the continental human rights supervisory bodies to challenge the decisions taken by SADC leaders regarding the SADC Tribunal.[2] Space constraints prevent any detailed analysis of those developments in this work. However, despite the setback experienced in the Southern Africa region, human rights activities have not slowed down in either the East African Community (EAC) framework or in the Economic Community of West African States (ECOWAS). Instead, in both of these regional economic communities (RECs), mechanisms involved in the promotion and protection of human rights are becoming stronger and more pervasive.

As the human rights activities of sub-regional bodies become more entrenched, there is a growing need for stakeholders to pay even more attention to those activities, at the very least to ensure some measure of quality control. This is because, even as continental human rights mechanisms battle to meet the challenge of translating the rhetoric of the African Charter on Human and Peoples' Rights (African Charter) into reality for the greatest number of people on the continent,[3] sub-regional mechanisms have moved into previously-uncharted areas applying the Charter as their normative framework. While this trend is positive to the extent that it complements the work of continental mechanisms for the benefit of African peoples, the need for vigilance remains as there is an attendant risk of reduced legitimacy of the African Charter arising, among other things, from conflicting interpretations of Charter provisions. Such watch-dog roles can only be played effectively when there is an awareness of the human rights activities in the RECs.

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1 Across Africa, there is an increase of doctoral investigation into different aspects of the human rights work of RECs. There is also an increase in scholarly work in this area. See eg K Alter *et al* 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (forthcoming, 2014).

2 See 'African Commission prepared to consider application for reinstatement of SADC Tribunal' http://www.mikecampbellfoundation.com/page/african-commission-to-consider-sadc-tribunal-case (accessed 28 April 2013). Also see 'African human rights court asked to rule on legality of SADC tribunal's suspension' http://www.southernafricalitigationcentre.org/2012/11/26/press-release-african-human-rights-court-asked-to-rule-on-legality-of-sadc-tribunals-suspension/ (accessed 6 May 2013).

3 See M Killander & A Abebe 'Human rights developments in the African Union during 2010 and 2011' (2012) 12 *African Human Rights Law Journal* 200.

Against the background outlined above this contribution undertakes a mostly descriptive analysis of the major human rights events that took place within the most human rights-active sub-regional bodies in Africa in 2012. Although limited, non-juridical human rights activities continue in the SADC framework. Due to space constraints, the article focuses on judicial and non-juridical human rights activities in the EAC and ECOWAS. The article highlights the huge contributions that sub-regional human rights regimes are making to the development of an improved human rights culture in Africa.

2 Human rights developments in the East African Community framework

2.1 Non-juridical human rights development

As has been the case over the past few years, a small but significant number of non-juridical human rights developments occurred in the framework of the EAC during 2012. These were mostly in the areas of standard setting, thematic meetings and activities aimed at strengthening democratic governance in the East African region. Considering that limited legislative activities occur in this issue area at this level, standard setting is used here in a wide sense to include resolutions and plans of action.

2.1.1 Setting human rights standards

At the very beginning of 2012, the EAC recorded standard-setting activity with the adoption of the Second Plan of Action on the Promotion and Protection of Human Rights in East Africa 2012-2015.[4] As set out in the Plan itself, its main objective is to 'enhance and complement partner states' laws, policies, strategies and programmes in inculcating the culture of respect for human rights in line with the Community's fundamental principles'.[5] The adoption of a Plan of Action dedicated to human rights is a strong statement that the EAC takes serious the fundamental principle of promoting and protecting human rights as set out in articles 6 and 7 of its Treaty. Effectively, the Plan provides a platform of legality and legitimacy for human rights realisation within the EAC framework.

Another significant activity was the adoption of the EAC Strategic Plan on Gender, Youth, Children, Persons with Disabilities, Social Protection and Community Development (2012-2016) in March

4 Final Plan on Action available at the EAC Secretariat (on file with author).
5 Para 3 EAC Plan of Action.

2012.[6] Background documents on this Strategic Plan set treaty-based fundamental principles as well as article 120 of the EAC Treaty as the supporting provisions for its adoption.[7] While lumping different vulnerable groups together in this document is likely to raise the challenges of dispersed attention, the adoption of the Plan takes protection beyond the level of mere rhetoric, as is generally the case at the regional level.

The East African Legislative Assembly (EALA) – the legislative arm of the EAC – was also actively involved in setting human rights standards in 2012. In this regard, the EALA adopted and passed the EAC HIV and AIDS Prevention and Management Bill at its 5th legislative session.[8] The Bill is seen as a preliminary step towards a model HIV and AIDS law that would be applicable in the EAC partner states. Although it requires the assent of EAC heads of state in order to become binding law, the passing of the Bill demonstrates a sense of awareness of the human rights issues that people living with HIV and AIDS face in Africa. Commentaries on the Bill indicate that, although it prioritises the prevention of HIV, the Bill takes a 'rights-based approach in content and spirit' in relation to treatment, care and support.

Another very important bill adopted and passed by the EALA is the EAC Human Rights Bill 2012. The EAC Human Rights Bill provides for the establishment of a Human Rights Commission for the region. The Bill, which also requires the assent of the heads of state, is supposed to 'give effect to the provisions of the Treaty for EAC on human and peoples' rights'.[9] It becomes an Act upon assent and supplements the EAC Treaty. This is another indication of the seriousness that the EAC attaches to the fundamental principles which urge partner states and the community to promote and protect human rights. Accordingly, the Bill is meant to consolidate 'various principles on human and peoples' rights found in the Charter on Human Rights and various conventions and agreements, including the African Charter on Human and Peoples' Rights, as well as the UN Charter on Human and Peoples' Rights'.

In the realm of international criminal law, the EALA also engaged in activities that have consequences for human rights protection in the

6 R Mtui 'EAC Sectoral Council meeting on gender, women, children, persons with disabilities and developing community' http://reginaldandersonmtui.blogspot.com/2012/03/eac-sectoral-council-meeting-on-gender.html (accessed 30 April 2013).

7 Art120 of the EAC Treaty obliges partner states to closely co-operate in the field of social welfare with respect to the development and adoption of a common approach towards the disadvantaged and marginalised groups, including children, the youth, the elderly and persons with disabilities.

8 http://www.eannaso.org/index.php/component/k2/item/15-eac-bill-passedbyeala (accessed 30 April 2013).

9 'EALA passes bill on human rights' http://www.eac.int/index.php?option=com_content&view=article&id=988:eala-passes-bill-on-human-rights&catid=146:press-releases&Itemid=194 (accessed 30 April 2013).

region. First, the Assembly adopted a resolution in which it urged the EAC Council of Ministers to 'implore the International Criminal Court to transfer the cases of the four accused Kenyans facing trial at The Hague to the East African Court of Justice (EACJ)'.[10] It then urged the Council of Ministers to take appropriate action to amend article 27 of the EAC Treaty relating to the East African Court of Justice (EACJ), with a view to expanding the jurisdiction of that Court with retrospective effect to cover international crimes. As would be discussed later in this contribution, the process for the expansion of the EACJ's jurisdiction in this regard has already commenced. It also needs to be noted that EAC action in this area runs parallel to ongoing moves to create a criminal chamber at the African Court. It remains to be seen how the two relate.

2.1.2 Thematic meetings

Another type of non-juridical human rights activity that took place in the EAC framework during 2012 was the involvement of the EAC in meetings and programmes on different thematic issues in the field of human rights. The EAC's involvement has generally been either as host, participant or facilitator in cases where it provides a platform for other actors to meet. This remained the case in 2012. In January 2012, the Community provided a platform for the EAC Forum of Human Rights Commissions to meet to examine the progress that has been made in the field of human rights.[11] The Forum created an opportunity for the EAC to reiterate its conviction that human rights realisation is 'key for social, political and economic development of the East African region'. Although the African Commission on Human and Peoples' Rights (African Commission) collaborates with national human rights commissions, sub-regional meetings such as the one hosted by the EAC creates space for meaningful engagement with a focus on region-specific trends and issues. Thus, proximity is positively applied to encourage peer learning.

Building on the EAC's growing focus on vulnerable groups, in 2012 an inaugural East African Community Child Rights Conference with the theme 'Addressing the issues that negatively impact on the realisation of child rights in the East African community' was held in Burundi.[12] A significant feature of the conference was the participation of children, creating an opportunity for their interaction with stakeholders. Considering the challenges that continue to

10 'EALA session ends in Nairobi' http://www.eala.org/media-centre/press-releases/347-eala-sessions-end-in-nairobi-.html (accessed 30 April 2013).

11 'EAC partner states urged to do more to uphold people's rights' http://www.eac.int/index.php?option=com_content&view=article&id=892:eac-partner-states-urged-to-do-more&catid=146:press-releases&Itemid=194 (accessed 30 April 2013).

12 'Inaugural EAC Child Rights Conference concludes in Bujumbura' http://www.eac.int/index.php?option=com_content&view=article&id=1093:inaugural-eac-child-rights-conference-concludes-in-bujumbura&catid=146:press-releases&Itemid=194 (accessed 30 April 2013).

beleaguer efforts at actualising the promise of the African Charter on the Rights and Welfare of the Child (African Children's Charter), sub-regional initiatives are commendable complements, especially when they create opportunities for children to be represented and heard. The Conference brought children's rights issues to the fore and ended with the adoption of the Bujumbura Declaration and Recommendations on Child Rights and Wellbeing in the EAC.

During 2012, sexual health rights also received attention in the EAC framework as the EAC sent a high-profile delegation to an African conference on the subject. Hosted by Namibia with the theme 'Sexual health and rights in Africa: Where are we?', the conference is an initiative originally conceived on the platform of the African Union (AU).[13] The conference aimed at addressing measures to eliminate all forms of discrimination and to promote the sexual health and reproductive rights of African citizens. Thus, issues such as maternal and child health, teenage pregnancies, gender-based violence, HIV and AIDS prevention, policy, legislation and rights, sexual and reproductive health for marginalised groups and social mobilisation were top on the agenda. While this was not an exclusive EAC initiative, its significance lies in the demonstration that RECs can partner with continental structures for the benefit of human rights. In this way, not only are scarce resources saved by the avoidance of duplication of efforts, but conflicting approaches to such sensitive issues are also prevented.

A final activity worthy of note under this heading was the November 2012 meeting of experts on the EAC Principles for Election Observation and Evaluation, hosted by the EAC in Nairobi, Kenya.[14] The meeting was convened to review the EAC's draft principles on the subject before submission to the EAC Council of Ministers. The formulation of these principles will contribute to the development of higher standards in election observation and promote the right to democratic governance in the region.

2.1.3 Strengthening democratic governance

The most significant activity under this heading is also a standard-setting activity. It involved the consideration of an EAC Elections Bill 2012, which seeks to establish the EAC Elections Board to be responsible for setting and harmonising electoral standards in the

13 'EAC at 5th Africa Conference on Sexual Health and Rights in Windhoek' http://www.eac.int/index.php?option=com_content&view=article&id=1113:eac-at-5th-africa-conference-on-sexual-health-and-rights-in-windhoek&catid=146:press-releases&Itemid=194 (accessed 30 April 2013).

14 'EAC committed to promoting credible elections in partner states' http://www.eac.int/index.php?option=com_content&view=article&id=1158:eac-committed-to-promoting-credible-elections-in-partner-states&catid=146:press-releases&Itemid=194 (accessed 30 April 2013).

Community.[15] The Board is expected to set standards that National Electoral Commissions in the partner states will adhere to. As a demonstration of the importance attached to democratic governance, sanctions are envisaged for non-adherence to the set standards. Considering the difficulty that the AU has had with effectively operationalising the African Charter on Democracy, Elections and Governance, sub-regional initiatives continue to drive Africa's search for a culture of democratic governance. The developments in this and the previous sections demonstrate that human rights are increasingly becoming central issues of interest in the framework of the EAC in a manner that civil society stakeholders can devote more attention to the EAC human rights regime.

2.2 Judicial protection of rights

Unlike in previous years, developments in the judicial sector during 2012 went beyond courtroom events. The first important development in this area with consequence for human rights was the launching of sub-registries of the EACJ in partner states. Beginning with a first sub-registry in Kigali, Rwanda,[16] the EACJ proceeded to launch sub-registries in Tanzania and Kenya.[17] Considering the level of poverty on the continent, these initiatives promote access to justice as they bring the EACJ closer to its potential users.

The year 2012 also saw developments aimed at improving the efficiency and effectiveness of the EACJ. In a significant departure from original practice, the EAC gave its approval for the Judge-President of the Appellate Division and the Principal Judge of the First Instance Division to transform into full-time staff of the Community with effect from July 2012.[18] In addition to improving administration, the permanent presence of the heads of the two divisions of the EACJ would allow matters requiring urgent judicial attention to be summarily dealt with without fuss.

A development which could evoke mixed feelings is the extension of the jurisdiction of the EACJ to cover international crimes. During 2012, this extension of the EACJ's jurisdiction reached an advanced stage with the approval by the Council of Ministers, of the draft

15 http://www.eala.org/media-centre/press-releases/347-eala-sessions-end-in-nairobi-.html (accessed 30 April 2013).

16 'Chief Justice of Rwanda officially opens EACJ Kigali sub-registry' http://www.eac.int/index.php?option=com_content&view=article&id=1072:chief-justice-of-rwanda-officially-opens-eacj-kigali-sub-registry&catid=146:press-releases&Itemid=194 (accessed 30 April 2013).

17 http://www.eac.int/index.php?option=com_content&view=article&id=1097:eacj-opens-sub-registry-in-dar-es-salaam&catid=146:press-releases&Itemid=194. Also see http://www.judiciary.go.ke/portal/east-african-court-of-justice-sub-registry-launched-in-nairobi.html (accessed 30 April 2013).

18 'EACJ Judge-President, principal judge now full-time in Arusha' http://www.eac.int/index.php?option=com_content&view=article&id=1044:eacj-judge-president-principal-judge-now-full-time-in-arusha&catid=146:press-releases&Itemid=194 (accessed 30 April 2013).

protocol on the extension.[19] The speed with which the extension was achieved raises some doubt regarding the intentions of the EAC to clothe the Court with an express human rights jurisdiction. While the subject of expansion to cover human rights has been oscillating for years, the current expansion has reached this stage even though it was only in their April 2012 meeting that EAC heads of state gave approval to the EALA Resolution, calling for an extension of jurisdiction to cover international crimes. In view of the perception that the ICC unfairly targets African leaders, it is difficult to gauge whether the expansion of the EACJ's jurisdiction in this direction will positively affect human rights through the promotion of transitional justice in the region. Apart from the developments above, the EACJ also considered cases with an impact on human rights.[20] The most important of those cases are considered below.

2.3 Consideration of cases[21]

2.3.1 *AG Republic of Kenya v Independent Medical Legal Unit*

In its decision in the case of *Independent Medical Legal Unit v Kenya* (Kenya Appeal),[22] the First Instance Division of the EACJ (lower court) overruled the objections raised by Kenya and ruled that it had jurisdiction to entertain the reference and that the reference was not barred by lapse of time. The present appeal is against that decision of the lower court. Before dealing with the substantive appeal, the Appellate Division held that preliminary objections ought to be used only where facts are not in dispute and a successful application of the contentious point of law leads to a determination of the entire action.[23] By this elaboration, the Court provides crucial guidance for practice as most human rights and rights-related cases before sub-regional regimes revolve around such objections raised by state parties.

On the first limb of the appeal challenging the jurisdiction of the EACJ over human rights cases, the Court first noted that the lower court relied principally on its own decision in *Katabazi and Others v Secretary-General of the East African Community and Another (Katabazi* case).[24] The Court then pointed out that the lower court had a duty to establish its jurisdiction beyond a mere reference to the *Katabazi* case. It concluded that the significance of the *Katabazi* case is not in the Court's refusal to abdicate its responsibility, but the 'ability to find

19 'EACJ jurisdiction extended' http://www.busiweek.com/index.php?option=com_content&task =view&id=3135&Itemid=1(accessed 30 April 2013).

20 In view of art 27(2) of the EAC Treaty, the EACJ currently lacks a clear human rights jurisdiction.

21 The case law of the EACJ is available on the website of the Court.

22 Appeal 1 of 2011; unreported suit, reference 3 of 2010, ruling delivered on 29 June 2011.

23 Kenya appeal judgment, 5-6.

24 (2007) AHRLR 119 (EAC 2007).

and supply, through interpretation of the Treaty, the source and basis for ... jurisdiction in the circumstances of the case then before the Court'.[25] Hence, the Appellate Division asserted that the lower court in the *Katabazi* case traced the cause of action, and by extension its jurisdiction, to the EAC Treaty rather than to an alleged violation of human rights. The Court expressed support for the judgment in the *Katabazi* case, but emphasised that that case was not 'a magic wand' that automatically conferred human rights jurisdiction on the EACJ.

Regarding the lapse of time, the Appellate Division reaffirmed that a two-month limitation applied by virtue of the EAC Treaty. The Court then stated that the Treaty did not empower it or the lower court to extend time limited in the Treaty and that courts had to act within the limits of power granted by the Treaty.[26] After engaging in a detailed analysis of facts and law, the Court came to the conclusion that the action was time-barred. Significantly, the Court refused to be swayed by the argument of a continuing violation. In essence, this decision reiterates the need for victims and civil society to be vigilant in monitoring cases for submission to the EACJ. Based on the ground that the case was submitted after the time frame allowed by the Treaty, the appeal was allowed.

2.3.2 *Rwanda v Plaxeda Rugumba*

In June 2012, the Appellate Division of the EACJ delivered its judgment in this appeal brought by Rwanda against the decision of the First Instance Division in *Plaxeda Rugumba v Rwanda (Rwanda Appeal)*.[27] The lower court had held that the reference filed by the applicant in the original case, on behalf of her brother who was in the custody of the Rwandan authorities, was competent. The lower court also ruled that the reference was not barred by the exhaustion of local remedies rule and, further, that by its continuing detention of the victim, Rwanda was in breach of its obligation under the EAC Treaty.[28] Dissatisfied with that decision, Rwanda argued afresh in the present case that the EACJ lacked jurisdiction to entertain the reference. Rwanda argued further that the application had been filed out of time, that local remedies had not been exhausted first, that the lower court's decision had no legal basis and that, since Rwanda rendered justice in the victim's irregular detention, there was no legal or factual basis to declare that the state was in breach of the EAC Treaty.[29]

25 Kenya appeal judgment, 10.

26 See Kenya appeal decisions, 16. To buttress this point, the Court made reference to the case law of the European Court of Justice

27 Appeal 1 of 2012; Unreported, Reference 8 of 2010, judgment of 1 December 2011.

28 Para 14 Rwanda appeal judgment.

29 Para 15 Rwanda appeal judgment.

The Appellate Division began its analysis by narrowing Rwanda's case to the argument that the original reference was inadmissible since it related to an alleged violation of human rights, an area that currently falls outside the EACJ's competence. While it agreed that article 27(2) supported Rwanda's position, the Court drew attention to articles 6(d) and 7(2) of the EAC Treaty, underlining the reference to the promotion and protection of human rights in accordance with the African Charter. The Court then pointed out that despite the lack of an EAC catalogue of rights, references to human rights abounded within the legal framework of the EAC.[30] The Court reinforced earlier decisions of the lower court where that court had assumed competence over matters that touched on human rights. It also agreed with the view that despite the absence of a protocol endowing the EACJ with human rights jurisdiction, it was possible to speak of 'a layer of inchoate human rights in the Treaty' awaiting operationalisation.[31]

The Appellate Division also introduced the concept of the 'doctrine of a special cause of action under the EAC Treaty'[32] which it considered to have arisen in the *Katabazi*[33] case. The Court drew the distinction between cases before national courts and cases before the EACJ, pointing out that in the latter cases the cause of action is usually a violation of the principles of the rule of law and of good governance by a partner state, which violation amounts to an infringement of the EAC Treaty.[34] This distinction is important for at least two reasons: First, it takes the discourse outside the framework of human rights over which the EACJ cannot immediately claim jurisdiction. Accordingly, the EACJ can deny any allegation of illegality or *ultra vires* action. Secondly, by this distinction, arguments of *res judicata* in cases where national courts had made a decision (as was the case in *Katabazi*) would be unsustainable.

Concluding that the Reference was properly admitted, the Court evaluated arguments on the merit and took the view that preventive detention without lawful authority and in breach of the laws of Rwanda amount to a breach of the EAC Treaty. Effectively, the Court concluded that Treaty obligations of partner states are invoked by non-compliance with their own national laws. The Court ruled that the mere fact of arrest of a person suspected of committing a crime does not violate the EAC Treaty or international human rights law, unless detention exceeds the allowable time limit and occurs in unacceptable conditions.[35] Despite its insistence that it was not

30 Paras 22–24 Rwanda appeal judgment.
31 Citing Justice J Ogoola 'Where treaty meets constitutional law' keynote address presented at the University of Dar es Salaam, May 2012.
32 Para 24 Rwanda appeal judgment.
33 n 25 above.
34 Para 24 Rwanda appeal judgment.
35 Para 31 Rwanda appeal judgment.

dealing with human rights, the Court still made some reference to international human rights law in this analysis.

This case also presented an opportunity for the Appellate Division to reaffirm that the rule of exhaustion of local remedies is inapplicable before the EACJ. Accordingly, even though it noted that the Court could be 'flexible and purposeful' to the extent of reading in the requirement, the Appellate Division expressed the need for the Court to 'be careful not to distort the express intent of the EAC Treaty'.[36] Hence, if there were any doubts on the matter, the *dictum* of the Court puts such doubts to rest and declares unequivocally that 'unlike other legal regimes ... the EAC Treaty provides no requirement for exhaustion of local remedies'.[37] In its final analysis, the Appellate Division upheld the decision of the first instance division, albeit on different legal grounds.

3 Human rights developments in the ECOWAS framework

3.1 Non-juridical human rights developments

In 2012, ECOWAS also engaged in comparatively fewer non-juridical human rights and rights-related activities. Similar to the discourse on the EAC, the most important of these developments are discussed broadly below under the headings of standard setting, thematic meetings and activities aimed at strengthening democratic governance. However, considering the growing importance of direct ECOWAS assistance to citizens of its member states, a discourse on direct humanitarian assistance has been included in this section.

3.1.1 Setting human rights standards

The first significant standard-setting activity with implications for human rights in the ECOWAS regime in 2012 was the promulgation of the Supplementary Act A/SP.13/02/12 on sanctions against member states that fail to honour their obligations to ECOWAS.[38] This Supplementary Act gives concrete effect to article 77 of the revised ECOWAS Treaty which allows for the imposition of sanctions against ECOWAS member states for their failure to comply with Community obligations. Some of the highlights of the Supplementary Act include the stipulation of respect for human rights as a core obligation under ECOWAS Community law[39] and the provision that a failure to comply with decisions of the ECCJ constitutes a violation of Community obligations.[40] Considering the difficulties that arose in relation to the

36 Para 35 Rwanda appeal judgment.
37 Para 39 Rwanda appeal judgment.
38 On file with author.
39 Art 2(2) Supplementary Act A/SP.13/02/12.
40 Art 2(3) Supplementary Act A/SP.13/02/12.

implementation of certain decisions against The Gambia,[41] the promulgation of this Supplementary Act is a welcome development.

Another significant activity was the adoption of the ECOWAS Humanitarian Policy and Action Plan in March 2012.[42] Although the focus of the Policy is conflict prevention and management, the link between human rights and humanitarian law makes this an important policy document for human rights in West Africa, especially considering the increasing involvement of ECOWAS in conflict resolution in the region.[43] The Policy envisages joint action by ECOWAS member states and the ECOWAS Commission to 'jointly ensure the integration of cross-cutting issues such as HIV/AIDS, sexual violence and gender, people with disabilities and other related issues in humanitarian strategies and action plans'.

3.1.2 Thematic meetings

Although the series of meetings and consultations that led up to the ECOWAS intervention in the Mali crisis obviously has huge implications for human rights in the region, it is the more general thematic meetings that this contribution focuses on. In this regard, the February 2012 meeting between the ECOWAS Commission and the International Labour Organisation (ILO) is significant.[44] The meeting addressed the rights of the child and resulted in a resolution of the two organisations to work closely in engaging the challenges of child labour in West Africa. Linked to the issue of trafficking in persons, the sustained ECOWAS attention on the rights of the child far exceeds current continental initiatives in this regard.

During the year, ECOWAS also provided a forum for Chairpersons and Vice-Chairpersons of election commissions of ECOWAS member states to meet for the purpose of reviewing the conduct of elections in the region.[45] The meeting addressed issues of democratic governance since it involved seeking additional measures for improving election management and entrenching the democratic culture in West Africa.

3.1.3 Strengthening democratic governance

Perhaps as a result of the conviction of ECOWAS leaders that the development of a democratic culture is vital for conflict prevention in the region, much time and resources were dedicated to activities strengthening democratic governance in the region. As early as January 2012, the ECOWAS Commission began its monitoring of the elections in Senegal by releasing a statement to 'express serious

41 Eg, *Ebrimah v The Gambia* ECOWAS Law Report (2004-2009) 181.
42 Document on file with author.
43 ECOWAS is currently involved in the conflict in Northern Mali.
44 'ECOWAS, ILO to intensify fight against labour'(2012) 6 *Echoes of ECOWAS*.
45 'Electoral chiefs agree action plan to improve electoral process in ECOWAS region' (2012) 28 *Echoes of ECOWAS*.

concern for the rising tensions among political parties and citizens'.[46] The Commission also seized the opportunity to appeal to 'the authorities to ensure that all citizens enjoy equal treatment and fundamental rights in accordance with the laws of the Republic'. Considering the general tradition on the continent of regional international organisations subtly supporting sitting governments, this is a major shift on the part of ECOWAS.

In terms of the actual observation and monitoring of elections, ECOWAS continued its practice in this regard by the deployment of election monitors and observers to the elections that took place in Ghana, Guinea Bissau, Sierra Leone and Senegal. As has been its practice over the years, the ECOWAS Commission sent teams led by former leaders but comprising of stakeholders from different sectors of society, including legal and civil society electoral experts.[47] One small area that might be of concern is the involvement of former military coup plotters as heads of ECOWAS missions to monitor elections in member states.[48] Although he was generally considered to be a benevolent military leader, the fact remains that General Salou Djibo, former head of the military junta in Niger who led the ECOWAS mission to Guinea Bissau, violated the ECOWAS Democracy Protocol by his coup. In that regard, inviting him to act on the strength of an instrument which he violated is a bad precedent even if it may be good diplomacy. Such actions have the potential of encouraging other coups as they send the messages that successful coup plotters will be rewarded by ECOWAS.

Regarding the actual conduct of the missions, ECOWAS continued its commendable practice of sending fact-finding teams ahead of missions to study and assess the general environment prior to the elections. This way, ECOWAS takes election monitoring as a process beyond the narrow concept of the voting. However, the sweeping endorsement of elections, despite reports of irregularities in the voting, is one area that ECOWAS may need to address.[49]

3.1.4 Direct humanitarian intervention

An increasingly important means by which ECOWAS contributes to the protection of human rights in West Africa is the provision of direct assistance in kind and cash to victims of natural and man-made

46 'ECOWAS releases press release on the forthcoming presidential elections in the Republic of Senegal' (2012) 1/122 *Echoes of ECOWAS*.

47 See eg 'ECOWAS sends 150 election observers to Senegal' http://news.ecowas.int/presseshow.php?nb=028&lang=en&annee=2012 (accessed 30 April 2013).

48 See 'Niger's former interim President to head ECOWAS election observation mission to Guinea Bissau' http://news.ecowas.int/presseshow.php?nb=049&lang=en&annee=2012 (accessed 30 April 2013).

49 'ECOWAS observation mission says Guinea Bissau presidential election was transparent' http://news.ecowas.int/presseshow.php?nb=066&lang=en&annee=2012 (accessed 30 April 2013).

disasters. During the year, ECOWAS approved the release of US $3 million to provide humanitarian assistance to victims of food crises and rebel attacks in the Sahel-Sahara region of West Africa.[50] ECOWAS also approved the disbursement of funds to assist member states to render support to the returnees arising from the Libyan crisis.[51] Similarly, ECOWAS approved the release of about 300 metric tons of rice to the Liberian government for distribution to more than 66 800 Ivorian refugees in Liberia, who were displaced by the post-2012 electoral crisis. These activities demonstrate that ECOWAS takes human rights realisation beyond the level of theory and policy formulation. In fact, the Commission sees the provision of humanitarian assistance to citizens in distress as 'a core task of our institution and, by extension, the implementation of one of the assignments passed on to us by the Community'.[52]

3.2 Judicial protection of rights[53]

The human rights jurisdiction of the ECOWAS Community Court of Justice (ECCJ) has become so entrenched that it needs no introduction. A clear manifestation of this is the fact that the bulk of the cases brought before the Court each year relate to complaints of human rights violations. A selection of some of the most important cases heard by the ECCJ in 2012 is discussed below in the order in which judgment was delivered.

3.2.1 *Falana and Another v Benin and 2 Others*[54]

The plaintiffs were former officials of the West African Bar Association who alleged that, in the course of travelling by road from Nigeria to Togo on an official assignment sometime in 2004, they encountered obstructions by roadblocks mounted by security officials of the three defendant ECOWAS member states. Although the plaintiffs were allowed to proceed after they had identified themselves, they brought this action in the interest of other ECOWAS citizens who allegedly suffer harassment and extortion on these routes. Thus, the plaintiffs sought a declaration that Benin, Nigeria and Togo have no powers to close their borders and erect checkpoints that restrict the right to free movement as guaranteed under the ECOWAS Protocol on Free

50 'ECOWAS to provide humanitarian assistance to victims of food crisis, rebel attacks' http://news.ecowas.int/presseshow.php?nb=022&lang=en&annee=2012 (accessed 30 April 2013).

51 'ECOWAS to provide humanitarian assistance to victims of food crisis, rebel attacks' http://news.ecowas.int/presseshow.php?nb=022&lang=en&annee=2012 (accessed 30 April 2013).

52 'ECOWAS supports Ivorian refugees in Liberia with humanitarian assistance' http://news.ecowas.int/presseshow.php?nb=359&lang=en&annee=2012 (accessed 30 April 2013).

53 Most of the decisions of the ECCJ are now available on the Court's website.

54 Unreported Suit ECW/CCJ/APP/10/07 Judgment ECW/CCJ/Jud/02/12 of 24 January 2012.

Movement[55] and under the African Charter. The plaintiffs also sought a declaration that the defendant states were obliged to remove all obstacles to free movement, an order compelling the removal of the obstacles and an order of perpetual injunction restraining the defendant states from closing the borders.[56] The states challenged the temporal jurisdiction of the Court on the grounds that the events occurred in 2004 when private individuals had no access to the ECCJ and that the 2005 Supplementary Protocol could not take retroactive effect.[57]

In its analysis, the ECCJ identified seven issues that it considered essential for a resolution of the dispute.[58] Four of the issues identified by the Court are particularly noteworthy. They include the questions whether article 9(3) of the 2005 Supplementary Protocol, which stipulates a three-year limit for action before the ECCJ against community institutions or member states was applicable in the present case; whether the 1991 Protocol of the ECCJ was amended, repealed or substituted by the 2005 Supplementary Protocol; whether the 2005 Supplementary Protocol could be applied retroactively and thereby keep the cause of action alive; and whether cases alleging human rights violations could be affected by statutes of limitation. The ECCJ concluded that article 9(3) of the 2005 Supplementary Protocol contained a limitation that applied to the present case since the case was filed some three years and six months after the alleged violation. In some ways, article 9(3) introduces a certainty that is lacking in the admissibility requirements in article 56(6) of the African Charter that merely require a complaint to be brought within a reasonable time. However, the African system allows for the exercise of discretion that could take account of exceptional cases. In coming to its conclusion on this point, the ECCJ aligned with domestic jurisprudence from Nigeria that urges judicial restraint in the interpretation of unambiguous words. Although not specific to the current issue, this approach raises the general question whether the rules of interpretation that apply to national statutes should also be applied strictly to the interpretation of treaties, especially international human rights treaties which other international human rights supervisory bodies have interpreted as living documents.

Further, the ECCJ concluded that the amended articles 9 and 10 in article 3 of the 2005 Supplementary Protocol were substitutes for article 9 of the 1991 Protocol so that they take effect from the date the original article 9 (in the 1991 Protocol) was adopted.[59] Thus, the

55 Protocol A/P1/S/79 relating to Free Movement of Persons, Residence and Establishment.

56 See paras 3-4 of the *Falana* decision. The action was originally brought against all 15 ECOWAS member states but was amended to target Benin, Nigeria and Togo after the defence successfully challenged the inclusion of the other states.

57 See paras 9-10 of the *Falana* decision.

58 Para 16 *Falana* decision.

59 See para 25 of the *Falana* decision.

Court held that a plaintiff could bring an action under the current articles 9 and 10, even though the events occurred before the adoption of the 2005 Supplementary Protocol which conferred a human rights mandate on the ECCJ. The gains of this interpretation were taken away by the Court's view that article 9(4) applied together with article 9(3) which sets the three-year limit for bringing action.[60] In this regard, the ECCJ pointed out that, while it can extend time set in its rules of procedure, it has no such power in relation to time limits set in the treaties. This is consistent with the view expressed by the EACJ that it cannot extend time limited by treaty provisions.

Although it held that a statute of limitation could apply to cases alleging violations of human rights, the Court held that such limitations would not apply in cases of gross violations of human rights.[61] For this position, the ECCJ relied on UN General Assembly Resolution 60/147 of 16 December 2005. The Court's stance is positive as, for instance, it holds promise for victims of massive violations by previous administrations who seek restorative justice from the Court. However, taking the view that the alleged restriction of the right to free movement is not a gross violation and that the right to free movement is not an absolute right, the ECCJ found no violation in this case. The Court passed on the opportunity to make any pronouncements on the allegation that other less privileged ECOWAS citizens suffer daily restrictions. Such a pronouncement would have strengthened the case for *actio popularis* in the regime. This case also provided a chance for the ECCJ to set its standard for proof of claims. The approach adopted by the Court relies heavily on municipal law based on its conclusion that international law does not have adequate rules governing evidence. Overall, the Court found that the right to free movement had not been violated.

3.2.2 *Gaye v Senegal*[62]

The plaintiff, a Senegalese citizen, brought this action in October 2011 alleging that Senegal had violated his Charter-guaranteed rights by arresting and detaining him on allegations of money laundering and financing terrorism. The plaintiff sought a declaration that his detention for four months was a violation of his rights and that he is entitled to an order compelling the state to release him immediately and to pay him damages.[63] The plaintiff argued that he had been the victim of a police trap arising from the association of his name with extremist organisations involved in insurgency activities in Somalia. He alleged that the police trapped him by posing as staff of a telephone company to intercept his telephone conversation. The plaintiff claimed that he was illegally held in preventive detention for nine days

60 As above.
61 Para 30 *Falana* decision.
62 Rôle gen ECW/CCJ/APP/28/11, arrêt ECW/CJJ/JUG/01/12, 26 January 2012.
63 Paras 1-2 *Gaye* decision.

without any *prima facie* proof of his involvement in any criminal activity and this amounted to a violation of his rights. He contended that his right to a presumption of innocence was violated and that the detention was beyond the allowable period for preventive detention. He argued further that the act of entrapping him was humiliating and abusive. Thus, plaintiff contended that his rights under articles 2, 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), as well as articles 6 and 7 of the African Charter, had been violated. Surprisingly, the plaintiff also invoked article 5 of the European Convention and demanded damages in the sum of CFA Francs 380 million.[64]

The state confirmed that by its participation in Interpol activities, it had received intelligence that the plaintiff and others were involved in terrorist activities. Further, that their investigations showed circumstantial evidence in support of the allegations, including that the plaintiff and others were in constant telephone contact with a suspected terrorist. Hence, these persons, including the plaintiff, were placed in preventive detention in accordance with Senegalese criminal procedure. The state stressed that the plaintiff was indicted by the investigating judge in the presence of his lawyers.[65] Since the plaintiff's application for bail before the national court failed, the state argued further that the ECCJ was not competent to adjudicate on matters previously heard by national courts and the matter was inadmissible since it is already pending before a domestic court. On the merits, the state argued that the arrest and detention were done in accordance with domestic law.

In its analysis, the ECCJ agreed that it could not review decisions of national courts. However, it asserted that the fact that a matter was before a national court had no impact on its jurisdiction as, by article 10(d)(ii), only cases brought before another international court can affect the ECCJ's jurisdiction.[66] This aspect of the Court's decision is in the right direction although the Court had previously given the impression that it was reluctant to handle a matter which had previously been heard by a national court.[67] However, it is also a matter of concern that the ECCJ would be willing to admit a case which is running before a national court. This is one of the negative consequences of the absence of a requirement to exhaust domestic remedies.

Taking the applicant's two grounds requesting an order to invalidate the national procedure together, the Court took the view that there had been no violence or physical abuse of the plaintiff. Thus, the Court found no violation, notwithstanding the plaintiff's contention that his rights to dignity and presumption of innocence

64 Paras 14-22 *Gaye* decision.
65 Paras 9-13 *Gaye* decision.
66 Para 28 *Gaye* decision.
67 See eg *Keita v Mali*, Suit ECW/CCJ/APP/05/06.

had been violated. The ECCJ reasoned that the right to the presumption of innocence does not prevent national authorities from arresting and investigating people suspected of committing a crime.[68] Regarding the legality of the plaintiff's detention, the Court examined article 6 of the African Charter which it compared to ICCPR and (curiously) the European Convention on Human Rights (European Convention) over which it has no basis to exercise jurisdiction. The ECCJ then analysed the circumstances of the arrest and detention and concluded that it was done in accordance with Senegalese law. The Court also found no violation in relation to the refusal to grant the plaintiff bail at the national level. Despite finding in favour of the state, the Court denied Senegal's application for damages against the plaintiff. Overall, the Court once again showed its deference to the legal procedures of member states which it ought to supervise along with the other arms of government.

3.2.3 *Aziablevi Yovo and 31 Others v Togo Telecom and Another*

This case[69] was filed by 32 Togolese citizens against Togo Telecom Company and the state of Togo. The plaintiffs alleged that the defendants had violated article 3 of the African Charter for failure to implement the judgment of the Labour Court of Togo.[70] The plaintiffs alleged that, despite the fact that the judgment of the Labour Court had been confirmed on appeal, Togo Telecom had claimed immunity and the state had failed to implement the decision. The defendants on their part invoked articles 10(d)(ii) and 24 of the 2005 Supplementary Protocol of the ECCJ, and argued that the matter was inadmissible on the grounds that it had been heard by another international court – the OHADA Court.[71] The defendants argued further that the plaintiffs lacked both cause of action and standing to bring the action because, among other things, some of the listed plaintiffs had died.

Although the Court in its analysis indicated that the plaintiffs (or at least the surviving plaintiffs) had both a cause of action and standing to bring the action, it resolved that the principle of *res judicata* was applicable on the basis of article 10(d)(ii), since the matter had previously been brought before the OHADA Court. However, the ECCJ affirmed that states had a firm duty to execute and implement court decisions against public institutions. In support of its position, the Court made one of its rare references to the jurisprudence of the European Court of Human Rights instead of its more common reference to the jurisprudence of the courts of ECOWAS member states.

68 Paras 33-36 *Gaye* decision.
69 Rôle gen ECW/CCJ/APP/08/11, judgment of 31 January 2012.
70 Para 1 *Yovo* decision.
71 The OHADA Court is the judicial organ of the West African-based Organisation for the Harmonisation of Business Laws in Africa.

3.2.4 *Saidykhan v The Gambia*

In line with article 25 of the 1991 Protocol of the ECCJ and article 92 of the Rules of Procedure of the ECCJ which allow parties to apply for a review of cases decided by the ECCJ, The Gambia brought this application for a review of the Court's decision in the case of *Saidykhan v The Gambia*.[72] The Gambia contended that in awarding Saidykhan damages to the tune of US $200 000, the Court failed to properly appraise the evidence before it. After establishing that article 25 of the 1991 Protocol of the ECCJ envisages a review only where previously unavailable but decisive evidence had emerged and that article 92 of its rules envisages that an application for review is brought within three months of the emergence of the new evidence, the Court concluded that the present case was not eligible for review. Essentially, this decision sends a message to states which display indifference to ECCJ proceedings that they cannot wake up after judgment is delivered to make the Court reverse its judgment without good cause.

3.2.5 *Ameganvi and Others v Togo* [73]

The original case was decided by the ECCJ in October 2011.[74] Following their contention that Togo had a duty to reinstate them to their seats in the Togolese Parliament, the plaintiffs returned to the Court to seek a review or interpretation of the original judgment.[75] Taking advantage of article 64 of the Court's Rules, the plaintiffs argued that one of their main demands in the original case was for them to be restored to their respective places as Deputies in the Togolese Parliament and that the ECCJ had failed to decide on that demand. Accordingly, the present action was brought to remedy that alleged omission by the Court. For its part, Togo claimed that it had fulfilled its entire obligation towards the plaintiffs as set out in the original judgment handed down by the Court.[76] The state also relied on the Rules of its National Assembly and its national Constitution to argue that the plaintiffs were not entitled to the reliefs that they sought, partly on grounds of *res judicata*.[77]

After deciding that the application for review was admissible, the Court drew attention to the fact that the complaint in the original action related to a violation of articles 7 and 10 of the African Charter. Thus, the Court held that a demand for reinstatement was at best a

72 Suit ECW/APP/11/07, judgment of 7 February 2012. The original judgment in *Saidykhan v The Gambia* was delivered in December 2010.

73 Rôle gen ECW/CCJ/APP/12/10, review judgment of 13 March 2012.

74 Rôle gen ECW/CCJ/APP/12/10, arrêt ECW/CCJ/JUD/09/11, judgment of 7 October 2011 where the ECCJ ordered the state to pay damages to the applicants.

75 Para 1 *Ameganvi* review decision.

76 Paras 2-4 *Ameganvi* review decision.

77 Paras 5-8 *Ameganvi* review decision.

consequence of a violation and not a separate claim.[78] Accordingly, the Court noted that it had properly dealt with the original complaint in its entirety. The Court reasoned further that the demand for reinstatement was a reaction to the decision of the Constitutional Court of Togo and since the ECCJ is neither a court of cessation nor an appellate court, it could not entertain that claim. The ECCJ stated clearly that it had no competence to order reinstatement of the plaintiffs. This case demonstrates the need for lawyers appearing before the ECCJ to understand the nature of its human rights mandate and the type of reliefs that can realistically be sought from the Court in view of its character as an international court.

3.2.6 *Hassan v Governor of Gombe State and Another*[79]

In February 2010, the plaintiff brought this action against the Governor of Gombe State (one of the component states in Nigeria) and the Federal Republic of Nigeria. The plaintiff alleged that the killing of 71 citizens of his community by government-sponsored or supported armed gangs in Gombe State amounted to a violation of articles 1, 4, 5 and 7 of the African Charter.[80] Accordingly, the plaintiff sought a declaration that the extra-judicial killing of those 71 citizens amounted to a violation of article 4 of the Charter, a declaration that the refusal of the Nigerian government to disarm the armed gang is illegal and poses a threat to life in the community, and an order directing the Governor of Gombe State to pay 150 million Nigerian Naira to the family of each of those killed. The plaintiff also sought an order directing the Nigerian government to disarm the armed gang of the Governor of Gombe State. Claiming that he had been arrested and released but continued to receive death threats, the plaintiff also sought provisional orders from the Court.

In their separate responses to the action, both defendants challenged the jurisdiction of the ECCJ. In addition to raising issues of *locus standi* and non-exhaustion of local remedies, the Governor of Gombe State argued further that the plaintiff could not use the processes of the ECCJ to undermine the powers of Nigerian courts.[81] Part of the plaintiff's reaction to the preliminary objection was the argument that, although the Governor of Gombe State is not a member state of ECOWAS, he was a necessary party for a resolution of the dispute.[82]

Setting out the rationale for the grant of provisional orders, the ECCJ in its analysis concluded that the death of the plaintiff before the hearing of the matter had rendered the request moot.[83] Faced with

78 Paras 13-14 *Ameganvi* review decision.
79 Suit ECW/CCJ/APP/03/10, judgment of 15 March 2012.
80 Paras 1-2 *Hassan* decision.
81 Para 21 *Hassan* decision.
82 See para 24 of the *Hassan* decision.
83 Para 34 *Hassan* decision.

the question whether the death of the plaintiff had automatically made reaching a decision irrelevant, the ECCJ held that it still had a duty to resolve issues raised in the matter. Regarding the preliminary objection raised, the Court held that a component of a member state could not be a defendant before it. In relation to the argument that Gombe State was a necessary party, the Court held that by its own rules, a third party could only join the matter as an intervener.[84] Another crucial pronouncement made by the ECCJ in this case relates to the *locus standi* of applicants. Interpreting article 10 of the 2005 Supplementary Protocol, the Court emphasised that there was a victim requirement in those provisions and only victims could institute actions before it. While this conclusion is consistent with the Court's position in cases such as *Mrakpor v Five Others*,[85] it contradicts the decision in *SERAP v President of Nigeria and Others*.[86] However, the Court may have given a clue for this supposed inconsistency when it held that the rights invoked were individual rights rather than collective rights under the African Charter so that Hassan had no *locus standi* to initiate the present case. It could then mean that SERAP was accepted as plaintiff because it invoked collective rights rather than the individual rights of the alleged victims.

3.2.7 *Dias v Senegal* [87]

On 31 January 2012, this case was brought on behalf of Barthelemy Dias against Senegal and it was concluded within the same year with judgment delivered in March 2012. The case arises from the 2011 riots in Senegal when Senegalese people demonstrated against what they considered to be unconstitutional political decisions of the ruling party, including the attempt to create the office of Vice-President. The plaintiff, a Senegalese national, was one of the leaders of the demonstration who had allegedly been arrested and detained in 2011 for his part in the demonstration.

The plaintiff alleged that as a result of the success of the demonstration and his own prominent role in it, he had been the target of threats and attacks by an armed group sponsored by the ruling party. In the course of one confrontation with the said armed group, the plaintiff alleged that he had to release shots from his own firearm in self-defence. Although no one was injured, and in spite of the fact that he was the one attacked, criminal proceedings were commenced against him but not against his attackers. On the basis of these criminal proceedings, the investigating judge ordered his detention. On these facts, which were not contested by the state, the plaintiff sought a declaration that Senegal had violated his rights as

84 Para 42 *Hassan* decision.

85 Consolidated suit ECW/CCJ/APP/17/10; ECW/CCJ/APP/01/11, judgment of 18 March 2011.

86 Suit ECW/CCJ/APP/08/09; ruling ECW/CCJ/APP/07/10, ruling delivered on 10 December 2010.

87 Rôle gen ECW/CCJ/APP/01/12, judgment of 23 March 2012.

guaranteed in all international human rights instruments to which the state is party.

The plaintiff specifically alleged a violation of articles 2, 3, 9 and 14 of ICCPR, article 5(4) of the European Convention on Human Rights (European Convention), articles 7 and 98 of the Senegalese Constitution, articles 5, 7, 8, 9,10, 11 and 25 of the Universal Declaration of Human Rights (Universal Declaration), articles 2, 3, 6, 7 and 16 of the African Charter and article 316 of the Senegalese Penal Code. The plaintiff also relied on the jurisprudence of the European Court of Human Right (European Court). He sought an order compelling the state to release him, to pay him reparations in the sum of FCFA 1 billion and another FCFA 100 million for legal fees.[88] Relying on the ECCJ's decision in *Gaye v Senegal*,[89] Senegal argued that the detention of the plaintiff was done in strict accordance with its national laws and as such was neither arbitrary nor inequitable and was not in violation of any international human rights instrument.[90]

In its analysis, the ECCJ correctly identified that the complaint alleged political interference with the criminal process against the plaintiff, a violation of his right to equality before the law and a denial of his right to be presumed innocent until found guilty, especially as the investigating judge did not take his status as a prominent politician into account. The Court then noted that the criminal process was founded on the applicable law of Senegal and therefore was not arbitrary. While at face value this position appears to represent a proper interpretation of the African Charter which is infamous for its claw-back provisions, the reluctance to review the national process falls short of standards set by regional institutions such as the African Commission. According to the African Commission, the term 'according to law' should not be applied in a manner that limits the exercise of the protected freedom.[91] At the least, the ECCJ ought to be willing to review national judicial process, even though not the judgment, for regularity. In fact it had done so to some extent in its original judgment in *Ameganvi v Togo*.[92]

Regarding the alleged political interference in the criminal process, the ECCJ held that the opinions expressed by the politicians were private, and even if they were made by people in authority, were not of a nature that would compromise or affect the independence of the investigating judge.[93] Considering the unequal relationship that exists between the arms of government in Africa, tilting heavily in favour of the executive arm, this position of the Court is somewhat unrealistic. However, on the basis of its analysis, the ECCJ found no violation of

88 See paras 1-8 of the *Dias* decision.
89 n 77 above.
90 Paras 12-13 *Dias* decision.
91 See *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000); *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998).
92 Rôle gen ECW/CCJ/APP/12/10, arrêt ECW/CCJ/JUD/09/11.
93 See para 21 of the *Dias* decision.

any human rights instrument. The Court went further to state that the principle of separation of powers had not been violated.

On the alleged violation of the right to equality before the law, the Court concluded that the plaintiff had not proved his allegation and accordingly found no violation.[94] The ECCJ again deferred to the national jurisdiction with regard to the allegation that the plaintiff's right to presumption of innocence had not been respected. In the Court's view, the claim to self-recognisance on the grounds of the plaintiff's political standing was a matter of fact that was outside the purview of a Community human rights mandate. However, the ECCJ correctly summarised its duty in the circumstances of the case as one requiring an evaluation whether the principles of fair hearing and respect for the right to defence have been respected in the national proceedings. Concluding that those rights had been respected, the ECCJ found no violation against Senegal.

3.2.8 *Adewale v Council of Ministers of ECOWAS and 3 Others*[95]

The plaintiff in this case had applied for a post at the ECCJ which had been declared vacant on the resignation of the incumbent. Following the reinstatement of the incumbent to the position, the plaintiff filed this action alleging a violation of her rights to equality, to be heard, equal access to the public service, equality and equal opportunity and freedom from discrimination as guaranteed in the African Charter. Accordingly, amongst other reliefs, she sought a declaration that these rights have been violated and that she is entitled to an order for damages amounting to 20 million Naira.

In view of the circumstances of this case, it was argued that it ought not have been admitted as a human rights complaint. Although the ECCJ did not simply dismiss the complaint as falling outside the category of human rights, the Court examined the question whether the plaintiff, who is not a staff member of ECOWAS, had the standing to prompt the Court to review the act of a Community institution.[96] After establishing that international organisations have to be governed in line with the principle of legality and that the ECCJ is empowered to review acts of ECOWAS institutions and officials for legality, the Court concluded that the right to trigger such review is only available to an individual if his or her rights had been directly affected.[97] In the present case, the ECCJ held that the plaintiff was not directly affected by the decision to reinstate the former incumbent to her office since the plaintiff had the same right as every other ECOWAS citizen. Accordingly, the ECCJ reiterated that the mere fact of being an ECOWAS citizen did not clothe an individual with the capacity to judicially challenge acts of

94 See para 24 of the *Dias* decision.
95 Suit ECW/CCJ/APP/11/10, judgment of 16 May 2012.
96 Para 31 *Adewale* decision.
97 See paras 38-42 of the *Adewale* decision.

the Community that had no direct impact on such a person. Thus, the Court found no violation.

Considering the difficulty that staff and officials of international organisations have with respect to challenging the acts and omissions of political and administrative actors in these institutions, this approach is a set-back for effective governance. This is even more so since ECOWAS had expressed an intention to move to being 'an ECOWAS of peoples' and this can only occur when citizens are actively involved in monitoring institutional governance in the Community framework.

3.2.9 *Ayika v Liberia*[98]

The plaintiff in this case was a Nigerian national. He brought this action against Liberia alleging that the seizure by that state of the sum of $508 200 from him was unlawful and in violation of his right to property under the African Charter. The facts indicate that the plaintiff had taped the amount in hard currency on his person and had failed to declare it on arrival at the airport in Liberia. Following his subsequent arrest and the order to confiscate made by a circuit court in Liberia upon application by the authorities, the sum of money was seized pending investigation. The money was never released despite an advice to that effect.[99] In his action before the ECCJ, the plaintiff alleged a violation of articles 7(1)(b), 12 and 14 of the African Charter. On these facts, the plaintiff sought a declaration that the confiscation of his $508 200 was 'unconstitutional, null and void', an order directing the state to release the sum and the plaintiff's passport and costs of 20 000 Liberian dollars.

A first point of interest in the *Ayika* case is procedural. In response to the state's contention that the failure of the plaintiff to give evidence in person should be translated to mean that he had abandoned his claim, the ECCJ pointed out that there were several ways, other than direct evidence by a plaintiff, by which facts could be proved.[100] As a result of its unusual position as a court of first instance, the ECCJ has to employ rules of evidence applicable before national courts. Another aspect worthy of note in the judgment relates to the ECCJ's analysis of the national court process. After acknowledging that the state had a right to investigate suspected crimes within its territory, the ECCJ embarked on an evaluation of the procedure adopted during the confiscation hearing.

Engaging in a determination whether the rules of fair hearing and natural justice had been respected, the Court concluded that the national proceedings fell short of acceptable standards for failing to

98 Suit ECW/CCJ/APP/07/11, judgment of 8 June 2012.

99 See paras 1-4 of the *Ayika* decision. The advice to release the money to the plaintiff was later reversed on the grounds that it was based on incorrect and fraudulent information.

100 See para 10 of the *Ayika* decision.

give the plaintiff prior notice of the pending confiscation proceedings. It would be noted that the ECCJ did not base its analysis on the right to a fair hearing under international human rights law, even though it could have arrived at the same result if it did so. It is also noteworthy that despite its acclaimed reluctance to act as an appellate jurisdiction over national courts, the ECCJ was bold enough to engage in this analysis. However, the Court was quick to point out that it was not the decision of the national court that was problematic since the national court 'did not finally determine the rights of the plaintiff'. In doing this, the ECCJ remained within the safety of its reluctance to confront national courts of ECOWAS member states.

After a lengthy discussion of the circumstances of the investigative report that led to retention of the plaintiff's money,[101] the ECCJ came to the conclusion that four years was too long a time for the state to conduct investigations. This kind of reasoning is a welcome development for the right to a fair hearing as it might be heralding a shift from the Court's earlier position which did not consider long delays as necessarily negative.[102] It is important to note that as a result of the nature of this case, the ECCJ had to engage in an analysis of issues that had little to do with human rights. This is one of the consequences of the Court acting as a court of first and last instance. Curiously, while it took the view that the right to a fair hearing had been violated, in the operative part of the judgment, the ECCJ only found a violation of the right to property even though it awarded costs against the state for the undue delay in investigating the case against the plaintiff.[103]

3.2.10 *Alade v Nigeria*[104]

In this case, the plaintiff, a citizen of Nigeria, brought the action against Nigeria, alleging that he had been unlawfully detained by the authorities at a maximum security prison facility in Lagos, Nigeria, from 2003 to 2011. The plaintiff alleged that he had been arrested in March 2003 by a plainclothes policeman and detained in a police station till May 2003 when he was charged before a magistrate's court for an alleged crime of armed robbery. Since the magistrate's courts in Nigeria lack jurisdiction over the crime of armed robbery, the plaintiff alleged that he was remanded in prison custody by the magistrate on a holding charge.[105]

101 Paras 28-44 *Ayika* decision.

102 *Amouzou & Others v Côte d'Ivoire* rôle gen ECW/CCJ/APP/01/09, arrêt ECW/CCJ/JUG/04/09, para 97.

103 Paras 48-50 *Ayika* decision.

104 Suit ECW/CCJ/APP/05/11, judgment of 11 June 2012.

105 A common practice in the Nigerian legal system is that the police charge suspects before magistrate's courts even when they know that that level of courts lacks jurisdiction over the offence allegedly committed by the suspect. In the knowledge that he or she lacks jurisdiction, the magistrate would usually remand the suspect in prison custody pending their arraignment before a court of competent jurisdiction.

Although he was not brought before any other court, the plaintiff alleged that he had been held in prison custody until June 2011 when the action before the ECCJ was filed. Based on these facts, the plaintiff sought a declaration from the ECCJ that his indeterminate detention without trial under the so-called holding charge amounted to a violation of his right to a fair trial within a reasonable time, his right to be presumed innocent and his right to liberty, all guaranteed under the African Charter. The plaintiff also invited the ECCJ to declare that his unlawful, excessive and continued detention by the Nigerian authorities was in violation of his rights as guaranteed in the African Charter. Accordingly, the plaintiff requested an order compelling his immediate release and directing the state to pay him 29 million Naira for unlawful detention, pecuniary damages for loss of earnings and the cost of the action. The defendant state challenged the jurisdiction of the Court and argued further that the plaintiff had failed to discharge the burden of proof on him for failing to adduce credible evidence before the Court.

In the analysis leading to its decision, the ECCJ reaffirmed its adoption of all African Charter-guaranteed rights on the basis of article 4(g) of the 1993 revised ECOWAS Treaty.[106] The Court then pointed out that its human rights mandate extended beyond the African Charter and encompassed UN human rights instruments to which ECOWAS member states are parties.[107] While this position extends the scope of instruments that victims of human rights violations in West Africa can claim, it heightens the risk of conflicting jurisdiction along with the attendant risks of conflicting jurisprudence and the danger to the coherence of established jurisprudence.

Another aspect worthy of note is the ECCJ's response to the state's question whether the Court is competent to exercise appellate powers over an order of a domestic court. The Court restated its position that it did not consider itself to be in hierarchical appellate relationship with the national courts of ECOWAS member states.[108] However, the ECCJ took a significant step towards upholding the almost supranational character[109] of its international jurisdiction when it drew the distinction between an appellate review and what the ECCJ considered itself to be doing. According to the ECCJ, 'there is a thin divide of not reviewing [*sic*] the decision but hearing the matters that

106 See para 24 of the *Alade* decision. Art 4(g) of the 1993 revised ECOWAS Treaty provides that recognition, promotion and protection of human rights contained in the African Charter is one of the fundamental principles upon which the ECOWAS integration is to take place. This is a position consistently held by the ECCJ in a whole line of cases.

107 See para 25 of the *Alade* decision.

108 See paras 33-34 of the *Alade* decision. This is a position that the ECCJ has maintained, famously since it gave its decision in *Keita v Mali* (n 67 above).

109 I have used 'almost' deliberately to qualify 'supranational jurisdiction' in the face of my awareness that there is insufficient material to sustain an argument that the ECCJ enjoys supranationality in the same manner or even similar to what the European Court of Justice claims and enjoys.

flow from the decisions which allegedly pose the questions of violations of human rights'.[110] The Court arguably used this decision to indicate that while it may not entertain any appeals against decisions of national courts, it would not hesitate to engage in a review of either procedures of those courts or the fall-out and consequences of such national decisions. This is a significant statement by the ECCJ since it defines the parameters of the Court's jurisdiction *vis-à-vis* national courts, including especially the highest courts of member states, which are the bearers of treaty obligations to ensure the implementation of the decisions of the ECCJ. In the present case, the ECCJ was not interested in reviewing the national decision that authorised the detention of the plaintiff but was rather interested in the events that have occurred since that decision was made by the national court.

In terms of the procedure that the ECCJ adopts in carrying out its human rights mandate, the decision in the *Alade* case contains pointers as to which way the Court will tilt when it acts as a court of first instance or when it has to engage in activities that are generally undertaken by national courts. First, the Court demonstrated that it preferred to 'eschew technicalities' and rather 'do substantial justice' in cases before it.[111] This could be significant in situations where clear human rights violations have occurred, but either as a result of incompetent legal advice or inexperience on the part of counsel, a party fails to satisfy important procedural issues that are raised by counsel for state parties. It remains to be seen how far the Court will go in toeing its current line of reasoning and action. In relation to proof of claims before it, the ECCJ made the point that in its character as an international court, it sees no distinction between a burden of proof and a burden of evidence, both of which have to be borne by the plaintiff first, but both of which could also shift to the state party involved in a case.[112]

On the substantive issue of unlawful detention, the ECCJ took the view that 'what amounts to ... arbitrary detention depends on the circumstances of each case'. The Court pointed out that even where detention may originally have been lawful, continued detention may violate the right to liberty since the original legality may cease as even the original justification for the detention would have become redundant.[113] Accordingly, the ECCJ found that Nigeria had violated the African Charter in relation to the plaintiff. The Court was, however, very conservative in its award of damages, pointing out in its analysis that the award of damages had to be fair to both parties. Accordingly, the ECCJ maintained some consistency in the

110 Para 35 *Alade*d decision.
111 Para 38 *Alade* decision.
112 See paras 48-51 of the *Alade* decision.
113 See paras 54-56 f the *Alade* decision.

conservative approach to the award of damages that it has shown in its recent jurisprudence.

3.2.11 *Tasheku v Nigeria*[114]

Following his arrest in September 2010 and continued detention for months despite an order of release made by a magistrate, the plaintiff in this case brought this action before the ECCJ in 2011. The plaintiff, a Nigerian national, asked the ECCJ to declare that his arrest and detention in spite of the order of release by the magistrate was arbitrary, illegal, illicit and violated his right to personal liberty and freedom of movement as guaranteed in the African Charter. The plaintiff also sought a declaration that the denial of medical care during his detention and the bad conditions of detention he was subjected to threatened his right to health and violated his right to dignity under the Charter. Thus, the plaintiff wanted the ECCJ to order his immediate release and ask the state to pay him damages in the sum of 10 million Naira.[115]

Following an allegation that the plaintiff had successfully pursued a similar action based on the same facts before the High Court of Abuja in Nigeria, the state argued that the present case was inadmissible on grounds of violating the principle of *res judicata*. Before the Nigerian court, the plaintiff along with a co-plaintiff had sued the Nigerian police for a declaration that his arrest and continued detention were in violation of his rights under the Nigerian Constitution and the African Charter. The plaintiffs in that case also sought an order of release and damages in the sum of 10 million Naira. The judgment tendered by the state indicated that the High Court made the declarations, ordered that the plaintiff should be brought before a court and awarded him compensation in the sum of 5 million Naira.[116] The High Court also ordered the Nigerian police to enforce the order of release made by the magistrate's court.

The ECCJ commenced its analysis by taking the view that *res judicata* would only apply if 'it is established that the application brought before it is essentially the same as another one already satisfactorily decided upon by a competent domestic court'.[117] The Court then determined whether[118]

> an application seeking to safeguard fundamental human rights constitutionally recognised and guaranteed, before ... a domestic court may be ... analogous with another application seeking to safeguard human rights internationally recognised and guaranteed before the Court of Justice ...

114 Suit ECW/CCJ/AAP/12/12, judgment of 12 June 2012.
115 Paras 1-2 *Tasheku* decision.
116 Para 11 *Tasheku* decision.
117 Para 13 *Tasheku* decision.
118 Para 15 *Tasheku* decision.

Citing the ECOWAS Democracy Protocol, the ECCJ stressed that its mandate covered rights protected at the African regional and international levels. It then took the view that, impliedly, the Democracy Protocol 'sanctioned the guarantee of human rights as a principle of constitutional convergence'.[119] In view of its understanding of its duty to protect international human rights 'in line with the laws, practices and national policies of the member states', the ECCJ concluded that constitutionally-guaranteed rights and international human rights were analogous so that the claim of the plaintiff before the Nigerian Court was essentially the same as the case before the ECCJ. Reasoning that the plaintiff was not dissatisfied with the outcome before the national court since he had not appealed and that he had not indicated that the state had refused to implement the decision and further that he had brought no new complaint before the court, the ECCJ held that it could not retry a case in which judgment had been delivered by a national court and 'against which no contestation has been raised'.[120] Thus, there is a subtle suggestion that the ECCJ may accept a case already decided by a national court if the plaintiff is not satisfied with the outcome at the national level or the state concerned fails to implement a favourable decision. Commendable as this may be, it raises the question whether all unfavourable national judgments amount to a violation of human rights.

In general terms, there are at least two obvious challenges with the ECCJ's approach in this case. First, it can be argued that *res judicata* should not be operative as between international courts and national courts since the normative instruments applicable before international courts and national courts are not the same. As technical as it may sound, similarity of content does not mean normative sources are synonymous. This explains why national courts of states with dualist legal traditions do not apply international instruments even where their contents coincide with constitutional bills of rights. Further, taking a different approach would mean that the exhaustion of local remedies principle would become redundant as every matter resolved by national courts would never be brought before an international tribunal.

Thus, notwithstanding the non-applicability of the exhaustion of local remedies principle in the ECOWAS regime, it may have been better for the Court to adopt 'mootness' as the applicable terminology since it can then be argued that the envisaged violation had already been remedied at the national level. The second challenge is with the use of the term 'satisfactorily'. It is not clear if this means satisfactorily to the plaintiff – in which case it would be synonymous with favourable decision – or satisfactorily to the Court, leaving open the question of what criteria would determine

119 Para 16 *Tasheku* decision.
120 Para 19 *Tasheku* decision.

'satisfactorily' to an international court. Following its analysis in which it established that the relevant sections of the Nigerian Constitution and the African Charter (Ratification and Enforcement) Act of Nigeria invoked before the national court protected the same rights invoked before the ECCJ, the Court reasoned that the case before the national court was essentially the same as that before it. Accordingly, the ECCJ rejected the case and declared it inadmissible.

3.2.12 *Pinheiro v Ghana*[121]

This case was brought by a Nigerian national who is a senior lawyer in Nigeria. He alleged that he had been refused admission into the Ghana Law School after he had been shortlisted for an interview. The plaintiff contended that Ghana had violated his rights as guaranteed in articles 7, 12, 20, 22 and 23 of the African Charter as well as articles 1, 2 and 12 of the ECOWAS Protocol on Free Movement of Persons, Right of Residence and Establishment. On these bases, the plaintiff asked the ECCJ to declare that the failure of the Ghana Law School to give him access to participate in the bar examinations in Ghana was a violation of article 2(2) of the ECOWAS Treaty, articles 1 and 2 of the ECOWAS Supplementary Protocol A/SP/2/5/90 and articles 20 and 22 of the African Charter. The plaintiff also sought an order mandating the Ghana Law School to immediately allow him to participate in its bar programme.[122]

The summary of the defendant state's case was that the plaintiff did not meet the requirements for participation in the programme. The state also stated that at the time the plaintiff applied, the programme was limited to Ghanaians. It was also pointed out on behalf of the state that articles 20 and 22 of the African Charter invoked by the plaintiff are collective rights which an individual cannot claim.

In its analysis, the ECCJ agreed with the defendant state that the plaintiff as an individual cannot singularly claim a collective right in exclusion of a community.[123] Using the opportunity to make a statement on the division of the rights in the African Charter into individual and collective rights respectively, the ECCJ made a very rare reference to the jurisprudence of the African Commission by relying on the *Katangese People v Zaire* communication.[124] Considering the fact that jurisprudential dialogue is one way to avoid the dangers of conflicting jurisdiction between the mechanisms of the African human rights system and the ECOWAS human rights regime, this trend is commendable.

In relation to the claim based on the ECOWAS Protocol on Free Movement, the ECCJ affirmed that it is a 'solid and consistent legal foundation' for a right to establishment of ECOWAS citizens in a

121 Suit ECW/CCJ/APP/07/10, judgment of 6 July 2012.
122 Paras 1-2 *Pinheiro* decision.
123 See paras 34-36 of the *Pinheiro* decision.
124 Para 37 *Pinheiro* decision.

country other than their own. The Court then added that the failure of a member state to internally implement either a Community Protocol or the rights of a Community citizen is a violation of that state's treaty obligation. A significance of this finding is that ECOWAS states can face sanctions for such a failure on the basis of article 77 of the revised ECOWAS Treaty and the recently-adopted Supplementary Act on Sanctions.[125] However, the Court was again quick to find that individuals do not have the right to sue states for a violation of obligations under Community texts. According to the ECCJ, only another member state or the ECOWAS Commission is capacitated to bring an action to compel a state to fulfil its obligations.[126] Hence, the Court suggested that the two options open to a citizen would be either to prompt his or her own state to bring an action or to come directly before the national courts of the defaulting state with those national courts acting as community courts.[127] On the basis that the plaintiff lacked standing, the Court dismissed the action. An interesting question that arises from this decision is whether the Court would have arrived at the same conclusion if it looked at the issue as a matter of the human rights of the citizen rather than the obligation of a member state, especially since the Court itself had pointed out the existence of a right.

3.2.13 *Umar v Nigeria*[128]

This case arose from the claim that the plaintiff had been arrested along with three of her children (including a baby) and subjected to physical and mental torture. Accordingly, the plaintiff argued that her rights as guaranteed in articles 2, 4, 6 and 12 of the African Charter had been violated. Thus, she sought a declaration that their arrest and torture were in violation of the African Charter, especially since her baby was still breastfeeding. She also sought an order compelling the defendant state to release her immediately and to pay her 10 million Naira in damages.

After the ECCJ ruled against it on the preliminary objection it brought, the state informed the Court during the hearing on the merits that counsel for the plaintiff had mentioned the existence of a judgment of a domestic court in favour of the plaintiff on the same facts as those before the ECCJ.[129] Similar to the *Tasheku* case, a copy of a judgment of the Federal High Court of Nigeria, Abuja, in a case in which the plaintiff had instituted an action against the Nigerian police force was tendered before the ECCJ. The production of the judgment, which was in favour of the present plaintiff, raised the question whether the ECCJ could proceed with its hearing of the present case

125 n 40 above.
126 Para 48 *Pinheiro* decision.
127 Paras 49-50.
128 Suit ECW/CCJ/APP/12/11, judgment of 14 December 2012.
129 Para 4 *Umar* decision.

since the state argued that the case was not admissible before the ECCJ.

In its analysis, the ECCJ considered the production of the judgment as new evidence which warranted a re-opening of the admissibility aspect of the case. The Court then went on to address the issue of *res judicata* in relation to the present case. Citing its earlier decision in the *Tasheku* case,[130] the Court repeated that *res judicata* would only apply if 'it is established that the case brought before it ... is essentially the same as another case which has already been satisfactorily adjudicated upon by a competent national court'. The issues discussed in relation to the *Tasheku* case therefore apply to this case. It is hoped that the Court would have the opportunity to revisit this issue. It is unfortunate that lawyers who are aware of existing national judgments in favour of their clients still go on to seek similar relief before the ECCJ. Such practice ought to be condemned as an abuse of the court process.

3.2.14 *SERAP v Nigeria*

Perhaps one of the most publicised cases decided by the ECCJ in 2012 was the case of *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria*.[131] Originally filed against the Federal Republic of Nigeria and some oil companies operating in Nigeria, the complaint was amended to exclude the oil companies following a ruling of the Court that non-state actors could not be defendants before it.[132] The plaintiff's case was that the rights to health, an adequate standard of living and economic and social development of the people of the Niger Delta had been violated by the state which had failed to enforce laws and regulations to protect the environment.[133]

Among other things, the plaintiff sought a declaration that everyone in the Niger Delta was entitled to the affected rights and that the failure of the defendant to establish adequate monitoring of the human rights impacts of oil-related pollution, as well as the systematic denial of access to information to the people concerning oil exploration and production effects, were in violation of the African Charter, ICCPR and ICESCR. The plaintiff requested the ECCJ to make orders directing the state to ensure the full enjoyment of the affected rights to the people of the Niger Delta, compelling the state to hold oil companies operating in the area responsible for complicity in human rights violations and compelling the state to solicit the views of the people throughout the process of planning and policymaking on the Niger Delta. Also sought were orders to direct the defendant state to establish adequate regulations for the operations of the companies, to carry out a transparent and effective investigation into

130 n 114 above.

131 Suit ECW/CCJ/APP/08/09, judgment of 14 December 2012.

132 See ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2011' (2012) 12 *African Human Rights Law Journal* 223.

133 Para 4 *SERAP* decision.

the activities of the oil companies and to pay compensation to the people of the region.[134]

An interesting argument put forward by the state was that the ECCJ had no jurisdiction to adjudicate on alleged violations of ICCPR and ICESCR as the Nigerian Constitution only recognises the jurisdiction of Nigerian domestic courts over ICCPR, while ICESCR is not intended to be justiciable.[135] The state contended that the ECCJ's jurisdiction covered only the treaties, conventions and protocols of the ECOWAS Community. The state argued further that SERAP lacked *locus standi* to bring the action and that some of the facts raised were statute-barred by reason of the application of article 9(3) of the 2005 Supplementary Protocol of the ECCJ.[136] On these bases, the state asked that the case be dismissed.

Linking article 9(4) of the 2005 Supplementary Protocol of the ECCJ, which endows the Court with its human rights mandate to the ECOWAS Protocol on Democracy and Good Governance (ECOWAS Democracy Protocol), the ECCJ pointed out that ECOWAS member states intended that human rights in 'the international instruments, with no exception whatsoever' be protected within the Court's mandate.[137] The ECCJ went on to assert that in spite of the lack of an ECOWAS-specific human rights catalogue, international human rights instruments could be invoked before it, especially because all ECOWAS member states 'have renewed their allegiance to the said texts within the framework of ECOWAS'. The Court is able to make this assertion since those instruments are mentioned in the text of the ECOWAS Democracy Protocol. While it may appear a somewhat remote link, the Court is arguably on reasonable grounds since, by a liberal reading, even the Vienna Convention on the Law of Treaties (VCLT) recognises the possibility of states implementing an earlier treaty within the framework of a subsequent treaty.[138]

It is also a significant advancement for judicial protection of economic, social and cultural rights that the ECCJ refused to be cowed by the argument that ICESCR is not intended to be justiciable. According to the ECCJ, no such general label of non-justiciability should be attached to the rights in that instrument as it is better to deal with each right on a concrete case-by-case basis in order to extract specific obligations that are imposed on duty bearers, taking into account the limitation that availability of resources imposes on enforceability.[139] In essence, the Court followed the common argument that, at the very least, state responsibility to protect (as distinct from the duty to fulfil) socio-economic rights is immediate

134 See para 19 of the *SERAP* decision.
135 Paras 20 & 24 *SERAP* decision.
136 Para 21 *SERAP* decision.
137 Paras 25-27 *SERAP* decision.
138 See art 30 of the VCLT.
139 Paras 31-32 *SERAP* decision.

and justiciable even in the face of resource constraints. Employing the framework of protection analysis, the ECCJ reasoned that in the instant case, it is the failure of the defendant state to live up to its protection obligation rather than the fulfilment obligation that was in issue.[140] Interestingly, despite its earlier view that there is a convergence of constitutional rights and international human rights which the ECCJ protects, the Court stated that its mandate was not to protect rights guaranteed in the constitutions of member states but international human rights.

Coming in response to the insinuation that economic, social and cultural rights are not justiciable under the Nigerian Constitution, the ECCJ is sending a message that even rights that national courts are constitutionally barred from enforcing can be brought before it insofar as the state concerned has ratified an international instrument that guarantees that right. This has the potential of flooding the Court's docket with cases from states such as Nigeria. The ECCJ also reaffirmed that SERAP had *locus standi* to bring the action. This is consistent with the Court's position in the earlier case of *SERAP v Nigeria and Others.*[141] However, it creates a difficulty for understanding some other decisions where the Court has held that there is a victim requirement for access to its human rights jurisdiction. Even the argument above that this decision may have been influenced by the collective nature of rights invoked can be defeated by another argument that certain rights invoked by SERAP in favour of the victims are individual rights. In relation to the argument that the events complained of occurred more than three years before the filing of the case, the ECCJ took a continuing violation approach as it pointed out that the limitation provision can only start to run 'from the time when the unlawful conduct or omission ceases'.[142]

Having disposed of the objections raised by the defendant state, the Court considered the alleged violations of articles 1, 2, 3, 4, 5, 9, 14, 15, 16, 21, 22, 23 and 24 of the African Charter, articles 1, 2, 6, 9, 10, 11 and 12 of ICESCR, articles 1, 2, 6, 7 and 26 of ICCPR as well as article 15 of the Universal Declaration. The Court subtly derided the idea of citing several instruments containing analogous rights as it considered such an approach to be superfluous. It then went on to state that the plaintiff could not rely exclusively on an Amnesty International report which was in 'the public domain' as conclusive evidence in proof of its case. This view is similar to the admissibility requirement under the African Charter that communications should not be based exclusively on events reported in the media.[143] After looking at the totality of evidence at its disposal, and pointing out that despite the state's contentions, it is public knowledge that oil spills

140 Para 33 *SERAP* decision.
141 n 135 above.
142 See para 62 of the *SERAP* decision.
143 Art 56(4) African Charter.

pollute water and consequently adversely affect the health and means of livelihood of people, the Court reasoned that it is not the cause of the harm that was in question but the attitude of the state to these spills.[144] The ECCJ consequently narrowed the dispute to a determination whether the defendant state's attitude was in conformity with its obligation under article 24 of the African Charter read together with article 1 of the Charter.

In the ECCJ's analysis, state obligation in article 24 of the African Charter is both 'an obligation of attitude and an obligation of result'.[145] Hence, the Court reasoned that article 24 'requires every state to take every measure to maintain the quality of the environment ... such that [it] may satisfy the human beings who live there, and enhance their sustainable development'.[146] The Court pointed out further that the determination whether the state has fulfilled its obligation can only be made by examining the environment.

Arguably, this is the most elaborate consideration and pronouncement on the right to a satisfactory environment made by an international court. After taking note of the legislative measures taken by the defendant state and the allocation of 13 per cent resources for the development of the Niger Delta, the Court held that environmental degradation has continued despite those measures.[147] The Court boldly pointed out that states needed to take concrete 'other measures' beyond the formulation of policies, the adoption of legislation and the establishment of agencies in order to comply with their obligations under article 24 of the Charter.

Overall, the Court found Nigeria in violation of articles 1 and 24 of the African Charter. Although the plaintiff asked for US $1 billion to be paid as compensation to the people of the Niger Delta, this request was dismissed because, according to the Court, no single victim had been identified and there would be difficulty in distributing any monetary award.[148] However, noting that a finding of violation is worthless to victims who are not awarded any reparations or remedial orders, the ECCJ ordered the state to take effective measures within the shortest possible time to ensure restoration of the environment, to prevent 'occurrence of damage to the environment' and to hold perpetrators of environmental damage accountable.[149] The Court further directed the state to bear all costs and pronounced that the state should comply with and enforce the judgment in accordance with the ECOWAS Treaty and the Court's 2005 Supplementary

144 Paras 94-98 *SERAP* decision.

145 Perhaps the ECCJ is substituting obligation of conduct with obligation of attitude. Otherwise, the Court would be introducing a new concept into international human rights terminology.

146 Paras 100-101 *SERAP* decision.

147 Para 104 *SERAP* decision.

148 Paras 116-117 *SERAP* decision.

149 Para 121 *SERAP* decision.

Protocol. While the reasoning of the Court with respect to the issue of payment of compensation is understandable, for the purpose of monitoring implementation, it is not clear how equipped the Court is to monitor the implementation of the orders it has made in this case. That difficulty notwithstanding, this decision remains a landmark in the pursuit of the effective enjoyment of economic, social and cultural rights by minorities.

4 Conclusion

In the early days after the adoption of the African Charter, the need for incorporation or domestication of the Charter into national law was paramount since it became obvious that the African Commission, which had the exclusive mandate to promote and protect as well as supervise the protection of Charter-guaranteed rights, would not be able to cover the entire continent. The African Commission certainly did not have the resources – human and material – to undertake such a herculean task. Even the emergence of the African Committee of Experts on the Rights of the Child and the operationalisation of the African Court on Human and Peoples' Rights did not bring the African human rights system anywhere near realising the expectations of civil society that Charter-guaranteed rights should be taken to the nooks and crannies of Africa to protect the most vulnerable, in ways beyond the reactive judicial and quasi-judicial processes that existed at the time.

Things have surely begun to change since African RECs discovered that promoting and protecting human rights were sure ways of realising the goals of regional economic integration. In the hands of the RECs, the African Charter is going into places and areas that it may not have reached in decades to come. Even more significant is the fact that this expansion of reach propelled by sub-regional human rights regimes is happening in a manner that combines proactive non-juridical and reactive judicial approaches. Hopefully, this article has demonstrated that annually, more and more human rights and rights-related activities occur at the sub-regional level. This is an important fact that stakeholders, especially civil society, need to pay attention to. It calls for greater attention in order to ensure quality control, but it also provides huge opportunities for intervention and collaboration. These regimes create spaces for human rights promotion and protection far beyond what the limitations of continental structures allow. The cause of creating a culture of human rights in Africa will definitely benefit more than it will lose from REC participation in the field of human rights.