ECOWAS Court of Justice: its linkage with the African Charter on Human and People's Rights

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Abstract

This article considers the Community Court of Justice (CCJ) of the Economic Community of West African States (ECOWAS) and its linkage with the African Charter of Human and People's Rights (ACHPR). No doubt when ECOWAS was established in 1975, the main objective was the economic integration of the sub-regional body. At the beginning, the CCJ was listed as one of the mandates of the economic bloc, but it was not until 1991 that the first Protocol which created the CCJ and which gives its composition and its functioning was adopted. The Revised Treaty of 1993 also provided for the establishment of the CCJ in its Article 15. The Protocol now makes references to the African Charter on Human and Peoples Rights (ACHPR) of the African Union (AU). Not only this, the Protocol also made reference to other international human rights instruments. The main objective of this work is to bring to fore that the jurisdiction of the CCJ is expansive and broad, and that the CCJ failed to utilise the expansive jurisdiction in the matter of the late President of Chad, Hissene Habre, against the Republic of Senegal, by ruling that the Senegalese court could not try him because this will violate the principle of non-retroactivity of penal law. This ruling led to the establishment of the Extraordinary African Chambers (a special criminal tribunal) that later tried Habre. Also, where it is appropriate and desirable, a comparison between, on the one hand, the CCJ and, on the other hand, African sub-regional courts and courts of international organisations will be made. It is also the contention of this article that the CCJ ought to have an Appeal Chambers, as a core international best practice. This work will adopt the doctrinal methodology and the data collection method is content analysis.

I. Introduction

The Economic Community of West African States (ECOWAS) was founded the Lagos Treaty of 1975.[1] The Treaty established a Regional Economic Community (REC) in the West African

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1 Treaty of Lagos (signed 28 May1975) No 14843 (ECOWAS Treaty of 1975) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5560/download> accessed 11 January 2024.

sub-region and provided a roadmap for the economic integration of the sub-region. The community adopted a Revised Treaty of 1993.[2] The Revised Treaty provides that:

> [t]he aims of the community are to promote cooperation and integration leading to the establishment of an economic union in West Africa in order to raise the living standard of its peoples and to maintain and enhance the economic stability, foster relations among member states and to contribute to the progress and development of the African continent.[3]

Although the 1975 Treaty of the sub-regional body provided for the establishment of the Community Court of Justice (CCJ) of ECOWAS, it was the 1991 Protocol Article 15 of the Revised Treaty of 1993 that created the CCJ. Also, the CCJ finds its basis under the provisions of Article 15 of the Revised Treaty of ECOWAS and Article 6 which mentions it as one of the institutions of the community. The Protocol relating to the CCJ sets out the composition, powers, procedure and the jurisdiction of the CCJ.[4] Furthermore, the Protocol clearly states that the CCJ is the principal legal organ of ECOWAS with the main function of resolving disputes relating to the interpretation and application of the provisions of the Revised Treaty and the annexed Protocols and Conventions. Although the Protocol on the CCJ was adopted in 1991, the CCJ only became operational in 2001 following the appointment and swearing in of its pioneer Justices.[5]

Though the CCJ has been in existence since 2001, many community citizens are unaware of its existence or of its mandate, jurisdiction, practice, and procedure. Since ECOWAS has transformed from ECOWAS of States to ECOWAS of Peoples, the member States and community citizens are the stakeholders in ECOWAS and all its institutions,[6] as community Court, the ECOWAS CCJ works with the member States and the community citizens.[7] In the light of the above, this work will interrogate the human right mandate of the CCJ and argue that the CCJ has not fully utilised the broad and expansive mandate as vested in her by the legal instrument that established her. This is so because the CCJ ruled that the Senegalese court lacks the powers to exercise jurisdiction and try the former Chadian president, the late Hissene Habre.

This paper is divided into three parts. Part I discusses the jurisdiction of the CCJ, the qualification, composition and tenure of the justices, the access to the court, the concept of non-exhaustion of local remedies, and the advisory from the CCJ. Part II discusses the CCJ's missed opportunity of not recommending the late President of Chad Hissene Habre for trial in Senegal. Finally Part III discusses the various challenges and the suggested recommendations thereto. In its methodology, this work considers the various legal texts by

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2 Economic Community of West African States (ECOWAS) Revised Treaty (signed 24 July 1993) Vol 2373, 1-42835 (ECOWAS Revised Treaty of 1993) <https://ecowas.int/wp-content/uploads/2022/08/Revised-treaty-1.pdf> accessed 11 January 2024.

3 ibid art 3.

4 ECOWAS, 'Protocol A/P.1/7/91 on the Community Court of Justice' (signed 6 July 1991, entered into force on 5 November 1996) A/P1/7/91 <http://www.courtecowas.org/wp-content/uploads/2018/11/Protocol_AP1791_ENG.pdf> accessed 11 January 2024.

5 Amos Osaigbovo Enabulele, *Teachings on Basic Topics in Public International Law* (Lap Lambert Academic Publishing 2014) 333.

6 ECOWAS Treaty of 1975 (n 1) art 4(d). This article provided for the Tribunal of the Community, which was not called a CCJ then. There was also no Protocol of the CCJ then.

7 Enabulele (n 5) 325.

ECOWAS and also made a comparative analysis with other sub-regional, regional, and international legal instruments.

II. The linkage

Jurisdiction is the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.[8] The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by similar means.[9] At inception, the ECOWAS CCJ faced jurisdictional challenge under its original Protocol.[10] But this Protocol was promptly revised after the first set of cases brought by individuals were dismissed by the CCJ for want of jurisdiction to accept direct claims from individuals, and as a result of which the CCJ fell out of use.[11]

Intriguingly, the ECOWAS CCJ, like all of other sub-regional courts in Africa, interprets and applies the African Charter.[12] The jurisdiction of the CCJ to apply the African Charter is based on the Revised Treaty of ECOWAS, wherein State parties undertook to adhere to the recognition, promotion, and protection of human rights in accordance with the provisions of the African Charter on Human and People's rights.[13] In the same vein, the Tribunal of the Common Market for Eastern and Southern Africa (COMESA) also provides individual direct access to its court, the COMESA Court of Justice.[14] The same goes to the East African Court of Justice (EACJ), which is the judicial organ of the East African community.[15] The jurisdiction of the CCJ is prescribed by the Revised Treaty, the Protocol of the CCJ as amended and other ECOWAS community texts. The CCJ has contentious and non-contentious jurisdiction. The Revised Treaty provides as follows:

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8 Federal Supreme Court of Nigeria, *Madukolu v Nkemdilim* [1962] 1 ALL NLR (Pt 4) 587; [1962] 2 SCNLR 341.

9 Amos Osaigbovo Enabulele and D U Odigie, 'African Charter on Human and People's Rights: Has the Long Walk to Effective Human Rights Enforcement in Africa Ended?' (2014) 2(1) The Journal of International Law and Diplomacy 3.

10 Protocol A/P1/7/91(n 3). The original challenge was whether the CCJ could entertain cases from individual community citizens. See CCJ, *Olajide v Federal Republic of Nigeria* (27 April 2004) ECW/CCJ/APP/01/04 where the CCJ ruled that it could not entertain individual complaints by community citizens.

11 ECOWAS, 'Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2 9 and 39 of Protocol A/P1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol' (19 January 2005) A/SP.1/01/05 <http://www.courtecowas.org/wp-content/uploads/2018/11/Supplementary_Protocol_ASP.10105_ENG.pdf> accessed 11 January 2024. It was only Article 3(4) of the Supplementary Protocol of the CCJ of 2005 that stated that the CCJ, in addition to its other jurisdiction, can determine violation of human rights occurring in any member State.

12 CCJ, *SERAP v Nigeria* (30 November 2010) ECW/CCJ/JUD/18/1. This decision affirmed the powers of the CCJ to apply the African Charter.

13 ECOWAS Revised Treaty of 1993 (n 2) art 4.

14 Agreement Establishing a Common Market for Eastern and Southern Africa (concluded 5 November 1993, entered into force 8 December 1994) art 26 <http://www.comesacompetition.org/wp-content/uploads/2016/03/COMESA_Treaty.pdf> accessed 11 January 2024.

15 The Treaty for the Establishment of the East African Community (signed 30 November 1999, entered into force 7 July 2000) art 9 <https://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf> accessed 11 January 2024.

> Any dispute regarding the interpretation or the application of the provisions of this Treaty shall be amicably settled through direct agreement without prejudice to the provisions of this Treaty and relevant Protocols. Failing this, either party or any other member states or the authority may refer the matter to the Court of the community whose decision shall be final and shall not be subject to appeal.[16]

Between 2001 and 2005 when the Protocol was finally amended, only two cases were filed before the CCJ and both were filed by individuals directly. In view of the fact that individuals did not have direct access to the CCJ by virtue of Article 9(3) of the Protocol of the CCJ at the material time, the CCJ held that it had no jurisdiction to entertain both matters. It is significant to note that no Member State or institution of ECOWAS within the period filed any case before the CCJ or even sought for an advisory opinion. Therefore, the problem of lack of direct access to the CCJ by individuals was of great concern to the court and other stakeholders.

This was clearly the issue in the case of *Olajide v Federal Republic of Nigeria*.[17] The claimant, a Nigerian community citizen, filed the matter for a violation of the community law in closing the Nigerian- border with the Republic of Benin. However, the CCJ concluded that on the examination of the extant Protocol, the Applicant could not bring proceedings other than as provided in Article 9(3) of the Protocol. This case made it clear that the limited scope of the jurisdiction of the CCJ, and denial of access to the CCJ to individuals, were grave and amounted to the fundamental limitation on the lives of private West African individuals. The then president of the CCJ, Justice Donli, urged formulators of the act to broaden its scope to enable individuals to bring actions before the Court as there are cases which members' States cannot bring on behalf of its nationals.[18]

Article 9(4) of the Protocol on the CCJ, as amended, provides that 'the Court has jurisdiction to determine cases of violation of human rights that occur in any member state'. Because of the importance of the human rights jurisdiction of the CCJ, this article shall further analyse some key elements of the human rights jurisdiction of the CCJ. The CCJ has held that human rights protection is a cardinal and fundamental value of ECOWAS CCJ. In *Bakary Sarre & 28 ors v Republic of Mali*, where the CCJ held as follows:

> The Court recalls that one of the fundamental principles of the community featuring Article 4 of the Revised Treaty of 1993 is the recognition, promotion and protection of human and people's rights in accordance with the provisions of the Africa Charter on Human and People's Rights; the Protocol on Democracy, Election and Governance 2007, which was the forerunner of the expansion in the powers of the Court to cover human rights violations, was adopted by the community state, which according to its preamble is "mindful of the ratification of the African Charter on Human and Peoples Rights and other International human rights instruments by the majority of the community states […] that the guarantee in each of the community states, of the rights contained in the African Charter on Human and Peoples' Rights and other, international instruments, were set out in Article 1 of this instruments. Under the domain of constitutional convergence, human rights protection thus constitutes a cardinal and fundamental value for the community".

It should, however, be noted that the human rights jurisdiction of the CCJ is very fluid and indeterminate. There is no catalogue of human rights and the Protocol does not state the

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16 ECOWAS Revised Treaty of 1993 (n 2) art 76(1)(2).

17 *Olajide v Federal Republic of Nigeria* (n 10).

18 ibid.

applicable human rights instruments. This lacuna has presented the CCJ a great opportunity to define and delimit the scope and legal parameters of its human rights mandate. The fact that CCJ does not have its own catalogue of rights was noted by the CCJ in the case of *Ugokwe v FRN,*[19] where the CCJ held that:

> [i]n Articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloguing of various human rights but by the provision of Article 4 paragraph (g) of the Treaty of the community, the community states of the Economic community of West African States (ECOWAS) are enjoined to adhere to the principles including 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and People's Rights. Even though there is no cataloguing of the rights that the individuals or citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the community behooves on the Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter.[20]

The CCJ has also held that the scope of its human rights mandate is expansive. In *Linda Gomez and others v The Republic of the Gambia*,[21] where the CCJ stated that:

> [a]rticle9(4) of the Protocol on the Court as amended clearly gives this Court jurisdiction over any human rights violation that occur within community states of ECOWAS. The Court's human rights jurisdiction is expansive; indeed Article 10(d) of the Protocol as amended lays down only two conditions necessary to the admissibility of human rights causes that occur within ECOWAS community states. The Court has given many decisions establishing the extent, scope and legal boundaries of its human rights mandate.[22]

By virtue of Article 4(g) of the Revised Treaty and the Protocol on Democracy, Election and Governance, the CCJ applies the African Charter on Human and Peoples Rights (ACHPR).[23] The CCJ will also apply against any community State any international human rights instruments adopted or ratified by the community States, such as Universal Declaration of Human Rights (UDHR),[24] International Covenant on Civil and Political Rights (ICCPR),[25] and International Covenant on Economic, Social and Cultural Rights.[26] In *SERAP v Federal Republic of Nigeria,*[27] where the CCJ held that:

> […] even though ECOWAS may not have adopted a specific instrument recognizing human rights, the Court's human rights protection mandate is exercised with regard to all the international instruments, including the African Charter on Human and Peoples' Rights, the

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19 CCJ, *Jerry Ugokwe v Nigeria* (7 October 2005) ECW/CCJ/JUD/03/05.

20 ibid [29].

21 CCJ, *Linda Gomez and others v The Republic of the Gambia* (2013) CCJELR 307 [28]-[30].

22 ibid 310.

23 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter on Human and Peoples' Rights).

24 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

25 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

26 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (ICESCR).

27 CCJ, *SERAP v Federal Republic of Nigeria* (2012) CCJELR 349, 358.

> International Covenant on Civil and Political Rights, the international Covenant on Economic, Social and Cultural Rights, etc to which the community states of ECOWAS are parties.[28]

That these instruments may be invoked before the CCJ reposes essentially on the fact that all the community States parties to the Revised Treaty of ECOWAS have renewed their allegiance to the said legal instruments, within the framework of ECOWAS. Consequently, by establishing the jurisdiction of the CCJ, they have created a mechanism for guaranteeing and protecting human rights within the framework of ECOWAS so as to implement the human rights contained in all the international legal instruments they are signatory to. This reality is consistently held by the CCJ. See *Henri v Republic of Cote d'Ivoire*[29] and *Tasheku v Federal Republic of Nigeria.*[30] In *Henry v The Republic of Cote d'Ivoire*[31] the CCJ held that the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights are legal instruments that all ECOWAS member states, including the State of Cote d'Ivoire are signatories. At the community level, their eminent importance has been underlined, notably by the affirmation from all member states which vowed to expressly respect them.[32]

The commitment to the African Charter on Human and People's Rights is derived from its ratification by each of the ECOWAS community States, of two fundamental instruments, which are (1) the ECOWAS Revised Treaty and (2) the Protocol relating to Democracy Elections and Governance. As to the commitment to the Universal Declaration of Human and Peoples' Rights, its pre-eminent place in human rights law, as recognised by the ECOWAS community is as drawn by its mention in the preamble of the aforementioned Protocol. The rights recognised and affirmed by these legal instruments constitute international obligations, for member States within the scope of general international law and community law. By affirming their commitment expressly to these international legal instruments relating to human rights, the community and its component units (State parties) have surely in mind, the core element of the United Nations (UN) system which is enshrined in the UDHR and ICCPR, as well as the core as the expression of values of authentic civilization which they are ready to uphold.[33]

Consequently, while examining the extension of its jurisdiction over cases of human rights violation within the community landscape, the CCJ takes into consideration, not only the African Charter on Human and Peoples' Rights, but also, the UN' basic instruments, namely the UDHR and the ICCPR. These UN legal instruments were, at least, accepted by West African States, which have ratified or signed them. The CCJ notes that the State of Cote d'Ivoire ratified the ICCPR in 1992 and ratified the Supplementary Protocol to that Convention in 1997 as was held in *Henry v The Republic of Cote d'Ivoire*.[34] This same principle is also applicable to *SERAP v President, Federal Republic of Nigeria*[35] and *Koraou v Republic Of Niger,*[36]where the CCJ's ruling was the same. And in the matter between *SERAP v Federal*

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28 *SERAP v Federal Republic of Nigeria* (n 27) 340.
29 CCJ, *Henri v Republic of Cote d'Ivoire* (17 December 2009) ECW/CCJ/JUG/04/09.
30 CCJ, *Tasheku v Federal Republic of Nigeria* (12 June 2012) ECW/CCJ/RUL/12/12.
31 *Henri v Republic of Cote d'Ivoire* (n 29).
32 ibid 297-298.
33 Enabulele (n 5).
34 *Henri v Republic of Cote d'Ivoire* (n 29) 298.
35 CCJ, *SERAP v President, Federal Republic of Nigeria* (30 November 2010) ECW/CCJ/JUD/09/10.
36 CCJ, *Koraou v Republic Of Niger* (27 October 2008) ECW/CCJ/JUD/06/08.

Government Of Nigeria[37] where the Federal Government of Nigeria suspended the operations of Twitter in Nigeria, the applicant went to CCJ to challenge the suspension describing it as unlawful and inconsistent with the provisions of the ACHPR[38] and the ICCPR,[39] both of which Nigeria is a State party. The Nigerian government, however, urged the CCJ to dismiss it, arguing that the sub-regional court lacked the jurisdiction to entertain it. The CCJ ruled that it had the requisite jurisdiction to hear the matter and that by suspending the Twitter operation, Nigeria violated the rights of the applicant to the enjoyment of freedom of expression, access to information, and fair hearing.

a. Qualification, composition and tenure of the judges

The Protocol of the CCJ provides that the CCJ shall be composed of independent judges selected and appointed by the authority of Heads of States and Government from nationals of member States who are persons of high moral character and possess the qualification required in their respective States for appointment to the highest judicial office or are jury-consults of recognized competence in international law. It further provides that the CCJ shall consist of seven members who shall elect a president and vice president from among their members. It should be noted that the number of judges of the CCJ was reduced from seventh five in 2017.[40] Under the 1991 Protocol of the CCJ, the tenure of the judges was staggered and they were appointed for a renewable five-year term. In 2006, the tenure of the judges of the CCJ was reduced to four years non-renewable.[41]

The judges of the CCJ have security of tenure and cannot be removed from office except for gross misconduct or inability to perform the functions of office as a judge by reason of physical or mental disability. Their method of appointment is void of any political influence and guarantees their independence. As mentioned should possess a high moral character and qualification for appointment to the highest judicial officers or be a jurist-consults of recognized competence in international law. In addition, the authority normally selects from a list of persons nominated by members States that have vacancies in the CCJ. The decision of June 2006 establishing the judicial council of the community, adopted by the authority of Heads of State and Government, provides clear guidelines for the recruitment and discipline of the judges of the CCJ.[42] The decision establishes the Judicial Council of the community, which is responsible for the recruitment and disciple of judges of the CCJ. It is composed of the Chief Justices of the Supreme Courts of community States.

Vacant positions of membership of the CCJ are required to be advertised by the member States that the positions have been allocated. The Rules of Procedure of the community Judicial Council provides that 'member states to which vacant posts of Judges have been allocated shall ensure wide publicity of such positions as well as transparency and competitive criteria with a view to enlisting candidates from their most qualified nationals'.[43]

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37 CCJ, *SERAP v Federal Government Of Nigeria* (2021) ECW/CCJ/RUL/03/21.

38 African Charter on Human and Peoples' Rights (n 23) art 9.

39 ICCPR (n 25) art 19.

40 ECOWAS, 'Assembly Decision at the 51st Summit' (June 2017) A/DEC.2/5/17.

41 ECOWAS, 'Supplementary Protocol A/SP.2/06/06' (14 June 2006) A/SP.2/06/06 art 4(1), new paragraph 1.

42 ECOWAS, 'Establishing the Council of the Community' (14 June 2006) A/DEC.2/06/06.

43 ECOWAS, 'Regulation C/REG 23/12/07 Adopting the Rules of Procedure of the Community Judicial Council' (15 December 2007) C/REG 23/12/07.

The Revised Treaty guarantees the independence of the ECOWAS CCJ specifically provides that 'the Court of Justice shall carry out the functions assigned to it independently of the community states and the institutions of the community'.[44] In addition, the Protocol of the CCJ, as amended, also provides that the CCJ shall compose of independent judges.[45] *Insane v Republic of the Gambia,*[46] the CCJ declared *inter alia* that the CCJ is independent of all the institutions of ECOWAS and the member states. Also in *Falana & Amor v Republic of Benin*,[47] the CCJ stated as that:

> […] Article 15(1) of the Revised Treaty of ECOWAS stipulates in clear terms that, 'The Court of Justice shall carry out the function assigned to it independently of the member states and the Institutions of the community.' The provision, if given its literal interpretation, would defeat the submission and objection by the 10th Defendant, in respect of the composition of the panel of judges, in the case. The Court is independent of the member states. Consequently, the objection is untenable and accordingly rejected.[48]

b. Access to the court

The specific provision that governs access to ECOWAS CCJ for human rights complaints is Article l0(d) of the Protocol on the CCJ as amended, which provides that

> Access to the Court is open to the following: Individuals on application for relief for violation of their human rights; the submission of application for which shall not be anonymous; norbe made whilst the same matter has been instituted before another International Court/or Adjudication.

The *locus classicus* on the interpretation of Article 10(d) of the Protocol on the CCJ is *Dexter Oil Ltd v Liberia*,[49] where the CCJ harmonised its previous decisions and clarified its interpretation of Article 10(d) of the Protocol on the CCJ by limiting access to the CCJ for human rights violation to only individuals with a few exceptions where corporations can maintain action for human rights violations in respect of violation of the right of fair hearing, right to property, and right to expression. In the words of the CCJ:

> The time is ripe to revisit the interpretation of "*Toute Personne Victime*" as decided in the above cases in order to reconcile the divergent jurisprudence and with a well-reasoned decision of the issues for the guidance of the parties, lawyers appearing before the Court and scholars. "Whereas the English text of article 10(d) clearly states individuals (natural persons), the French texts of the same Article states *toute personne victime*" (every person that is a victim)'. Personne in the French text includes an individual who is a physical person and a corporate body which is a juristic person. The key word however is that the personne must be a victim of human rights violation. It is the opinion of this Court that, if Article 10 (c) (English and French Texts) categorically includes both individual and corporate bodies, same would have been repeated in 10 (d) if that was the intention of the drafters of the law. The Court therefore affirms that it is not the intention of the statute to accommodate corporate legal person in Article 10 (d) of both versions of the text. In order to harmonize the prior inconsistent decisions of the Court as highlighted above, this Court in the exercise of its inherent powers hereby departs from all

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44 ECOWAS Revised Treaty of 1993 (n 2) art 15(3).
45 ECOWAS, 'Supplementary Protocol A/SP.1/01/05' (n 11) Article 3.
46 CCJ, *Essien v Republic of Gambia* (29 October 2007) ECW/CCJ/APP/05/07.
47 CCJ, *Falana & Anor v Republic of Benin* (24 January 2012) ECW/CCJ/JUD/01/12.
48 ibid 118.
49 CCJ, *Dexter Oil Ltd v Liberia* (6 February 2019) ECW/CCJ/APP/03/19.

> decisions wherein corporate body are accommodated under Article 10 (d) of the 1991 Protocol on the Court as amended by the Supplementary Protocol 2005, and affirms only individuals have access for Human Rights violation except in internationally accepted conditions.[50]

There are only two conditions for admissibility of applications for human rights violation under Article 10(d)(ii) of the Protocol as amended. They are: (1) that the application must not be anonymous; (2) that the application must not be pending before another international court. The CCJ has applied the conditions in Article 10(d)(ii) of its Protocol, as amended, in its jurisprudence. In *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v The Federal Republic of Nigeria & Anor*.[51] The CCJ noted that for an application to be admissible before it the application must not be lodged anonymously rather, it must be lodged by identifiable parties. In the words of the CCJ:

> We note that this Application is lodged in this Court by SERAP, a non- governmental organization purportedly on behalf of alleged victims of human rights violation, who are not specifically identified or identifiable. To plead a case before this Court one must have suffered a personal harm. In support of this position, the texts controlling provides: "Access to the Court is open to […]Individuals on application for relief for violation of their human rights and the same text, for the purposes of accurate identification of such victims, add that: […]the submission of the application for which shall not be anonymous".[52]

In *Saidykhan v Republic of the Gambia*[53] the CCJ reiterated that applications for human rights violations can only be declared admissible where the application is not lodged anonymously, and where the same matter is not be before another international court. Also in:

> Article 10(d) of the Supplementary Protocol on the Court of Justice expressly grants jurisdiction to this Court with regards to human rights violations except that the application should not be anonymous, and the same matter should not be before another International Court. This is a provision of the Statute which cannot be ousted by implication.[54]

Also in *Ayika v Republic of Liberia*,[55] the CCJ ruled that the case was admissible notwithstanding the fact that it was alleged to be pending before the Supreme Court of a community State. It stated that:

> the pendency of an action before the Liberia Supreme Court is no bar to proceedings before this court; and, lastly that the exhaustion of local remedies is not a prerequisite in this court. It also decides that since the case is ripe for hearing the application for expedited hearing is rendered

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50 *Dexter Oil Ltd v Liberia* (n 49).

51 CCJ, *Registered Trustees of the Socio-Economic Rights &Accountability Project (SERAP) v The Federal Republic of Nigeria & Anor* (14 October 2015) ECW/CCJ/JUD/19/16.

52 ibid 23.

53 *Saidykhan v Republic of the Gambia* (16 December 2010) ECW/CCJ/JUD/08/10.

54 ECOWAS, 'Supplementary Protocol A/SP.1/01/05' (n 11); See also, Stephen Temitope, 'The Human Rights Jurisdiction and Jurisprudence of the Community Court of Justice of ECOWAS' (17 December 2020). <https://ssrn.com/abstract=3750610> accessed 18 January 2024.

55 CCJ, *Ayika v Republic of Liberia* (8 June 2012) ECW/CCJ/APP/07/11.

> irrelevant, and any decision will serve no useful purpose.[56]

c. Enlargement of the jurisdiction

The Supplementary Protocol adopted in 2005 expanded the jurisdiction of the CCJ and for the first time and gave direct access to individuals to access the CCJ in respect of certain causes of action. In addition to its primary mandate of interpreting and applying the Revised Treaty, Protocols, Conventions, and Supplementary Acts, the CCJ has competence to adjudicate on disputes relating to the legality of Regulations, Directives, Decisions, and other subsidiary legal instruments adopted by ECOWAS or the failure by member States to honor their obligations under the Treaty, Conventions and Protocols and other community texts. The Court also has competence to adjudicate on disputes relating to non-contractual liability of the community. It also has jurisdiction in respect of actions relating to damages against a community institution or an official of the community for any act or omission in the exercise of official functions.[57] The authority of Heads of State and Government can also grant the CCJ the power to adjudicate on any specific dispute that it may refer to the CCJ other than those specified in the Protocol.[58]

d. Advisory opinions

The CCJ has jurisdiction to give advisory opinion in respect of legal questions brought before it. The provision in respect of advisory opinion as contained in the Protocol which provides as follows:

> The Court may, at the request of the Authority, Council, one or more member states, or the Executive Secretary, and any other institution of the community, express, in an advisory capacity, a legal opinion on questions of the Treaty. Requests for advisory opinion as contained in paragraph 1 of this Article shall be made in writing and shall contain a statement of the questions upon which advisory opinion is required. They must be accompanied by all relevant documents likely to throw light upon the question.[59]

The advisory opinion is given in public and in the exercise of its advisory functions; the CCJ shall be governed by the provisions of the above Protocol which apply in contentious cases where the CCJ recognises them to be applicable. The CCJ has issued several advisory opinions at the request of the ECOWAS Commission.[60]

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56 *Ayika v Republic of Liberia* (n 55) 238.

57 ECOWAS, 'Supplementary Protocol A/SP.1/01/05' (n 11).

58 ibid art 9(8); ECOWAS Revised Treaty of 1993 (n 2) art 7(3)(g).

59 ECOWAS, 'Protocol A/P.1/7/91' (n 4) art 10.

60 See ECOWAS, 'Advisory Opinion, Requested by the President of the ECOWAS Commission' (6 December 2016) ECW/CCJ/ADV.OPN/01/16 685 <http://www.courtecowas.org/wp-content/uploads/2023/04/CCJE-LAW-REPORT-2016-ENGLISH.pdf> accessed 18 January 2024; ECOWAS, 'Request for Advisory Opinion from Executive Secretary of ECOWAS relating to Article 23 (11) of the Rules of Procedure of the community Parliament and the Provisions of Article 7 (2) and 14 (2) (f) of the Protocol on the community Parliament' (5 December 2005) ECW/CCJ/ADV.OPN/01/05 55 <http://www.courtecowas.org/wp-content/uploads/2023/04/CCJE-LAW-REPORT-2004-2009-ENGLISH.pdf> accessed 18 January 2024; See also ECOWAS, 'Request by the President of ECOWAS Commission on Renewal of the Tenure of the Director General and Deputy Director General of GIABA' (16 June 2008) ECW/CCJ/ADV.OPN/01/08 201 <http://www.courtecowas.org/wp-content/uploads/2023/04/CCJE-LAW-REPORT-2004-2009-ENGLISH.pdf> accessed 18 January 2024.

e. The concept of non-exhaustion of local remedies

Exhaustion of local remedies (domestic) is usually the first step in seeking redress for human rights violations. It is a step that requires a person attempt to use the available national legal protections to seek justice or reparation for the violation or abuse, appealing as necessary until the claim can be pursued no further at the national level. If such a person does not receive an adequate remedy from a national body, such a person may submit the complaint alleging human rights violations, for consideration by an international court or tribunal.

However, one key element of the human rights mandate of the CCJ is that exhaustion of local remedies is not a requirement. This is in contradistinction with the African Court of Human and People's Rights that makes the exhaustion of local remedies a core principle before filing a matter before the court.[61] In real terms, international customary law and the African Court of Human and Peoples' Rights' practices are equivalent. In this sense, the exhaustion of local (domestic) remedies rests on the principle that international bodies should supplement State institutions and should not get involved unless the human rights violation cannot be resolved at the national court. In this wise, before submitting a complaint to an international court or tribunal, for example a UN treaty body or a regional human rights court, an individual or organization must first attempt to remedy the situation using national proceedings. Generally, it requires that claims for human rights violation be first of all brought before the highest national authority, often the highest court of that nation State. The amended Protocol provides that access to the CCJ is open to individuals on application for relief for violation of their human rights on the condition that the application is not anonymous nor be made whilst the same matter has been instituted before another international court for adjudication.[62] The CCJ has therefore decided emphatically in a long line of cases, that exhaustion of local remedies is not a requirement under ECOWAS community texts for human rights litigation, such as in *Essien v Republic of The Gambia,*[63] *Koraou v Republic of Niger*[64] *and Saidy Khan v Republic of The Gambia*.[65]

The African Charter requires authors of communications to exhaust local remedies before resorting to the procedures of the African Commission 'unless it is obvious that this procedure is unduly prolonged'.[66] This provision implies and assumes the availability, effectiveness, and sufficiency of domestic adjudication procedures. If local remedies are unduly prolonged, unavailable, ineffective, or insufficient, the exhaustion rule will not bar consideration of the case.[67] The African Commission will decline to receive a case as long as domestic remedies are available, effective, and sufficient. According to the Commission, 'a

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61 African Charter on Human and Peoples' Rights (n 23) art 56. This article sets forth the criteria for consideration and admissibility from complainants seeking to lodge cases before African Commission or before the CCJ; see African Commission on Human and Peoples' Rights, *Dawda Jawara v Gambia* (11 May 2000) Comm No 147/95 and 149/96.

62 ECOWAS, 'Protocol A/P.1/7/91' (n 4) art 10(d).

63 *Essien v Republic of The Gambia* (n 46).

64 *Koraou v Republic Of Niger* (n 36).

65 CCJ, *Saidy Khan v Republic of The Gambia* (16 December 2010) ECW/CCJ/APP/11/07.

66 Nsongurua J Udombana, 'So Far, so Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97American Journal of International Law 1.

67 *Dawda Jawara v The Gambia* (n 61).

remedy is available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the complaint'.[68]

In *RADDHO v Zambia*,[69] the Government of Zambia objected on grounds of non-exhaustion of domestic remedies to a case filed on behalf of several hundreds of West African nationals expelled en masse by Zambia. In dismissing Zambia's objection and upholding the admissibility of the communication, the Commission reasoned that Article 56(5) of the Charter 'does not mean […] that complainants are required to exhaust any long remedy which is found to be, as a practical matter, unavailable or ineffective'.[70] The Commission pointed out that the victims and their families concluded that the remedies referred to by the respondent State were as a practical matter unavailable.[71]

These principles, in the jurisprudence of the Commission, extend to those cases where it is 'impractical or undesirable' for a victim or applicant to approach domestic courts.[72] This is applicable in many cases to victims of torture and forced displacement.

Indeed, a regime of impunity for torture would trigger an exception to the exhaustion requirement. The African Commission took this view in *OMCT et al v Rwanda*,[73] in which it considered the Rwandan government's mass expulsion of Batutsi Burundian refugees to Burundi. In its 1996 decision, the Commission held on the question of admissibility that 'in view of the vast and varied scope of the violations alleged and the large number of individuals involved […] remedies need not be exhausted'.[74] On the merits, the Commission found multiple violations of the African Charter, including due process rights and the prohibition against torture and cruel, inhuman and degrading treatment. The Commission further held that Article 12(3) of the Charter 'should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another State',[75] and that Article 12(4) effectively prohibits refoulement of asylum seekers and refugees, making it also part of the protection against torture. It is also arguable that the absence of effective remedies against torture would constitute an exception to the rule requiring exhaustion of domestic remedies as this would in reality mean the absence of sufficient or adequate remedies.

In practice, the authors of communications should indicate not only the available remedies but also the efforts made to exhaust such remedies. Communications should similarly state any difficulties, legal as well as practical, encountered in trying to utilise available remedies and should describe the outcome of efforts made. In *Stephen O. Aibe v*

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68 ibid 31-33.

69 Communication 71/92, *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia* (2000) 6 IHRR 825.

70 ibid.

71 ibid.

72 Communication 27/89, 46/91, 46/91, *Organisation Mondiale Contre la Torture et al v Zaire* (1996) 27/89-46/91-49/91-99/93

73 ibid

74 ibid; but see, Communication 162/97, *Mouvement des Refugies Mauritaniens au Senegal v Senegal* (2000) AHRLR 287 (ACHPR 1997), in which the Commission, on grounds of non-exhaustion of domestic remedies, declined to consider a communication initiated on behalf of Mauritanian refugees in Senegal who alleged wide ranging violations against Senegalese security forces.

75 ibid; it should be stressed that the right guaranteed in art 12(3) of the African Charter is that to 'seek and obtain asylum'. The African Charter is unique in this respect in including an implicit obligation on the States Parties to grant asylum once the circumstances stipulated in the article are fulfilled.

Nigeria,[76] the Commission declared a communication inadmissible because the complainant had alleged that he sought redress before 'several authorities'. The Commission has no indication in the file before it that there was any proceeding before the domestic courts on the matter. In a latter case, *Rights International v Nigeria*,[77] finalized in 1999, a person fleeing the dictatorship in Nigeria was eventually accorded refugee status in the USA. As he took to flight for fear of his life, the person was not required to return to Nigeria in order to exhaust local remedies.

At the Commission's 27th session, held in October 2000, three further cases concerning this question were finalised. In two of them, the Commission followed the line of argument established in previous cases. In one of the cases, *Dawda Jawara v Gambia*,[78] a previous Head of State submitted a complaint related to his deposition and events following the coup d'état that removed him from power .In the third case, *Legal Defence Centre v The Gambia,*[79] the Commission seems to have deviated from its own jurisprudential approach, without justification. In this case, the Commission required exhaustion of local remedies by a complainant in a situation analogous to those just discussed. The complainant was a Nigerian journalist, based in The Gambia, who was ordered to leave The Gambia after his reporting caused embarrassment to the Nigerian Government. Ostensibly, the Journalist was deported to 'face trials for crimes he committed in Nigeria'. His deportation took place within a very short time, and he was not arrested or prosecuted. Despite the uncontested allegation presented as part of his argument that he cannot return to The Gambia because the deportation order was still valid, the Commission for the first time, and in clear disregard of its jurisprudence, including two findings taken during the very same session, required that a complainant that had fled or was otherwise forced to leave a country to instruct counsel in the country that he had left. This requirement may place an unreasonable and insurmountable financial and logistical burden on victims in similar circumstances.

The finding also contradicts a line of cases dealing specifically with deportation, in which the exhaustion of local remedies was not required. Under circumstances of mass expulsion that prevented a group of West Africans in Zambia and in Angola from challenging their expulsion, the Commission did not require them to attempt exhaustion of local remedies in the countries to which they had been expelled.[80]

The effect of this is far-reaching because victims of human rights violations may choose to directly approach the ECOWAS CCJ without exhausting local remedies at the national courts. Although the exhaustion of local remedies is a well-recognised principle of customary international law, the CCJ has held that it can be waived or legislated away as was held in *Saidykhan v Republic of the Gambia*.[81] The CCJ also refused the invitation to treat the lack of provision for exhaustion of local remedies as a *lacuna* in the law that it can fill in, using its

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[76] Communication 252/2002, *Stephen O Aigbe v Nigeria* (2003) AHRLR 128 (ACHPR 2003).

[77] Communication 215/98, *Rights International v Nigeria* (2000) AHRLR 254 (ACHPR 1999).

[78] *Dawda Jawara v The Gambia* (n 61).

[79] Communication 219/98, *Legal Defence Centre v The Gambia* (2000) AHRLR 121 (ACHPR 2000).

[80] *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia* (n 69); Communication 159/96, *Union Interafricaine des Droits de l'Homme and Others v Angola* (2000) AHRLR 18 (ACHPR 1997).

[81] ibid.

judicial discretion.[82] In *Saidy Khan v The Republic of the Gambia*[83] the CCJ held that:

> [t]he drafters of the Supplementary Protocol clearly decided against making the exhaustion of local remedies a condition precedent to the accessibility of this Court in human rights violation causes. The fact that there is a rule of customary international law in support of the view that local remedies ought to be exhausted before a plaintiff can properly go before international Courts is not in doubt. However, this is not an inflexible rule. It can be legislated away or even parties can compromise it. Article 10(d) of the Supplementary Protocol is an example of legislating out of the rule of customary international law regarding the exhaustion of local remedies. With the enactment of the Supplementary Protocol, ECOWAS member states expressly dispensed with the customary international law rule regarding the exhaustion of local remedies before access is granted to Plaintiffs coming before this Court.[84]

In *Obioma C Ogukwe v Republic of Ghana*[85] the CCJ held that:

> [t]he jurisprudence of this Court is rich in its decision that the exhaustion of local remedies is not a precondition to come before the Court. The Applicant can come directly without having to first institute a suit in the domestic court, or, he can institute such a in this Court while that other suit is pending, thus it is possible to maintain both suits simultaneously.[86]

f. Reference from national courts of community states

A very important aspect of its mandate as a CCJ is in respect of preliminary rulings. Since the CCJ has exclusive jurisdiction in respect of the interpretation and application of ECOWAS community texts,[87] national courts of member States are required to refer issues of interpretation of community texts to the ECOWAS CCJ in order to ensure uniformity in the interpretation of community texts. Specifically, the Protocol as amended provides that:

> [w]here in any action before a court of a community State, an issue arises as to the interpretation of a provision of the Treaty, or the other Protocols or Regulations; the national court may on its own or at the request of any of the parties to the action refer the issue to the Court for interpretation.[88]

The European Court of Justice (ECJ) exercises similar jurisdiction under the concept of a preliminary ruling, although the issue of referral is discretionary as stipulated above, it appears to be more evolved in the practice of ECJ for preliminary rulings.[89] This concept of a preliminary ruling as practiced by the ECJ is yet to take place in the context of regional integration in Africa. No national court of a member State has referred a matter for the interpretation of ECOWAS community texts to the CCJ.

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82 ibid.
83 ibid.
84 *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia* (n 69); *Union Interafricaine des Droits de l'Homme and Others v Angola* (n 80).
85 CCJ, *Obioma Co Ogukwe v Republic of Ghana* (2016) ECW/CCJ/JUD/20/16.
86 ibid 9.
87 ECOWAS, 'Supplementary Protocol A/SP.1/01/05' (n 11) art 23(1).
88 ibid art 10(f).
89 Consolidated Version of the Treaty on the Functioning of the European Union (2008) OJ C 306/1 art 267.

g. ECOWAS CCJ does not operate as an appellate court over national courts

The CCJ has also made it crystal clear in several decisions that it does not have appellate jurisdiction over the decisions of national courts. In *Frank Ukor v Rachad Lalaye and the Government of the Republic of Benin*,[90] the CCJ in its judgment stated that:

> [w]e therefore agree with Counsel to the 2nd Defendant that he acts complained of by the Applicant/Plaintiff are devoid of violation of Human Rights. We therefore state that there is a serious misconception as to whether the complaint of the seizure and confiscation of the truck and goods therein, upon the Court order, violates the rights of free movement of goods which Counsel hinges upon as Human Rights violation. It is trite that a valid order of the Court stands until any person dissatisfied with same makes the move by following the relevant judicial process to set it aside. Consequently, this Court which has no appellate jurisdiction over the decisions of the Courts of member state, cannot act as one through this process that Counsel of the Applicant/Plaintiff impressed upon it to enforce. On this note, this Court declines to act outside its mandate as specified in Protocol A/P 1/7/91 and the Supplementary Protocol (A/SP.1/0]I/05) which clearly spelt out such mandate.[91]

In *Derry & 2 others v The Republic of Ghana*,[92] the CCJ further reiterated that it is not an appellate court and will only admit cases from national courts where human rights violations were alleged in the course of the proceedings. Article 4 of the Supplementary Protocol amended the Protocol of the CCJ by the insertion of a new Article 10 in the Protocol of the CCJ in respect of access to CCJ. It provides access to the CCJ to member States, individuals, corporate bodies and staff of institutions of ECOWAS in respect of certain causes of action.

h. Practice and procedure before the CCJ

The Practice and Procedure of the CCJ is governed by Protocol A/P1/7/91, the Rules of Procedure of the CCJ and instructions to Chief Registrar and Practice Direction. The Procedure of the CCJ is divided into two parts, written procedure and oral procedure. The written procedure shall consist of the application, the defence, the reply or counter-statement, the rejoinder and any other briefs or documents in support. The Oral procedure shall consist of hearing of parties, agents, witness, experts, advocates or counsels. The CCJ has through its jurisprudence established its practice and procedure relying on its Protocol, Rules of Procedure and general principles of law in numerous decisions. It must be noted that the ECOWAS CCJ is an international court and its practice and procedure is different from that of the national courts. It is therefore advisable that lawyers that want to appear before the ECOWAS CCJ are familiar with its practice and procedure.

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[90] CCJ, *Frank Ukorv Rachad Lalaye and the Government of the Republic of Benin* (2 November 2007) ECW/CCJ/APP/04/05.

[91] *Frank Ukorv Rachad Lalaye and the Government of the Republic of Benin* (n 90) 145.

[92] CCJ, *Derry & 2 others v The Republic of Ghana* (29 April 2019) ECW/CCJ/JUD/17/19; see also *Jerry Ugokwe v Nigeria* (n 19).

III. The opportunity missed by ECOWAS CCJ in Hissene Habre's trial

With the vast human rights jurisdiction of this CCJ, it was therefore a surprise why this CCJ will rule that the matter of Hissene Habre cannot be tried in Senegal.[93] Habre ruled the Republic of Chad between 1982 and 1990 was accused of human rights, humanitarian rights abuses, torture and genocide.[94] According to Magliveras:

> Habre belongs to that generation of brutal African dictators who destroyed their countries 'structures and institutions and sentenced their population to underdevelopment and to extremely low standard of living. In their turn, the policies pursued by these dictators have resulted in their countries' inability to take full advantage of the economic growth and expansion that Africa has experienced.[95]

A commission of inquiry was thereby setup by his successor in office, late Idris Deby who was also killed in a battle in 2021. By this period, Hissene Habre has already fled to Senegal. The report of the commission concluded that Habre's regime led to 'more than 40,000 victims, more than 80,000 orphans, more than 30,000 widows, more than 200,000 people left with no moral or material support as a result of this repression'.[96] The commission recommended the prosecution of those involved in the crimes. As a result, in 2008, Hissene Habre was prosecuted *in absentia* in Chad and sentenced to death.[97] In the years that followed, Chad failed to secure his extradition from Senegal and the enforcement of his sentence.

At the same time, inspired by the Pinochet case, in which a Spanish court exercised universal jurisdiction to hear a case brought against the former Chilean dictator,[98] civil society groups intensified their efforts to try Habre in Senegal. Led by Human Rights Watch, they filed an application before the Senegalese court in January 2000. Habre was subsequently indicted, and his lawyers challenged the criminal prosecution. In April 2000, Senegalese Court of Appeal of Dakar dismissed the indictment, finding a lack of jurisdiction.[99]

Under increasing international pressure, in 2005, Senegal reported the case of Hissene Habre to African Union (AU) for an African solution. In January 2006, the Assembly of Heads of State and Government of the AU established an expert committee to advice on the situation. The resulting report was discussed during the following Summit and

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93 Akin Olawale Oluwadayisi, 'An Assessment of the Statute and Mandate of the Economic Community of West African States Towards Advancing her Member Nations' (2020) 2(2) International Journal of Comparative Law and Legal Philosophy 125.

94 Kameldy Neldjingaye, 'The Trial of Hissene Habre in Senegal and Its Contribution to International Criminal Law' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press, 2011) 185; 'The Trial of Hissene Habre' (*Human Rights Watch*, 2007) <http://www.hrw.org/legacy/backgrounder/africa/habre0107/> accessed 12 December 2024.

95 Konstantinos D Magliveras, 'Fighting Impunity Unsuccessfully in Africa: The African Union and Habre case' (Paper for Albany Law School, New York, 12-14 April 2012).

96 ibid.

97 ibid.

98 Steve Czajkowski, 'Chad Court Sentences Ex-Dictator Habre to Death in Absentia' (*JURIST,* 16 August 2008) <https://www.jurist.org/news/2008/08/chad-court-sentences-ex-dictator-habre/> accessed 19 April 2022.

99 Elihu Lauterpacht, C J Greenwood and A G Oppenheimer, 'Introductory Note: In re Augusto Pinochet Ugarte' (August 2002) 119 ILR 1.

the AU mandated Senegal to try Habre on behalf of the continent.[100] In response, and with the plan to organize the trial, Senegal amended its domestic law,[101] but Habre complained to the CCJ about the retrospective nature of the new legal framework. The CCJ found a retroactivity problem, holding that the new laws violated Habre's rights.[102] According to Alter, Helfer and McAllister:

> We had low expectations for the ECOWAS Court. Human rights violations, destabilizing coups, and civil unrest are sadly commonplace in West Africa, and domestic legal instruments are generally weak. We anticipated that national governments in such a region would resist giving an international court the power to review human right claims from private litigants. And if officials did give the court such authority, we expect that they put in place political checks to carefully control the judges and their decisions. What we found - based on a review of ECOWAS Court decision and more than two dozen interviews with judges, community officers, government officials, attorney, and Non-Governmental Organization – was quiet different. The member states gave the ECOWAS Court a broad human right jurisdiction, and they have eschewed opportunity to narrow the Court's authority.[103]

The above is quite true and it is surprising and alarming that the CCJ rules against the prosecution of late Habre. In the interim, Senegal complained that it had delayed prosecuting Habre due to his obligation to obey the ECOWAS CCJ judgment.[104] The ECJ made an equivalent shift in the 1970s, more recently, courts associated with other sub-regional economic communities, most notably, the East African Court of Justice (EACJ) and the Tribunal of the Southern African Development Community (SADC Tribunal), have made similar moves. In all three instances, however, the judges themselves asserted the authority to adjudicate human rights claims. In Africa, the political and legal consequences of these bold assertions of competence are still unfolding, but early evidence indicates that the EACJ and the SADC Tribunal have faced greater opposition from governments than has the CCJ.[105]

The ECOWAS CCJ judgment led the Government of Senegal to engage in negotiations with the AU for an alternative solution. The agreement signed on 22 August 2012, is the result of these negotiations. The agreement includes the Statute of the Extraordinary African Chambers (EAC) that provides the operational criminal code for

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[100] *Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 128.

[101] African Union, 'Decision on the Hissene Habre Case and the African Union' (2006) AU Doc Assembly/AU/Dec. 103 (VI); African Union, 'Decision sur le Process D'Hissene Habre et L'Union Africaine' (2006) AU Doc Assembly/AU/Dec.127 (VII) (July 2006). The Republic of Senegal to prosecute and ensure that Hissene Habre is tried, on behalf of AU, by a competent Senegalese court with guarantees for fair trial.

[102] CCJ, *Hissene Habre v Senegal* (18 November 2010) ECW/CCJ/JUD/06/10.

[103] Karen J Alter, Laurence R Helfer and Jacqueline R McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 American Journal of International Law 737, 738.

[104] *Obligation to Prosecute or Extradite* (n 100) [110]. The ICJ rejected Senegal's argument, holding that 'Senegal's duty to comply with its obligations under the (UN) Convention (Against Torture) cannot be affected by the decision of the ECOWAS Court of Justice'.

[105] Solomon Ebobrah, 'Litigating Human Right Before Sub-regional Courts in Africa' (2009) 17(1) African Journal of International and Comparative Law 79; Lucyline Nkatha Murungi and Jacqui Gallinetti, 'The Role Sub-Regional Court in the African Human Rights System' (2010) 7 International Journal of Human Rights 119.

prosecution. The EAC tried Habre and found him guilty on all on all the charges. His appeal against conviction and sentence was equally dismissed by the Appellate Chambers of the EAC.[106]

In addition, in *David v Uwechue*,[107] the CCJ have also rejected litigants' attempts to assert human right claims against individuals, corporations, and sub national political bodies. The same ratio was also decided in *Hassan v Nigeria.*[108] This was also the case in *SERAP v Nigeria,*[109] where the CCJ did not order the Nigerian government to allocate whatever funds needed to educate all primary school age children. Instead, based on evidence that particular funds had been embezzled from the national education program, the CCJ ordered Nigeria to take the necessary steps to provide the money to cover the shortage while the government at the same time makes efforts to recover the looted funds and the prosecution of those found culpable. This CCJ in the above named cases ought to have made the ancillary orders that would have compelled the government to do the needful.

IV. Challenges of the CCJ

The CCJ faces a lot of challenges in its operations, some of which are briefly discussed. First, the issue of the enforcement of the judgment of the CCJ is most profound. The ECOWAS Revised Treaty and the Protocol on the CCJ have provisions in respect of the binding nature of the judgments of the CCJ. Specifically, the Revised Treaty provides that '[j]udgments of the Court of Justice shall be binding on member states, the institutions of the community and on individuals and corporate bodies'.[110] Also, the Revised Treaty went further to provides '[…] failing this, either party or any other member State or the Authority may refer the matter to the Court of the community whose decision shall be final and shall not be subject to appeal'.[111] Decisions of the CCJ are final and immediately enforceable. Again the Protocol of the CCJ as amended provides that '[d]ecisions of the Court shall be read in open court and shall state the reasons on which they are based, subject to the provisions on review contained in this Protocol, such decisions shall be final and immediately enforced'.[112] On the other hand, the Protocol on the CCJ as amended provided that 'member states and institutions of the community shall take immediately all necessary measures to ensure execution of the decision of the Court'.[113] In *Essien v Republic of the Gambia*[114] the CCJ declared that 'this Court is the highest judicial organ of the community (ECOWAS) and its decisions are not appealable and are therefore binding on all the member states'.

On the enforcement of the judgment of the court, Onabulele and Bazuaye observed that:

> […] the problem of ineffective enforcement of the right of individuals still pervading the African continent despite the proliferation of international human rights Courts/Tribunals in Africa, locates, not in the will and independence of the judges, as is often the case with municipal

[106] EAC, *The Prosecutor General v Hisseine Habré* (Appeal Judgment) (27 April 2017).
[107] CCJ, *David v Uwechue* (11 June 2010) ECW/CCJ/APP/04/09.
[108] CCJ, *Hassan v Nigeria* (15 March 2012) ECW/CCJ/APP/03/10.
[109] *SERAP v Nigeria* (n 12).
[110] ECOWAS Revised Treaty of 1993 (n 2) art 15(4).
[111] ibid art 76(2).
[112] ibid art 20(2).
[113] ibid art 23(3).
[114] *Essien v Republic of Gambia* (n 46).

> courts, but in the willingness of African States to give the court the legal bulldog teeth to function effectively.[115]

Nothing can be further than this. In *Garba v The Republic of Benin*,[116] the applicant, a community citizen complained of his inhuman treatment by the Beninois immigration officials and got judgment in his favour pursuant to African Charter on people and Human Rights. The court delivered judgment in his favour but he was unable to enforce the judgment.

Article 24 of the Protocol on the CCJ as amended provides the method of enforcement of the judgments of the CCJ. Specifically, Article 24(2) provides that the

> execution of any decision of the Court shall be in the form of writ of execution, which shall be submitted by the Registrar of the Court to the relevant member state for execution according to the rules of civil procedure of the member state.

Also, Article 24(4) of the Protocol on the CCJ as amended provides that '[a]ll member states shall determine the competent national authority for the purpose of receipt and processing of execution and notify the Court accordingly'.

Second, accessibility of this CCJ to citizens of member states of ECOWAS is also of great concern. This is a single court serving fifteen States. Notwithstanding that this CCJ goes on assizes to member States is not adequate at all. The percentage of citizens that are aware of the existence of this court is very low. Three, the funding of this sub-regional court is also a matter of utmost concern. Most member States of ECOWAS are unwilling to pay their annual accessed contributions to this body that will in turn fund the CCJ. Fund is needed for promoting the activities of the CCJ so that citizens of member States will be aware of her existence. On the same note, the judgments of the CCJ need to be well-reported in the official languages of the CCJ, ie, English, French, and Portuguese.

V. Recommendations

This work recommends that there ought to be an Appeal Chambers of the CCJ as a key best practice. It is pertinent to mention that the national court of each member state has appellate courts. Even the Extra-ordinary Chambers that tried Hissene Habre had appellate Chambers. Paul said 'I appeal to Caesar' and Festus replied 'since you have appealed to Caesar you will go to Caesar'.[117] Under human rights law, the right to appeal is universally accepted under various charters including ICCPR, the American Convention on Human Rights, the European Convention on Human Rights and the African Charter. However, appeal process may vary between legal systems, for example: one may be required to obtain leave to appeal or may only appeal on paper without oral hearing. Also, the basis of appeal may differ. For example, the European Court of Human Rights (ECHR) has established that in common law jurisdictions, a judgment from a court of first instance (trial court) may be appealed only on the basis of an error in fact or law which may be substantive or procedural.[118] Similarly the East African Court of Justice has explained that a higher court

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[115] Enabulele (n 5).
[116] CCJ, *Garba v The Republic of Benin* (17 February 2010) ECW/CCJ/APP/09/08.
[117] The Book of Acts of the Apostles (The Holy Bible) 25:11-12.
[118] See *Krombach v France* App no 29731/96 (2001).

only has jurisdiction to decide matters of appeal on errors of law or fact or procedural irregularities.[119]

There are no effective remedies when a victim is denied access to an effective appeal.[120] In the Sudan cases *(Law office of Ghazi Suleiman v Sudan)*,[121] the Commission described the right to an appeal as 'a general and non-derogable principle of international law'. The Commission defined an 'effective appeal' in the Sudan cases as one that 'subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice'.[122] It held that domestic legislation in both Mauritania and Nigeria that permitted the executive the prerogative to confirm decisions of first instance tribunals, in lieu of a right of appeal, violated Article 7(1)(a).[123]

Second, virtual filing and hearing of cases should be introduced. This will enable ECOWAS citizens living outside Abuja, Nigeria to have the opportunity of being heard by the CCJ. Third, it is also imperative for the CCJ to collaborate with national courts of members States in respect of enforcement of its decisions. According to the revised Treaty of the CCJ, this provides that 'all member states shall determine the competent national authority for the purpose of receipt and processing of execution and to notify the court accordingly'.[124] As at 2021, only six member states, Nigeria, Guinea, Mali, Burkina Faso Togo, and Ghana have complied with the treaty obligation.[125] The non-enforcement of the judgment of the CCJ affects to a very large extent the credibility of the CCJ. It is also suggested that the Protocol of the CCJ should be amended to make provisions for legal aid by the community members for indigent litigants whose rights might have been violated. Counsel should be encouraged to take up pro-bono cases for poor litigants.

Fourth, the CCJ should have both criminal and civil jurisdictions so as to try the so called 'warlords' and those involved in unconstitutional change of government in the West Africa sub-region. Thus, there will be no need to set up an *ad hoc* tribunal like the Extraordinary African Chambers like the one that tried Hissenne Habre in Senegal.

Finally, the protocol of the CCJ should be amended to include a non-derogation clause which itself will prevent state parties from enacting laws that will oust the jurisdiction of the CCJ from entertaining some fundamental human right cases.[126] In comparison with the Inter-American human right system, the Inter-American Convention on Human Right though technically, is not a treaty that is legally binding, it is still considered by the Inter-American Court of Human Rights and the Inter-American Commission on human rights as

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[119] See the case of *Attorney General of United Republic of Tanzania v African Network for Animal Welfare* (2014) Appeal No 3 of 2014 61-62.

[120] Frans Viljoen & Chidi Odinkalu, *The Prohibition of Torture and Ill-Treatment in the African Human Rights System: A Handbook for Victims and their Advocates* (2nded, OMCT Handbook Series Vol 3 2014)

[121] Law Office of Ghazi Suleiman v Sudan, 'Communication 222/98, 229/99, Sixteenth Activity Report' (2003) AHRLR 143 (ACHPR 2003).

[122] ibid.

[123] ibid.

[124] ECOWAS Revised Treaty of 1993 (n 2) art 24.

[125] 'ECOCOURT Bulletin' (*ECOWAS Court of Justice*, October 2021) <http://www.courtecowas.org/wp-content/uploads/2022/01/Bulletin-External-Court-Session-Edition.pdf> accessed 29 July 2022.

[126] Ali Abdi Jibril, 'Derogation from Constitutional Rights and its Implication under the African Chapter on Human And People's Rights' Law, Democracy And Development' (2013) 17 Law, Democracy & Development 78.

a credible source of human rights provisions that member states must abide by.[127] As a matter of fact and law many earlier human rights instrument such as the UDHR are so reflected in the American Convention on Human Rights, it becomes binding in the sense that states under the American Human Rights system, commit 'to respect the rights and freedoms recognized' in the Convention as stipulated in Article 1 of the American Convention. A clear example of the occurrence of such can be seen in the case of *Tanganyika Law Society & Anor v Tanzania*[128] where amendments to the Tanzanian Constitution violated the right of the citizens accorded by the African Charter, hence an issue of incompatibility of domestic and regional legislation. Even though the African Court in its decision highlighted on the obligation to cure the incompatibility found in domestic laws, this can be viewed as an obligation limited to Tanzania except and until it is incorporated as a binding legislation in the Charter. Thus, this could be fixed by taking reference from the Inter-American system approach.[129]

VI. Conclusion

In this work the history of ECOWAS CCJ has been traced. The composition, powers, and jurisdiction of the CCJ has been discussed. The argument of this paper is that with the expansive and very broad powers of the ECOWAS CCJ, the CCJ was seized of the matter of Hissenne Habre rather than ruling on the principle of non-retroactivity of laws and punishment under Article 7 of the African Charter; Article 8 of the UDHR and Article 3(4) of ICCPR, this CCJ ought to have entertained this matter. With the recent increase of unconstitutional changes of government in the sub-region and the attendant or envisaged rise in the abuse of human and humanitarian rights, this court needs to be pro-active. If the recommendations listed above are implemented, it will greatly enhance the realization of the objectives for setting up the CCJ.

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[127] Ebrima Sowe, 'The Weakness of the of the African Human Rights System in Comparison with the Inter-American Human Rights System' (Academic Paper at the University of the Gambia, 2019) <https://www.grin.com/document/509902> accessed 2 August 2022.

[128] *Law Society & Anor v Tanzania* App No 011/2011 (13 June 2014) IHRL 3931.

[129] ibid.