



**COMPENDIUM
OF SEMINAR PAPERS PRESENTED
AT THE INTERNATIONAL CONFERENCE**

**ORGANIZED BY THE
COMMUNITY COURT OF JUSTICE, ECOWAS
BANJUL, THE GAMBIA.**

22ND - 25TH MAY, 2023

THEME

**ECOWAS' ZERO TOLERANCE FOR UNCONSTITUTIONAL
CHANGE OF GOVERNMENT**



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FOREWORD

Foreword

In the ever-evolving landscape of international law and regional integration, the role of judicial bodies such as the ECOWAS Court of Justice remains indispensable. As part of its annual work programme, the ECOWAS Court of Justice continues to uphold its commitment to fostering legal discourse and strengthening the rule of law within the ECOWAS Community. One of the Court's pivotal initiatives is the organization of international conferences, hosted in collaboration with various Member States, to address pressing legal issues and thematic concerns that impact the region.

The 2023 International Conference, held from the 22nd to the 25th of May in Banjul, The Gambia, centered on the critical theme of “ECOWAS' Zero Tolerance for Unconstitutional Change of Government.” This theme underscores the Court's dedication to addressing an urgent and grave issue within the ECOWAS Community's legal framework. The conference brought together scholars, jurists, and stakeholders from Member States to engage in a comprehensive examination of this vital topic.

The objectives of the 2023 International Conference were multifaceted. Primarily, it aimed to critically appraise the tendency for unconstitutional change of government in some Member States of ECOWAS, alongside the ECOWAS policy of Zero Tolerance for such changes and its application and legal implications. Additionally, the conference sought to scrutinize the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping, and Security, as well as the Sanctions Regime associated with these policies.

The conference also provided a platform to examine the ECOWAS Constitutional Convergence Principles, emphasizing the need to respect human rights, the rule of law, democracy, and good governance to maintain regional peace and security. Participants delved into the factors responsible for the subversion of constitutional democratic order, such as the lack of free, fair, and transparent elections, weak institutions, poor human rights profiles in most member states, and the general lack of accountability for non-fulfillment of treaty obligations.

The discussions were structured around several sub-themes, each addressing a critical aspect of the overarching issue.

This compendium of conference papers is a testament to the rigorous intellectual engagement and collaborative spirit that characterized the 2023 International Conference. It reflects the collective insights and recommendations of the distinguished participants, providing a rich resource for scholars, practitioners, and policymakers committed to advancing the rule of law and constitutional governance within the ECOWAS Community.

As we present this collection, we are reminded of the pivotal role that the ECOWAS Court of Justice plays in promoting justice, peace, and security in the region. We hope that the papers contained herein will inspire continued dialogue and action towards achieving the goals of democracy, good governance, and the protection of human rights.

In conclusion, I extend my heartfelt gratitude to all contributors, organizers, and participants for their invaluable efforts in making the 2023 International Conference a resounding success. May this compendium serve as a beacon of knowledge and a catalyst for positive change in our collective pursuit of justice and the rule of law.

Hon. Justice Edward Amoako Asante
President

CONCEPT NOTE

1. The ECOWAS Court of Justice, as part of its annual work programme, organises international conferences that it hosts in any selected Member State in collaboration with the host government. The international conference provides a forum for the Court to examine, in conjunction with scholars, jurists, and stakeholders from Member States, important and topical legal thematic issues. The 2023 international conference therefore gives the Court the opportunity to address an urgent and grave issue of concern in the ECOWAS Community legal landscape. In the past two years, there have been unconstitutional changes of government in three Member States of ECOWAS, following the military coups in the Republics of Mali, Guinea and Burkina Faso.
- 2) This unfortunate development is a throwback to the founding era of the Economic Community of West African States. As at 28th May 1975, when the Treaty of Lagos that established the Economic Community of West African States was adopted, eight of the sixteen Member States that signed the Treaty establishing ECOWAS, were under military dictatorships that came to power through military coups.
- 3) However, ECOWAS progressively overcame that era, and in the new millennium, boasted of democratic governance in all ECOWAS Member States, however imperfect the constitutional orders were. It was a deliberate policy of ECOWAS, that later resulted in its zero tolerance for unconstitutional change of government in the Community, in line with the trending global emphasis on participatory democracy and constitutional order. Despite the best efforts of ECOWAS to enthrone democracy, rule of law and good governance in the sub region, the unconstitutional change of government in the said three Member States is a grave setback for the Community.
- 4) It is therefore of grave concern to key stakeholders, that the West African sub region has once again, suffered a rash of military interventions in governance, with the risk of spreading to other Member States. The Authority of Heads of State and Government of ECOWAS has taken the proactive step of suspending the three Member States (Mali, Guinea and Burkina Faso) from the Community and imposed a range of sanctions, while still engaging with the military dictatorships for restoration of democracy and constitutional order in the three countries as soon as possible. In addition, at its recent summit in Abuja, the Authority of Heads

of State and Government decided to recalibrate the security architecture of the community and declared its determination to establish a regional force that will intervene in the event of need, whether in the area of security, terrorism or to restore constitutional order in Member States, in order to boost constitutional governance in Member States.

- 5) Indeed, ECOWAS has made deliberate efforts in the past, to enthrone participatory democracy in the sub region and to put the era of unconstitutional governments firmly in its past and to sanction unconstitutional change of government.
- 6) It would be recalled, that, following the civil war in Liberia which began in 1989, and which later spread to Sierra Leone, the Authority of Heads of State and Government of ECOWAS in July 1991, adopted the Declaration of ECOWAS Political Principles, in which they declared their adherence to certain principles, in order to enhance the prospects of advancing; "our economic cooperation and integration in a political environment of peace, security and stability". In addition to pledging to respect human rights and fundamental freedoms in all their plenitude, the Heads of State amongst others, declared their determination to "concert our efforts to promote democracy in the sub region on the basis of political pluralism and respect for fundamental human rights as embodied in universally recognised instruments on human rights and in the African Charter on Human and Peoples Rights".
- 7) They further declared, "we believe in the liberty of the individual and in his inalienable right, to participate by means of free and democratic processes in the framing of the society in which he lives. We will therefore strive to encourage and promote in each of our countries, political pluralism and those representative institutions and guarantees for personal safety and freedom under the law that are our common heritage".
- 8) In 1993 ECOWAS went a step further, in its Revised Treaty, under the Fundamental Principles of the Community. In Article 4(g) the High Contracting Parties, pledged amongst others: the "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples Rights" and in Article 4(j) the "promotion and consolidation of a democratic system of

governance in each Member State as envisaged by the Declaration of Political Principles adopted in Abuja on 6 July, 1991."

- 9) Furthermore, in 1999, ECOWAS adopted the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. In the preamble to the Protocol Member States recalled their commitment to the ECOWAS Declaration of Political Principles and were conscious of the fact that good governance, the rule of law, and sustainable development are essential for peace and conflict prevention. Article 1 thereof, established a Mechanism for collective security and peace, to be known as the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. Amongst the Fundamental Principles of the Mechanism is the "promotion and consolidation of democratic government as well as democratic institutions in each Member State." It also established as part of the organ of the Mechanism, the ECOWAS Ceasefire Monitoring Group (ECOMOG), a structure composed of several stand by multipurpose modules (civilian and military) in their countries of origin and ready for immediate deployment. ECOWAS deployed ECOMOG in the conflicts in Liberia and Sierra Leone under this Mechanism.
- 11) Finally, in 2001 ECOWAS adopted the Protocol on Democracy and Good Governance, a supplementary instrument to the Protocol on the Mechanism. Section 1 of the Protocol spells out, the Constitutional Convergence Principles of ECOWAS, amongst which are: every accession to power must be made through free, fair and transparent elections; zero tolerance for power obtained or maintained by unconstitutional means; popular participation in decision making, strict adherence to, democratic principles, and decentralisation of power at all levels of governance; the armed forces must be apolitical, and must be under the command of a legally constituted political authority; and no serving member of the armed forces may seek to run for elective political office. The Protocol also has copious provisions on Rule of Law, Human Rights and Good Governance; Elections; the Role of the Armed Forces, the Police and the Security Forces in a Democracy; and the Modalities for Implementation and Sanctions.
- 12) Therefore, the 2023 international conference to be organised by the

ECOWAS Court of Justice in Banjul, in The Gambia, will focus on the need for participatory democracy and constitutional order in all ECOWAS Member States, and in particular on the ECOWAS policy of Zero Tolerance for Unconstitutional Change of Government. It will also examine the linkages with the rule of law and the duty of Member States to respect, protect and fulfil human rights in their territories; the underlying factors for political instability, terrorism and insecurity in the sub region; failure by Member States to fulfil their obligations to ECOWAS; weak institutions of Member States; and the lack of political will for the implementation of community obligations.

- 13) The other significant linkages the conference will also examine include: the mandates of the ECOWAS Court of Justice in facilitating the integration process of the community and in holding Member States accountable for their Treaty obligations; the roles of the national courts of Member States and the ECOWAS Court of Justice in upholding and sustaining the rule of law and constitutional democracy in the sub region; the ECOWAS Community Law/ ECOWAS legal order; and the challenges of enforcement of the judgements of the ECOWAS Court of Justice.

14) **Theme**

In the light of the foregoing, the proposed theme for the 2023 international conference is:

ECOWAS' Zero Tolerance for Unconstitutional Change of Government.

15) **Keynote Presentation**

ECOWAS Zero Tolerance for Unconstitutional Change of Government: Democracy and Rule of Law for Sustainable Development

16) **Sub Themes**

SUB THEME 1

Rule of Law, Democracy and Good Governance: ECOWAS Constitutional Convergence Principles in perspective.

Issues for Consideration

- Democracy, Rule of Law and Good Governance: ECOWAS Constitutional

Convergence Principles in focus.

- ECOWAS policy of Zero Tolerance for Unconstitutional Change of Government: Application, Sanctions and Legal Implications.
- Building Strong Institutions and a Democratic Culture.
- Role of the Military in a Democracy: Subjugating the Military to Civilian Political Control.

SUB THEME 2

ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

Issues for Consideration

- ECOWAS Peace and Security Architecture
- ECOWAS Mechanism for Conflict
- Prevention, Management, Resolution, Peacekeeping and Security.
- Dispute Resolution under the Mechanism: Noninvolvement of the ECOWAS Court of Justice.
- Sanctions Regime under the Mechanism
- Desirability of the Community Intervening to restore constitutional order
- How insecurity and political instability trigger migration.

SUB THEME 3

Human Rights as a Critical Factor in Democracy, Peace and Security: Duty of Member States to Respect, Protect and Fulfil Human Rights.

Issues for Consideration

- Protection of Human Rights as a Core and Cardinal Value of the Community.
- ECOWAS Human Rights Mechanism.
- Duty of Member States to Respect, Protect and Fulfil Human Rights and Holding them accountable for their Treaty Obligations.
- Human Rights Protection as a Critical Factor in Democracy, Peace and Security.

SUB THEME 4

Lack of Free, Fair and Transparent Elections as a Key Source of Conflict: Holding Member States Accountable for Their Treaty Obligations and the Sanctions Regime.

Issues for Consideration

- Parameters for Free, Fair and Transparent Elections under the Protocol on Democracy and Good Governance.
- Elections Monitoring and ECOWAS Assistance to Member States.
- Factors responsible for the undermining of Free, Fair and Transparent Elections.
- Factors Responsible for the subversion of Constitutional Democratic Order.
- How to Hold Member States accountable for their Treaty Obligations.
- Sanctions Regime for Unconstitutional Change of Government.

SUB THEME 5

The Role of National Courts of Member States and the ECOWAS Court of Justice in Upholding Human Rights, Rule of Law and Constitutional Democracy.

Issues for Consideration:

- Role of National Courts of Member States in Protecting Human Rights and Upholding Rule of Law and Constitutional Democracy.
- Role of ECOWAS Court of Justice in Regional Protection of Human Rights and in Upholding Rule of Law and Constitutional Democracy in the Community.
- Law as an Instrument for the Maintenance of Regional Peace and Security: Treaty Supervision and Oversight functions.
- Enhancing the Roles of National Courts of Member States and the ECOWAS Court of Justice in the Peace and Security Architecture of the Community.

SUB THEME 6

The Enabling Legal Environment for ECOWAS Integration: ECOWAS Community Law in Perspective.

Issues for Consideration

- The Enabling Legal Environment for ECOWAS Integration: An Integrated Community Legal Order.
- Challenges militating against the realisation of an integrated Community Legal Order.
- How to advance from an ECOWAS Regime of Laws to ECOWAS Community Law.
- Relevance of integrated Community Legal Order in the Maintenance of Regional Peace and Security.

SUB THEME 7

An Appraisal of the Judgment Enforcement Mechanism of ECOWAS Court of Justice:

Issues for Consideration:

- The Judgement Enforcement Mechanism of ECOWAS Court of Justice.
- Pacta Sunt Servanda.
- Challenges of the Judgment Enforcement Mechanism.
- How to strengthen the Judgement Enforcement Mechanism.

17) General Objectives of the International Conference.

The general objectives of the International Conference are:

- i) To critically appraise the tendency for unconstitutional change of government in some Member States of ECOWAS; the ECOWAS policy of Zero Tolerance for Unconstitutional Change of Government and its application and legal implications; the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security; and the Sanctions Regime.
- ii) To examine the ECOWAS Constitutional Convergence Principles and the need to respect Human Rights, Rule of Law, Democracy and Good Governance for the maintenance of regional peace and security.
- iii) To examine the factors responsible for the subversion of constitutional democratic order: the lack of free, fair and transparent elections; weak institutions; poor human rights profile of most member states; general lack of accountability for non-fulfilment of treaty obligations; and other threats

to the rule of law, democracy and good governance.

- iv) To consider the desirability of the Community intervening to restore constitutional order under the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, in instances of unconstitutional change of government.
- v) To examine the Role of National Courts of Member States and the ECOWAS Court of Justice in sustaining democracy, rule of law and good governance and the protection of human rights.
- vi) To examine the ECOWAS Community Law and the challenges militating against the realisation of an integrated Community Legal Order necessary for the realisation of the ECOWAS integration objectives; and
- vii) To analyse the challenges militating against the Judgment Enforcement Mechanism of the ECOWAS Court of Justice.

18) **NUMBER OF PARTICIPANTS**

1. The maximum number of participants expected at the conference is **One Hundred and Twenty (120)**.

VENUE

2. The conference will be held in Banjul, The Gambia. The venue of the conference will be communicated to the participants in due course.

19) **METHODOLOGY**

The proposed international conference will be a **four (4) day** conference plus two travelling days to hold between **22nd and 25th of May, 2023**. It will hold in plenary sessions and there will be two sessions in the morning and one in the afternoon per day. Each session will be moderated by an Honourable Judge of the Court, Presidents of Supreme/Regional Courts or any other Jurist. Each panel of discussants will collectively have between One hour Twenty minutes and One hour Forty minutes for their discussions or presentations depending on the number of discussants and the complexity of the issues. This will be followed by general discussions by the participants under the moderation of the chair of session or the moderator.

The recommendations from each session will be drawn up from the panel discussions and contributions by the other participants. The resource persons will consist of Honourable Judges from Member States, key staff of ECOWAS Institutions, Professors of Law and reputable Scholars and Jurists, Senior Lawyers from Bar Associations and Development Partners.

SIGNED

**Chief Registrar,
Community Court of Justice, ECOWAS
Abuja- Nigeria**

**WELCOME ADDRESS OF THE PRESIDENT
ECOWAS COURT OF JUSTICE**

INTRODUCTION

1. Your Excellencies, on behalf of the ECOWAS Court of Justice, it is my pleasure, to warmly welcome the President of the Republic of The Gambia, His Excellency Adama Barrow to the opening ceremony of this International Conference being hosted by the Court in this beautiful metropolitan city of Banjul, in the Republic of The Gambia. We are indeed delighted, that despite the very busy schedule of His Excellency, he agreed to personally attend this opening ceremony and to declare open this very important conference.
2. May I also seize the opportunity, to welcome to this event all our invited dignitaries here present, including: the Chief Justices of Member States; Honourable Ministers, Judges of the ECOWAS Court of Justice, high government officials and the members of the judiciary of the Republic of The Gambia; Heads of ECOWAS Institutions; Presidents of Regional Courts; Justices of Supreme Courts of Member States; Heads of ECOWAS National Offices in the Member States; the Special Representative of the President of ECOWAS Commission to The Gambia; Your Excellencies, Members of the Diplomatic Corps; the Presidents of all the Bar Associations; our International Development Partners; Members of the Academia; our august Resource Persons; Members of the Press; all our collaborators and indeed all distinguished staff of the ECOWAS Court and other participants at this conference.
3. Your Excellencies and distinguished guests, it is common knowledge that the Economic Community of West African States (ECOWAS) was established by the Lagos Treaty of 28th May, 1975. As presently composed, ECOWAS consists of fifteen Member States in the West African sub region. The Revised ECOWAS Treaty, which replaced the initial Treaty, was adopted in 1993. This Revised Treaty is the fundamental Charter of ECOWAS and the roadmap for the economic integration of the Community. Article 3 of the Revised Treaty provides that the main “aims of the community are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent”. These are indeed laudable objectives which can only be achieved in a democratic and stable political environment.

4. The ECOWAS Community Court of Justice (ECCJ) is the principal legal organ of the Community and one of the key Institutions of ECOWAS. The essential role of the Court is to ensure the observance of law and justice in the interpretation and application of the Treaty and the Protocols and Conventions annexed thereto, and to be seized with the responsibility of settling such disputes as may be referred to it in accordance with the provisions of the Treaty or between Member States inter-se and Institutions of the Community. The 2005 Supplementary Protocol on the Court, which amended the initial 1991 Protocol on the Court, granted to the Court four clear mandates: mandate as a Community Court, with contentious and advisory jurisdictions; mandate as an ECOWAS Public Service Court, mandate as an Arbitral Tribunal and mandate as a Human Rights Court.
5. Your Excellencies, the ECOWAS Court of Justice organizes an international conference on an important legal theme every year in the territory of a Member State, in collaboration with the government of the host state. It is the most important program in the annual work program of the Court. We are indeed very delighted that His Excellency, the President of The Gambia and the Gambian Government accepted our request to hold this year's conference in Banjul. The international conference affords us the opportunity to bring together Honourable Judges of the ECCJ, Heads of ECOWAS Institutions, Heads of Regional Courts, Development Partners, and relevant stakeholders from Member States, including; Chief Justices and Supreme Court Justices, Law Professors, and other legal experts/resource persons, Heads of ECOWAS National Offices, Presidents of Bar Associations, and the Civil Society to discuss important thematic issues for the benefit of our Community. It therefore provides an excellent forum for cross fertilization of ideas by the legal experts, resource persons and participants, on themes with regional significance from a regional perspective.

The Theme of the Conference

6. The theme of this year's international conference is **ECOWAS' Zero Tolerance for Unconstitutional Change of Government**. This theme is a burning issue, the violation of which is of very grave concern in our Community and it was very carefully chosen by the Court because of the several incidence of unconstitutional change of government that we have witnessed in our sub region in recent years. Indeed, there have been military

interventions in governance through military coups in the past two years in three ECOWAS Member States; the Republics of Mali, Guinea and Burkina Faso. As we speak, these Member States are under military dictatorships and have been suspended from the Community by the Authority of Heads of State and Government.

7. Your Excellencies and distinguished participants, the intention of the Court in choosing this theme is to focus on the need for participatory democracy and constitutional order in all ECOWAS Member States, and in particular, on the ECOWAS policy of Zero Tolerance for Unconstitutional Change of Government. Under the various sub themes, the conference will also examine the linkages between the rule of law and the duty of Member States to respect, protect and fulfil human rights in their territories; the underlying factors of political instability, terrorism and insecurity in the sub region; failure by Member States to fulfil their obligations to ECOWAS; weak institutions of Member States; and the lack of political will for the implementation of community obligations.
8. The other significant linkages the conference will also examine include: the mandates of the ECOWAS Court of Justice in facilitating the integration process of the community and in holding Member States accountable for their Treaty obligations; the roles of the national courts of Member States and the ECOWAS Court of Justice, in upholding and sustaining the rule of law and constitutional democracy in the sub region; the ECOWAS Community Law/ECOWAS legal order; and the challenges of enforcement of the judgements of the ECOWAS Court of Justice.

Military Intervention in Governance

9. It is indeed very regrettable, that we are again witnessing military interventions in governance in our sub region, which is an unfortunate setback for our Community. It was believed that ECOWAS had progressively overcome, and left firmly behind in its past, the incidence of military intervention in governance. It is not in dispute, that as at 28th May, 1975 when the original Treaty that established the Economic Community of West African States was adopted in Lagos Nigeria, eight of the sixteen Member States that signed the Treaty, were under military dictatorships. Regimes that came to power through military coups. In the annals of our Community, that era has been buried in the past, until its recent resurrection.

10. However, ECOWAS progressively overcame that era, and in the new millennium, boasted of democratic governance in all ECOWAS Member States, however imperfect the constitutional orders were. It was a deliberate policy of ECOWAS, that later resulted in its zero tolerance for unconstitutional change of government in the Community, in line with the trending global emphasis on participatory democracy and constitutional order. Despite the best efforts of ECOWAS to enthrone democracy, rule of law and good governance in the sub region, the recent unconstitutional changes of government in the said three Member States are a grave setback for the Community.
11. It is therefore highly regrettable that the West African sub region has once again, suffered a rash of military interventions in governance, with the risk of spreading to other Member States. The Authority of Heads of State and Government of ECOWAS has taken the proactive step of suspending the three Member States from the Community and imposed a range of sanctions, while still engaging with the military dictatorships for restoration of democracy and constitutional order as soon as possible. However, the Authority of Heads of State and Government, at its summit in the last quarter of 2022, decided to recalibrate the security architecture of the community and declared its determination to establish a regional force that will intervene in the event of need, whether in the area of security, terrorism or to restore constitutional order in Member States, in order to boost constitutional governance in Member States.

Democratic Culture

12. Indeed, ECOWAS has made deliberate efforts in the past, to enthrone participatory democracy in the sub region and to put the era of unconstitutional governments firmly in its past and to sanction unconstitutional change of government. Your Excellencies will recall, that, following the civil war in Liberia which began in 1989 and later spread to Sierra Leone, the Authority of Heads of State and Government of ECOWAS in July 1991, adopted the Declaration of ECOWAS Political Principles, in which they declared their adherence to certain principles, in order to enhance the prospects of advancing; "our economic cooperation and integration in a political environment of peace, security and stability". In addition to pledging to respect human rights and fundamental freedoms in all their plenitude, the Heads of State amongst others, declared their

determination to "concert our efforts to promote democracy in the sub region on the basis of political pluralism and respect for fundamental human rights as embodied in universally recognised instruments on human rights and in the African Charter on Human and Peoples Rights".

13. The Heads of State and Government further declared, "we believe in the liberty of the individual and in his inalienable right, to participate by means of free and democratic processes in the framing of the society in which he lives. We will therefore strive to encourage and promote in each of our countries, political pluralism and those representative institutions and guarantees for personal safety and freedom under the law that are our common heritage".
14. Your Excellencies, in 1993, ECOWAS went a step further, in its Revised Treaty, under the Fundamental Principles of the Community. In Article 4(g) the High Contracting Parties, pledged amongst others: the "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples Rights" and in Article 4(j) the "promotion and consolidation of a democratic system of governance in each Member State as envisaged by the Declaration of Political Principles adopted in Abuja on 6 July, 1991."
15. Furthermore, in 1999, ECOWAS adopted the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. In the preamble to the Protocol, Member States recalled their commitment to the ECOWAS Declaration of Political Principles and were conscious of the fact that good governance, the rule of law, and sustainable development are essential for peace and conflict prevention. Article 1 thereof, established a Mechanism for collective security and peace, to be known as the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. Amongst the Fundamental Principles of the Mechanism is the "promotion and consolidation of democratic government as well as democratic institutions in each Member State." It also established as part of the organ of the Mechanism, the ECOWAS Ceasefire Monitoring Group (ECOMOG), a structure composed of several standby multipurpose modules (civilian and military) in their countries of origin and ready for immediate deployment. ECOWAS deployed ECOMOG in the conflicts in Liberia and Sierra Leone under this Mechanism.

16. Finally, in 2001, ECOWAS adopted the Protocol on Democracy and Good Governance, a supplementary instrument to the Protocol on the Mechanism. Section 1 of the Protocol spells out the Constitutional Convergence Principles of ECOWAS, amongst which are: every accession to power must be made through free, fair and transparent elections; zero tolerance for power obtained or maintained by unconstitutional means; popular participation in decision making, strict adherence to democratic principles and decentralisation of power at all levels of governance; the armed forces must be apolitical, and must be under the command of a legally constituted political authority; and no serving member of the armed forces may seek to run for elective political office. The Protocol also has copious provisions on Rule of Law, Human Rights and Good Governance; Elections; the Role of the Armed Forces, the Police and the Security Forces in a Democracy; and the Modalities for Implementation and Sanctions.

ECOWAS's Policy on Zero Tolerance for Unconstitutional Change of Government

17. In a constitutional democracy, governance of a country is the exclusive prerogative of civilian leaders elected by the people in free and fair elections, and the military must be subject to the control of civilian authority. Therefore, the role of the military is to protect the territorial integrity of the nation, and it should not turn its guns against a government elected by the people. This was clearly emphasized by ECOWAS, under its constitutional convergence principles, as contained in the Protocol on Democracy and Good Governance. The said Protocol also prescribes the role of the military in a democracy as follows:
- The armed forces and the police shall be nonpartisan and shall remain loyal to the nation. The role of the armed forces shall be to defend the independence and the territorial integrity of the state and its democratic institutions.
18. The importance of the ECOWAS Zero Tolerance policy for unconstitutional change of government cannot be over emphasized. We cannot achieve our community objectives, without the enthronement of participatory democracy, rule of law, good governance and political stability. We also cannot overemphasize, the importance of political pluralism, and the right of the people to freely participate in their government. Furthermore, constitutional democracy will remain fragile or a mirage, if there are no

guarantees, of free, fair and transparent elections. Without doubt, rigging of elections is a major cause of political instability.

19. The intervention of the Armed Forces in governance is an aberration that greatly undermines constitutional order, rule of law and participatory democracy. It also hampers economic development, foreign direct investment in the economies of such countries, which are invariably further subjected to economic sanctions. It also undermines the human rights regime. In this day and age, the international community has no stomach for military coups, and such States invariably become pariah states in the comity of nations. ECOWAS has equally demonstrated that it has zero tolerance for such unconstitutional changes of government.

Member States as Critical Stakeholders

20. We recognize that the Member States are the most important stakeholders in ECOWAS. They must therefore continue to act collectively, to prevent unconstitutional change of Government and to sanction defaulters. We also recognize that the political will of Member States is a necessary factor for the achievement of this objective. In the implementation of the economic agenda of the Community, it is necessary to provide the enabling democratic culture that should guarantee economic growth. I therefore urge all Member States to take advantage of this conference to explore ways of providing a sustainable democratic culture in our Community. It is our hope, that this conference will identify the causes of unconstitutional changes of government, and proffer recommendations that can put an end to military interventions in governance in our sub region.

Conclusion

21. Your Excellencies and all our distinguished participants, in conclusion, may I once more express the profound appreciation of the ECOWAS Court of Justice, to the President of the Republic of The Gambia, His Excellency Adama Barrow, for graciously honouring us with his presence at this opening ceremony. May I also express our profound appreciation to the Government of The Gambia for collaborating with the Court to host this conference in this beautiful city of Banjul and for the very warm African brotherly hospitality that has been extended to all the non-resident participants at this conference since our arrival in Banjul. May I also express our gratitude to the Chief Justices and Judges of the Member States, here

present, Honourable Ministers and high Government Officials of the Republic of The Gambia, and all our distinguished participants at this conference, for accepting to be part of this very important event.

22. I am delighted that this conference gives us the opportunity to examine a very topical theme in the West African landscape. By the quality of the participants at this conference and having had the privilege of previewing the high quality presentations to be made at this conference by our distinguished resource persons in respect of the various thematic areas in the next three days, I am confident that this conference will be very fruitful, and that the outcome will be useful in charting a way forward to prevent future unconstitutional changes of Government within our sub region.

I wish you all very fruitful deliberations.

Muito Obrigado.

Merci beaucoup pour votre amable attention.

Thank you for your attention.

Hon. Justice Edward Amoako Asante

President,

Community Court of Justice, ECOWAS.

Abuja – Nigeria.

**GOODWILL MESSAGE BY THE
PRESIDENT OF ECOWAS BANK FOR
INVESTMENT AND DEVELOPEMENT (EBID)**

His Excellency, Adama Barrow, President of the Republic of The Gambia
Honourable Justice Edward Amoako Asante, Honourable President of the
Community Court of Justice
Honourable Justices of the ECOWAS Community Court of Justice
Heads of ECOWAS Institutions,
Distinguished Legal Scholars, Members of the Press,
Dignitaries and Invited Guests,
All protocol observed

1. It is an honour to address this eminent gathering on behalf of Dr George Agyekum Donkor, President of the ECOWAS Bank for Investment and Development (EBID), who could not attend due to prior engagements. Permit me to express our appreciation to the ECOWAS Community Court of Justice for inviting EBID to participate in this programme.
2. The theme of this conference "ECOWAS Zero Tolerance for Unconstitutional Changes of Government is key to the development of the ECOWAS Member States. These discussions could not have come at a more pivotal moment, as countries experience the economic shocks caused by the Russia-Ukraine crisis and the aftermath of the Covid-19 pandemic.
3. Ladies and gentlemen, over the past 3 years, the ECOWAS subregion has been battling with a surge of unconstitutional overthrows, posing a threat that the former Chairman of the Authority of Heads of State and Government of ECOWAS, His Excellency Nana Addo Danquah Akuffo Addo, President of Ghana, described as "contagious" in January 2022.
4. Although the factors leading to such political unrest vary from one Member State to another, there are certain shared commonalities to be observed:
 - Problematic legislative infrastructure
 - Economic instability
 - Insecurity concerns
5. It is critical that Member States and indeed all stakeholders, enhance their efforts to address the foregoing issues to avoid the unpleasant effects and challenges associated with unconstitutional changes in government.
6. In fact, undemocratic changes in government, tend to exacerbate economic inequality and undermine the Community's objectives of durable socio-economic development to positively impact the lives of vulnerable populations and regional integration.

7. Therefore, it is important that ECOWAS adhere to its stance and impress upon countries in such situations, the importance of upholding the rule of law while addressing the needs of the people.
8. At the same time, the Community must exert greater efforts to establish mechanisms that promote cooperation and prevent isolation, reducing the risk of undemocratic takeovers including: enhancing collaboration for security operations especially to counter extremist or terrorist activity and; actualization of community-recognized protocols by incorporating them into the legal framework at the country level.
9. It is our hope that this conference will engender positive outcomes and result in dynamic collaborations to contribute to the advancement and prosperity of the ECOWAS sub-region.
10. I wish you fruitful deliberations throughout this program.

Merci beaucoup pour votre attention.
Thank you for your kind attention.
Muito obrigado.

**GOODWILL MESSAGE BY THE AUDITOR GENERAL
OF ECOWAS INSTITUTIONS**

Your Excellency the President of the ECOWAS Commission
Honorable President of the ECOWAS Court of Justice,
Your Excellency Speaker of the Parliament
Your Excellencies, Commissioners and Heads of Institutions of the
ECOWAS
Distinguished and honorable guests
Ladies and Gentlemen,

It is with great satisfaction that, as Auditor General of the ECOWAS Institutions, I take the floor at this very important International Conference under the theme "**ECOWAS Zero Tolerance for Unconstitutional Changes of Government**".

Mr President, I congratulate you on the organization and choice of the theme, which I hope you will agree with me on its relevance and topicality, since it constitutes one of the elements or factors that are as fundamental as they are critical to the development and consolidation of democracy in our community area.

Unfortunately, we have witnessed several threats and risks in our community area, such as the phenomenon of terrorism and in recent years changes in the constitutional order through unconstitutional change of government, which have contributed to political instability and an increase in violence in several countries in the area. These changes have also contributed to an increase in poverty.

However, ECOWAS, based on its fundamental principles which include improving the well-being of the population, has been firm in its stance against unconstitutional change of government in member states. There is no doubt that democracy is a fundamental value that must be protected, and that is why we must continue to fight against any form of undemocratic and illegal government.

However, the defense of democracy should not be limited to how governments are elected or dismissed. But also about how governments **respond to citizens' needs and aspirations**.

In this context, good governance and accountability are crucial for the socioeconomic development and the **prosperity of the ECOWAS people**. It is important to remember that the transparent and consequent management of resources is essential to ensure political stability and security in the region, and they are fundamental factors that contribute to democracy.

The lack of transparency and accountability in the management of public resources can lead to corruption and mismanagement, which in turn can harm the economic and social development and consequently constitute sources of political

instability.

In this regard, the ECOWAS is highlighted as an outstanding example, since the authorities of our community have carried out the institutional reform of our organization with the aim of ensuring economy, efficiency and effectiveness in the use of the resources from taxpaying citizens. These measures were taken to improve the living conditions of our people.

At the national level, as long as we are unable to respond to the needs of our populations by managing the scarce public resources available efficiently, effectively and economically, the fight against the changes to the constitutional framework in our different countries will become more challenging.

It is therefore essential that all actors and stakeholders work together to ensure that good governance, transparency, accountability and citizen participation prevail in our region, because only in this way will we be able to strengthen our democratic institutions.

In order to combat mismanagement and corruption, it is essential to ensure that judicial institutions function and that supreme audit institutions are strengthened and able to carry out their functions independently and impartially.

Ladies and gentlemen, it is time to join forces for transparency, accountability and good governance at ECOWAS. As Auditor General of ECOWAS, I would like to reaffirm my commitment to continue working on strengthening the governance and transparency of ECOWAS structures, as well as strengthening relations with external control structures to ensure that the management of public resources is carried out in a transparent manner, guaranteeing value for money.

Together, we can ensure that ECOWAS continues to move towards a more stable, democratic and prosperous future for all its citizens.

I thank everyone for their attention and commitment to defending democracy through good governance, transparency and accountability in our region

**STATEMENT BY HON. DAWDA A. JALLOW
HON. ATTORNEY GENERAL AND MINISTER
OF JUSTICE**

I stand on all existing protocols.

It gives me immense pleasure to extend a hearty welcome to each one of you. We are privileged to host the esteemed judges of the Economic Community of West African States (ECOWAS) Court, the Attorney Generals, the Chief Justices, legal practitioners, friends from the academia and other participants from our sister countries.

The choice of the theme of this year's conference - "ECOWAS' Zero Tolerance for Unconstitutional Change of Government" - could not have come at a better time. It signifies our commitment to strengthening democracy, preserving constitutional order, and respecting the rule of law, echoing a sentiment that is very relevant to our West African region.

In The Gambia, our history has taught us the importance of this commitment. We have witnessed the turmoil that ensues when constitutional norms are violated. These experiences have been our lessons, hard-taught and deeply learned. They have become the force propelling us forward, fuelling our desire for a democratic society rooted in justice and respect for the rule of law.

Each one of us, as legal practitioners, carries a significant responsibility. We are the custodians of justice, the protectors of rights, and the guardians of our constitutions. Our task may be challenging, complex, and often demanding, but it is within these very challenges that we discover our true potential.

Our past experiences have shaped us, but they do not define us. Today, The Gambia stands as a testament to the resilience of a people who chose to prioritize unity, peace, and justice over discord, conflict, and impunity. As the Minister of Justice, I am dedicated to ensuring that we continue on this path, that we uphold the ideals of our constitution, and that we never again stray into the shadows of unconstitutional governance.

Our gathering here today is more than a conference; it is a testament to our shared commitment, our shared values, and our shared goals. Let us leverage this opportunity to learn from one another, to share our experiences, and to brainstorm strategies that promote democracy, uphold the rule of law, and prevent unconstitutional changes of government. I am confident that the discussions and deliberations over the next few days will inspire us, challenge us, and guide us towards a more prosperous, peaceful, and democratic West Africa.

Let me also invite you to explore The Gambia while you're here. Take time to enjoy

our rich and diverse culture, our scenic landscapes, and our warm hospitality. We are a country that prides itself on its resilience, its unity, and its commitment to democratic values. We hope that you will carry a piece of The Gambia with you when you leave.

Once again, I extend my warmest welcome to each one of you. I look forward to engaging, thought-provoking, and productive discussions. Let's join hands and work together for a better tomorrow, a brighter future, and a stronger West Africa.

Thank you.

**STATEMENT BY
HON. BABOUCARR OUSMAILA JOOF
HONORABLE MINISTER OF TRADE,
INDUSTRY, REGIONAL INTEGRATION,
AND EMPLOYMENT**

Your Excellency, The President of The Republic of The Gambia,
The President of The ECOWAS Commission,
The President of the ECOWAS Court of Justice,
Chief Judges,
The Chief Registrar, the ECOWAS Court of Justice,
Heads of ECOWAS Institutions,
Honourable Attorney Generals,
Fellow Ministers,
Your Excellencies Members of the Diplomatic and Consular Corps,
The ECOWAS Special Representative to The Gambia,
Staff from ECOWAS Institutions,
Experts From Member States,
Distinguished Ladies and Gentlemen,
Kindly permit me to welcome our distinguished guests and diplomats from the sub-region and beyond to the smiling coast of Africa, The Gambia.

In The Gambia, we are proud of the adage "every smile is genuine". With that said, it is my pleasure to welcome you all to this very important conference on the theme "ECOWAS Conference on Zero Tolerance for Unconstitutional Change of Government".

On behalf of the President of the Republic of The Gambia, His Excellency President Adama Barrow, I want to send our sincere thanks and appreciation to the ECOWAS Commission through its President, Dr. Omar Alieu Touray, for their commitment to strengthening regional integration. I would like to further thank the ECOWAS Commission through the Community Court of Justice for choosing The Gambia to host this very important conference. This conference demonstrates the importance ECOWAS places on regional peace, security, and stability.

Over the past few years, the African continent has witnessed an unprecedented surge in the number of military coups, especially in our region, ECOWAS. This has posed a huge threat to the fundamental principles of ECOWAS. That is, economic integration through trade for enhanced standards of living for community citizens, and promotion of regional stability through maintenance of peace and security as well as good governance.

Therefore, the theme for the conference, "ECOWAS Zero Tolerance for Unconstitutional Change of Government," could not be crafted any better and come anytime later. The need to discuss and address undemocratic change of government cannot be overemphasized. The resurgence of military coups and other governance-related issues-such as election -related violence constitutes a setback for the democratic process in Africa. Yet this happens at a time when the African Union and Regional Economic Communities (RECs) are striving to fine-tune their

relevant mechanisms and policy/legal instruments to address what has been identified as one of the major sources of dysfunctionality of the post-colonial African states.

Your Excellencies, Distinguish Ladies and Gentlemen, unconstitutional changes of government have impacted negatively on the economic development of the continent for far too long. Military coups provoke unrest and instability in the nations involved and even in those beyond, distract leaders and people from making significant investments, and promote widespread financial corruption. This has manifested itself in countries that have undergone military coups

The number of refugees and internally displaced individuals compelled to relocate to more stable locations increased as a result of military coups and conflicts across Africa. One-third of all people who have been forcibly relocated live in Africa at the moment. Huge economic consequences were brought on by this refugee crisis, including a falling growth rate, rising poverty rates, low median personal income, deteriorating infrastructure, family dissolution brought on by forced relocation and casualties, kidnappings of children, and recruitment into armed combat.

The political upheaval brought on by military coups throughout Africa slowed down the continent's key economic operations, including mining, the oil industry, and agriculture. Parties engaged in political or military conflict compete for control of these resources or sabotage supplies to exert pressure on their rivals. Production of vital commodities is affected, which distorts domestic economies, drives up global prices, and increases concerns about supply disruptions going forward. Such environment brings in untold suffering of our people, and as a consequence divert all efforts away from critical development issues towards search for peace and stability.

Recognizing the threats that an unconstitutional change of government poses to the continent's economic development, general security and stability, The African Union devised several methods to deal with this undesirable and unconstitutional method of changing governments, such as the Lomé Declaration, often known as the constitutive act, and the African Charter on Democracy, Elections, and Governance, adopted by the Union in July 2000 and January 2007, respectively. In addition, the adoption of the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping, and Security, and the Supplementary Protocol on Democracy and Governance in December 2001, as well as the establishment of Early Warning Centers across the region to complement those of the continental body, all geared towards the promotion of governance, regional peace and stability.

Studies have shown that the adoption of these strategies has led to a significant

decline in unconstitutional changes of government on the continent. However, the recent spike in military coups in Africa is a great concern for the continent's general security and stability. Thus, the need for a more concerted effort to address this continental endemic, which I hope this conference will come up with results.

Your Excellencies,

Mindful of the current geopolitical environment and the recent waves of conflicts, the need to redouble our efforts to secure peace and stability and entranced the principles of good governance, democracy and human rights, we risk losing our hard economic gains over the years. We must work together to stop our continent being used as a platform for proxy wars by the West as a mean of competing for our resources while continue to languishing in poverty.

As we gathered today, we must carefully reflect on the causes of unconstitutional change of government in our region. We must not pretend that there has not been any genuine cause of unconstitutional change of government in our countries, and therefore we must work together to avoid such circumstances from being created. We must avoid weaponization of our institutions including judiciary against our opponents but rather to improve our democratic and human rights credentials.

Given the current fragility of our economies, we cannot afford to slide back to military or undemocratic means of changing government characterized by civil unrest, violent extremism, and general instability. The government of The Gambia hopes that this conference will discuss the theme comprehensively and come up with strong recommendations or resolutions to ending all forms of unconstitutional change of government in our region.

Distinguished Guests, Ladies, and Gentlemen,

In conclusion, I wish to express our deep and sincere appreciation to the ECOWAS Commission for organising such an important conference to address such an important socio-economic challenge of our region. No meaningful development can take place without peace and stability and therefore whatever disrupt that must be frowned upon by all.

I thank you for your kind attention and wish you fruitful deliberation and a very good stay in Banjul.

**STATEMENT BY
HON. JUSTICE HASSAN BUBACAR JALLOW-CRG,
CHIEF JUSTICE OF THE REPUBLIC
OF THE GAMBIA**

Your Excellency Mr. Muhammad B.S Jallow, Vice President of the Republic of the Gambia

Hon. Chief Justices and Judges

Hon. Representative of the President of the ECOWAS Commission

President of the ECOWAS Court of Justice

The President of the ECOWAS Parliament

Our Guest speaker, the Hon. Prof. Chidi Odinkalu.

Hon. Ministers

Members of the Diplomatic Corps

Distinguished Delegates and Guests

It is my great pleasure to welcome our guests from abroad to the Gambia and all of you to this conference organised by the ECOWAS Court of Justice and co-hosted by the government of the Gambia on the theme: “ECOWAS zero tolerance for unconstitutional change of Government.” Over the next three days we shall, together, be exploring ways in which we can strengthen good governance in order to promote peace and progress in our vast region.

Both the venue and the theme could not be more appropriate and relevant for our times. The Sahel region – which covers much of the ECOWAS – is today seriously confronted with conflict, violence, violations of human rights to the detriment of much of our population.

Africa has been the victim of many attempted and successful unconstitutional changes of government. Despite its size the Gambia has been the scene for no less than three such occasions in its post-independence period. With much pain and damage to the country – to its population, its values and institutions.

As a young lawyer holding the office of Principal State Counsel in the Ministry of Justice and subsequently as the Solicitor General I was much engaged in providing legal and logistical support to the team of external counsel engaged in the prosecution of the leaders of the 1981 rebellion. As Attorney General and Minister of Justice I was a victim, like many of my compatriots, of the coup d'état of 1994. As Chief Justice of The Gambia since 2017 I have been engaged in dealing with the aftermath of the 2016/2017 attempt to subvert the constitutional order and the will of the Gambian people. We are now determined to turn a new chapter of governance in the Gambia and put these tragic events behind us.

But when you look around in the Gambia today the signs of the ECOMIG presence demonstrate the potential of our collective efforts, through our regional grouping, in the prevention and resolution of conflict and the restoration of constitutionalism and entrenchment of good governance. The military and diplomatic intervention of

the ECOWAS here in the Gambia in 2017 to prevent conflict and to support the constitutional order must be regarded as one of the finest moments of the ECOWAS. We in the Gambia owe a debt of gratitude to the ECOWAS and to the ECOMIG for their timely and effective intervention in the Gambia to avert disaster and restore the rule of law and constitutionalism. We congratulate the ECOWAS and its institution the ECOWAS Court of Justice for their important initiative in organising this conference in collaboration with the Gambia government.

Distinguished guests there is undoubtedly a linkage between insecurity – as we experience it in the Sahel – and governance. At the heart of many conflicts and of much of the community violence, lie issues of justice, governance and deprivation. Poor governance is not an excuse for terrorism or other forms of violence. But it nonetheless provides fertile breeding grounds for conflict, for terrorism and other forms of violence. The organisation of such a conference and indeed the great work ECOWAS has undertaken in improving the governance architecture of our region and its member states is strong recognition of this linkage between the two. We must not provide fertile breeding grounds which may empower those who would wish to destroy our communities. We must nurture, cultivate and sustain in all member states an environment of good governance based on constitutionalism, on respect for the rule of law and human rights, and on justice, social and economic progress as well as integrity and accountability in public life. These are all legitimate entitlements of our citizens. But also the strongest foundation for peace and progress; a very strong bulwark against conflict, violence and retardation. Faithful adherence to constitutional principles must be the bedrock of governance: those in authority must not be permitted to manipulate and subvert the constitution for their own ends; those aspiring to power must do so through the constitutional processes which are based on the cardinal principle that government must be with the consent of the people – that it must be of the people, for the people and by the people. Unconstitutional changes of government which deny the people their fundamental right to choose their government as enshrined in our national Constitutions, the African Banjul Charter on Human and Peoples Rights, declarations of the African Union and of the ECOWAS as well as the Universal Declaration of Human Rights amongst others must be condemned and resisted as a major violation of this important collective right of the community.

The fundamental rights and freedoms recognised by our national constitutions, by the African (Banjul) Charter on Human and Peoples Rights as well as other relevant instruments adopted by the A.U and the ECOWAS together with the international human rights legal regime must not be mere promises or words; they lie at the core of respecting and enhancing the dignity of individuals and hence the health and wellbeing of our communities. These rights and freedoms must be respected by public as well as private authorities. National as well as regional mechanisms for their enforcement need to be strengthened and made use of.

Distinguished guests timely and fair resolution of conflicts and disputes among

citizens – or between citizens and the state – can contribute significantly to peace and stability in the community. We must therefore invest in our judiciaries and other dispute resolution mechanisms to enable them deliver justice expeditiously, independently and fairly so that the community can reap the social and economic dividends of peace, stability and economic progress which flow from established rule of law and constitutionalism.

Above all, distinguished guests, we must not relent in the struggle against corruption and for the promotion of integrity and honesty in public life. For corruption undermines and saps the state structure and overall any system of good governance based on respect for the constitution, the rule of law and human rights. It leads to wrong decision making on important public issues, causes economic and financial loss and undermines public confidence in the state.

The next two days provide us with the opportunity to consider some of these and other pressing issues which impact on good governance and possibly on security in our region. Much has been done already, both in the context of the African Union (AU) and the ECOWAS. Many challenges to peace, to progress, to good governance remain. I am however confident that we will, together, rise to these challenges and out of this Banjul conference chart a way forward to an improved framework for and a greater impetus to the drive for good governance as an engine for combatting insecurity and for attainment of sustained peace and progress in our region.

I thank you for your attention.

**OPENING STATEMENT BY
HIS EXCELLENCY ADAMA BARROW,
PRESIDENT OF THE REPUBLIC OF THE GAMBIA**

Opening Statement by His Excellency the President at the Opening Ceremony of the ECOWAS International Conference on Unconstitutional Changes of Government. Banjul 22nd to 25th May 2023.

The Hon. Chief Justice,
Members of Cabinet,
Members of the Diplomatic Corps,
The President of the Ecowas Commission,
The President of the Ecowas Court,
Visiting Chief Justices from sister nations
Visiting Attorney Generals from sister nations,
Judges of the Ecowas Court,
Judges of the Superior Courts of The Gambia,
Legal practitioners,
Ladies and gentlemen,

It is with immense gratitude that I welcome you to The Gambia. We are grateful to the Economic Community of West African States (ECOWAS) Court for selecting The Gambia to host this important international conference. The trust, the respect, and the confidence vested in us by ECOWAS is not lost on us; it is a symbol of our shared commitment, our shared aspirations, and our shared journey towards a future characterized by our democracies and respect for the rule of law.

The theme of this conference, "ECOWAS' Zero Tolerance for Unconstitutional Change of Government," is not merely a topic for discourse. It is a proclamation of our commitment, a testimony of our strength, and a call to action. This theme is a reminder of our shared vision for a West African region defined by strong democratic institutions, upheld by the rule of law, and led by governments that respect and adhere to their constitutional mandates.

In The Gambia, our history has been marked by periods of unconstitutional change of government. We have gone through a period of authoritarian rule that lasted two decades, marked by deliberate disregard for democratic principles and violation of constitutional norms. As a country, we have seen the anguish, the pain, and the despair that emerge when constitutional order is disrespected. But we have also seen the dawn of a new era, an era of change, of hope, and of commitment to constitutional order.

Through our struggles, we have learned the importance of democracy, not merely as a system of government, but as a philosophy, as a way of life. Democracy is about listening, even when we disagree. It's about respecting the rule of law, even when we don't understand it. And it's about adhering to the constitution, even when it seems inconvenient.

Democracy is about recognizing the dignity of every individual, respecting their rights, their freedom, and their voice. It requires a commitment to justice, to fairness, and to the principles of equality. And it demands that we work tirelessly to create a society where every voice is heard, every opinion is respected, and every right is protected.

The experiences of The Gambia serve as a testament to the commitment of our people, to our capacity for change, and to our commitment to democratic principles. As we gather here today, let us remember our shared history, our shared struggles, and our shared victories. Let these memories guide us as we chart a course towards a future that is firmly rooted in respect for our constitution, irrespective of the challenges that may come our way.

Distinguished Ladies and Gentlemen,

The ECOWAS' stance of zero tolerance for unconstitutional change of government sends a clear message to every corner of our region that democracy is not just an option but an absolute requirement. This commitment underscores our resolve to build nations that respect the will of the people, where every citizen has a voice, and where that voice is valued.

To realize this vision, education plays an instrumental role. Informed citizens form the bedrock of a strong democracy. Therefore, we must strive to empower our people with knowledge, promote constitutional literacy, and inspire civic engagement at all levels of society. When our citizens understand their rights and responsibilities as enshrined in our constitution, they become active participants in the democratic process, contributing to the growth and development of our nations.

Zero tolerance for unconstitutional changes in government should not just be a slogan; it should reflect in our actions, in our policies, and in our laws. It calls for strengthening our legal and institutional frameworks to guarantee the supremacy of our constitution. We must ensure that every individual, irrespective of their position or status, is subject to the law and held accountable for their actions.

As we engage in the deliberations, remember that every decision we make and every policy we endorse, ultimately shapes the lives of the millions of people we represent. Let our discussions guide us towards a future marked by peace, unity, prosperity, and an unwavering commitment to constitutional order.

In conclusion, let me reiterate The Gambia's commitment to the noble cause of ECOWAS' zero tolerance for unconstitutional change of government. Our history, our experiences, and our aspirations echo this commitment. We are honoured to serve as the venue of this important conversation, and we are confident that our collective efforts will lead to the strengthening of our democracies, the safeguarding of our constitutional order, and the advancement of our region.

We hope that your stay in The Gambia will be an enriching experience, filled with enlightening discussions, meaningful interactions, and memorable moments.

Thank you.

**ZERO TOLERANCE FOR UNCONSTITUTIONAL CHANGE IN
GOVERNMENT IN (WEST) AFRICA: DEMOCRACY AND RULE
OF LAW FOR SUSTAINABLE DEVELOPMENT**

BY

PROF. CHIDI ANSELM ODINKALU

PROFESSOR OF PRACTICE, FLETCHER SCHOOL OF LAW AND DIPLOMACY, TUFTS UNIVERSITY

1. Introduction

The Court of Justice of the Economic Community of West African States (ECOWAS) is to be commended for organizing this international conference to advance the frontiers of institutional growth but, even more, for finding it fit to address an issue of such monumental salience at this time for the sub-region and for Africa. The focus of the present paper is framed within the broad theme of this conference which is “ECOWAS' Zero Tolerance for Unconstitutional Change in Government”. The twinning of the subject of unconstitutional change in government (UCG) with the ideas of democracy, rule of law and sustainable development forays beyond the traditional judicial comfort level of exclusively normative explorations. It is functionally challenging and, in the context of the history of the region and of contemporary evolution of its political economy, it is also timely.

The subject matter of UCGs has risen in international or global priority and attention in recent years. In October 2021, following a second UCG in Sudan in as many years, the Secretary-General of the United Nations, Antonio Guterres, complained of “an epidemic of *coups d'état*”, calling on the United Nations Security Council to take urgent steps to arrest what he identified as a global trend.¹ Judge President of the ECOWAS Court of Justice, Edward Amoako Asante, has equally described UCGs in the states of the Community as a “grave danger to West Africa's march towards the consolidation of democratic governance in the region.”²

UCGs are also a subject of continental norm creation within the institutional mechanisms of the African Union and its predecessor, the Organization of African Unity, (OAU). As a result, a conversation about UCGs in West Africa must be located within the wider context of developments in the African continent. Indeed, it can validly be said that developments in West Africa themselves inspired the continental soul searching that led to the crystallization of a norm against UCG in Africa. At the turn of the Millennium, African Heads of State and Government in

¹ Ph.D. (London-LSE), Professor of Practice, Fletcher School of Law and Diplomacy, Tufts University, MA; Chair Global Rights & International Refugee Rights Initiative. Keynote Text for International Conference of the Court of Justice of the Economic Community of West African States (ECOWAS Court of Justice), Banjul, Gambia, 22-25 May, 2023. The views contained herein are personal to the author and do not represent the official positions or policies of any entities or institutions with which he is or has previously been associated.

² Michelle Nichols, “An epidemic of coups”, UN Chief laments, urging Security Council to act”, *Reuters*, 26 Oct, 2021, available at <https://www.reuters.com/world/an-epidemic-coups-un-chief-laments-urging-security-council-act-2021-10-26/>

³ “ECOWAS Court President Warns of Dangers of Recent Political Developments in the Region”, *ECOWAS Court Blog*, available at <http://www.courtecowas.org/2021/09/16/ecowas-court-president-warns-of-dangers-of-recent-political-developments-in-the-region/>, accessed, 19 Feb., 2023.

the OAU expressed “grave concern about the resurgence of *coup d'état* in Africa”,³ while also recognizing that coups “are a threat to peace and security of the Continent and they constitute a very disturbing trend and serious setback to the ongoing process of democratization in the Continent”.⁴

West Africa is arguably at the epicentre of this “global epidemic”. The African Union reports that it “has declared a total of fourteen (14) instances of UCG since 9 July 2002 when it was established: three in North Africa, seven in West Africa, one in East Africa, one in Southern Africa and two in Central Africa”⁵. In West Africa, this recent raft of supposed UCGs has included two in Guinea, two in Mali, as well as one popular uprising and one coup in Burkina Faso, which together have combined to put to the test the viability and trends in convergence of regional norms to constrain domestic jurisdiction and sovereignty.⁶ This list does not include attempted coups, the most recent in the sub-region of which were reported in Guinea-Bissau and in The Gambia.⁷

The subject matter of UCGs in (West) Africa has quite a rich and complex history and remains of high salience in the contemporary development of the region. It is not possible in the brief space available in this paper to address every conceivable dimension of the subject. It is proposed hereafter to examine the scope of the subject, its emergence in regional institutional law and lore, as well as some epistemics of its relationships with development. Within the framework of examining the substantive and conceptual scope of UCGs, it is also proposed to examine the subject of popular uprisings. Before concluding, attention will be called to the challenges of implementation and application of the regional norm against UCGs in (West) Africa.

³OAU, Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government”, AHG/Decl.5 (XXXVI), adopted Lomé, Togo, 10-12 July 2000, preamble, para 2, available at https://au.int/sites/default/files/decisions/9545-2000_ahg_dec_143-159_xxxvi_e.pdf accessed, 4 March, 2023.

⁴*Id*

⁵African Union, *Africa Governance Report 2023: Unconstitutional Changes in Government in Africa – Final Key Highlights*, Assembly/AU/7(XXXVI), 36th Ordinary Session of the Assembly of Heads of State & Government, Addis Ababa, Ethiopia, 18-19 Feb., 2023, para 25. (Hereafter referred to as “ACG-23”)

⁶See Congressional Research Service, “An Epidemic of Coups' in Africa? Issues for Congress”, *CRS Insight*, 11 February 2022, available at <https://crsreports.congress.gov/product/pdf/IN/IN11854>, accessed 1 Mar, 2023; Emmanuel Akinwotu, “Contagious Coups: What is Fuelling Military Take-overs Across West Africa”, *The Guardian*, 7 February 2022, available at <https://www.theguardian.com/world/2022/feb/07/contagious-coups-what-is-fuelling-military-takeovers-across-west-africa>, accessed, 3 March, 2023; Thomas Lowe, *Yale Rev. Int'l Studies*, Mar 2022, available at <http://yris.yira.org/comments/africa-comments/5657>, accessed 3 Mar, 2023

⁷In West Africa, Guinea-Bissau and The Gambia both reported attempted coups in 2022. See, Emmanuel Akinwotu, “Guinea-Bissau under control, President says, after feared coup attempt”, *The Guardian*, 1 Feb., 2022, available at <https://www.theguardian.com/world/2022/feb/01/fears-of-guinea-bissau-coup-attempt-amid-gunfire-in-capital>; “Gambia foils alleged coup attempt, arrests four soldiers”, *Reuters*, 21 Dec., 2022, available at <https://www.reuters.com/world/africa/gambia-foils-military-coup-arrests-four-soldiers-govt-2022-12-21/>, accessed, 3 March, 2023.

2. Governance and Development: Three Dimensions of the UCG

The theme for this meeting is therefore timely for historical, normative, and functional reasons, among many. Let us begin with the historical. This is a subject matter that affects nearly every country in West Africa and most in Africa. The history of the African continent in the aftermath of decolonization was dominated by UCGs. In all, Patrick McGowan reports 169 “military interventions of some type” in 16 West African countries (including Mauritania) in the half century from 1 January 1955 to 31 December 2004, with Cape Verde being the only country in the region to not have reported a significant coup incident.⁸

In the normative sphere, it is to be noted that over the period since Independence, there has been a normative shift in the acceptability of *coups d'état* or UCGs globally and in Africa. In their Declaration on the Framework for an OAU Response to UCG adopted at the Lomé Summit in 2000, the Heads of State and Government of the OAU claimed the “the phenomenon of *coup d'état* has resulted in flagrant violations of the basic principles of our Continental Organization and of the United Nations”⁹, and that “coups are sad and unacceptable developments in our Continent, coming at a time when our people have committed themselves to respect of the rule of law based on peoples will expressed through the ballot and not the bullet”¹⁰. This was not always so. Indeed, for much of its life, the position of the OAU was the exact opposite.

In his foreword to the 1978 revision of Edward Luttwak's widely acclaimed *Coup d'état: A Practical Handbook*, Walter Laqueur declared as a matter of fact that “the *coup d'état* is not the normal mode of political change in most member states of the United Nations.”¹¹ Around Africa, Military law and rule became an accepted norm, legitimized by jurisprudence and legal doctrine across the continent,¹² and taken for granted as an essential rampart of public and constitutional law. Outstanding judicial and legal careers were even built on it.¹³ By the turn of the millennium in Africa, however, Nic Cheeseman acknowledges that uniformed military rule had become by and large discredited and that “in the 2000s, elections and term limits replaced death and *coup d'état* as the most common ways in which African presidents and prime ministers left office”¹⁴.

⁸Patrick McGowan, “Coups and Conflict in West Africa, 1955-2004”, 32:2 *Armed Forces & Society*, 234 at 236 (2006). Solomon Dersso counts 91 successful coups in Africa from 1952 to 2014. See, Solomon Dersso, “Unconstitutional Changes of Government and Unconstitutional Practices in Africa”, World Peace Foundation, Occasional Paper No. 2, available at <https://sites.tufts.edu/wpf/files/2017/07/2.-UCG-Dersso-f.pdf>

⁹OAU, Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government”, AHG/Decl.5 (XXXVI), adopted Lomé, Togo, 10-12 July 2000, preamble, para 3

¹⁰*Id.*

¹¹“Foreword by Walter Laqueur (1978)” in Edward Luttwak, *Coup d'état: A Practical Handbook*, (Rev Edition), (Cambridge) MA, Harvard Univ Press 2016), xxxiii

¹²See, *Lakanmi v. Attorney-General, Western Region*, (1970) SC.58/69; Cf., *Sallah v Attorney-General*, [1970] *Ghana Law Rep.*, 55.

¹³See, for instance, Okay Achike, *Groundwork of Military Law and Military Rule in Nigeria*, 2nd. Ed., (Enugu, Fourth Dimension Publishers, 1980).

¹⁴Nic Cheeseman, *Democracy in Africa: Successes, Failures and the Struggle for Political Reform*, (New York,

Functionally, the UCG is anchored on a philosophy that splinters political power on the one hand from ownership by or legitimacy in the will of the people on the other. In doing so, it licenses a despot by definition. It was perhaps the pioneering anarchist thinker, William Godwin, who put the functional consequences of constitutional instability into perspective, even if inadvertently, when he juxtaposed despotism with anarchy and came away choosing the latter over the former. He reasoned:

Anarchy is a horrible calamity, but it is no less horrible than despotism. Where an anarchy has slain its hundreds, despotism has sacrificed millions upon millions, with this only effect: to perpetuate the ignorance, the vices, and the misery of mankind. Anarchy is a short-lived mischief, while despotism is all but immortal.¹⁵ It is logical, therefore, that constitutional instability should be a major determinant of development and its outcomes. Daron Acemoglu and James Robinson illustrate this point with the example of Mexico:

Between 1824 and 1867 (there were fifty-two presidents in Mexico, few of whom assumed power according to any constitutionally sanctioned procedure. The consequence of this unprecedented political instability for economic institutions and incentives should be obvious. Such instability led to highly insecure property rights. It also led to a severe weakening of the Mexican state, which now had little authority and little ability to raise taxes or provide public services.¹⁶

The effect of the constitutional instability of the UCG in (West) Africa and the region's development has been no different. The concern with UCG in the region, therefore, acknowledges the “blight that political instability has visited on the continent generally and on its individual citizens and inhabitants in particular”¹⁷. Anthony Hopkins similarly underscores the relationship between constitutional and governance instability, impoverishment, and misery around Africa, describing it as “a moral reproach on a scale even greater than that represented by the slave trade in the 19th century”¹⁸. He summarizes these consequences in graphic numbers on a continental scale:

Much of Africa has failed to achieve any growth in *per capita* incomes since 1960; some countries have seen incomes decline. At the close of the twentieth century, the average life expectancy of a child born in sub-Saharan Africa in 1980 was only 48 years; a typical African mother had only a 30 per cent chance of seeing all her

Cambridge University Press, 2015), 3

¹⁵William Godwin, *An Enquiry Concerning Political Justice and Its Influence on General Virtue and Happiness*, (London: G.G.J. and J. Robinson, 1793), 548-Paul Eltzbacher, *Anarchism: Seven Exponents of the Anarchist Philosophy*, (Steven Byington, Trans; James Martin (ed), London, Freedom Press, 1960), 25

¹⁶Daron Acemoglu & James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, (London, Profile Books, 2012), 31-32

¹⁷Chidi Anselm Odinkalu, “Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa”, 47:1 *J. African Law*, 1 at 14 (2003).

¹⁸Antony Hopkins, “A New Economic History of Africa”, 50:2 *J. African History*, 155 at 158 (2010)

children survive to the age of five; daily calorie intake was only 70 per cent of that of Latin America and East Asia.¹⁹

This underscores the organic relationship between UCG and development in Africa. Development remains one of the major preoccupations of the international settlement evolved at the end of World War II and decolonization in Africa was a central reason for this.²⁰ Conceptually, however, it is also both complex and slippery. Opinions diverge as to what its most pressing priorities should be from a selection that includes a focus on advancing economic progress, enhancing the frontiers of human agency, growing the institutional capacities of the state, the quality of leadership, or a synthesis of all these factors.²¹ One basic agreement in this debate is around the centrality of the state in the project of development. This makes state building essential, therefore, in development. The United Nations Declaration on the Right to Development rightfully affirms that “States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development”.²²

The idea of sustainable development is now well established as a norm of customary international law.²³ It was first fully articulated in the report of the World Commission on Environment and Development, better known as the Brundtland Commission Report, in 1987. As articulated by the report:

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.... Development involves a progressive transformation of economy and society. A development path that is sustainable in a physical sense could theoretically be pursued even in a rigid

¹⁹*Id.*, 157

²⁰See, Peter Jackson, “A Pre-History of the Millennium Development Goals: Four Decades of the Struggle for Development in the United Nations”, 44:4 *UN Chronicle*, 6 (2007) available at <https://www.un.org/en/chronicle/article/prehistory-millennium-development-goals-four-decades-struggle-development-united-nations>; D.I. Ajaegbo, “The United Nations Development Decade in Africa, 1960-1970: A Political and Socio-Cultural Analysis”, 14 *J. East African Research & Dev.*, 1 (1984)

²¹See H.W. Arndt, “Economic Development: A Semantic History,” *Economic Development and Cultural Change* 29, no. 3, (1981): 457; Kenichi Ohmae, *End of the Nation State: The Rise of Regional Economies* (New York: Harper Collins, 1986), 21; Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (London: Blackswan, 2000), 5; Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), 36.; Daron Acemoglu and James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (London: Profile Books, 2012), 41-44.; Stefan Dercon, *Gambling on Development: Why Some Countries Win and Others Lose* (London: Hurst and Co, 2022), 32.; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*, (Cambridge: Cambridge University Press, 2011), 241.

²²Declaration on the Right to Development, UNGA Res 41/128 of 4 Dec., 1986, Article 3(1)

²³See, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7, Separate Opinion of Judge Vice-President Weeramantry, pp 88-98

social and political setting. But physical sustainability cannot be secured unless development policies pay attention to such considerations as changes in access to resources and in the distribution of costs and benefits. Even the narrow notion of physical sustainability implies a concern for social equity between generations, a concern that must logically be extended to equity within each generation.²⁴

Inter-generational equity and effective participation of citizens are both inherent in this conceptualization of sustainable development. These, in turn imply government that is founded on popular legitimacy, which alone the people can hold to account for any failure to address or meet the needs of the society. This cannot be the case where government derives its power from anything other than the will of the people democratically expressed. It is no accident, therefore, that the UN's 2030 Agenda for Sustainable Development democracy proclaims that, “good governance and the rule of law as well as an enabling environment at national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger”²⁵. At the national level, this requires government that is founded on and able to guarantee “just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions”²⁶. As the African Commission on Human and Peoples' Rights noted in the *Jawara case*, these are not guarantees that come naturally from a government which comes to power by way of an UCG.²⁷

Mirroring these issues, the African Union's *Africa Governance Report 2023*, identifies five factors that predispose countries to UCGs. These include integrity of elections, diversity management and human rights, constitutional order and state legitimacy, economic governance, and public sector accountability, popular uprising, militarisation and terrorism.²⁸ It concludes that “if elections are not considered credible or if the will of the people is subverted by the incumbent administration as was the case in Nigeria (1993), Ivory Coast (2012), Kenya (2017) and Malawi (2019)”²⁹, the threat of UCGs becomes stronger. Government founded on UCG denies the rule of law, popular legitimacy, and participation and in this way precludes development that is sustainable.

²⁴*Our Common Future: Report of the World Commission on Environment and Development*, 1987, Chapter 2, para 1-3 (hereafter referred to as the Brundtland Commission Report)

²⁵United Nations, “Transforming Our World: The 2030 Agenda for Sustainable Development”, A/Res/70/1 (2015), para 9.

²⁶*Id.*, para 35.

²⁷*Jawara v. The Gambia*, *supra*, para. 74

²⁸ACG-23, 4

²⁹*Id.*, para 30

3. An Elusive Concept: The UCG

Although well-established now in regional lore, the UCG remains a somewhat elusive concept. The African Union High Level Panel on Egypt acknowledged this in 2014 when it complained about “difficulties encountered in applying the AU norms on unconstitutional changes of Government”³⁰. A year earlier, on the 50th anniversary of the establishment of the OAU in 2013, the AU had adopted a “Solemn Declaration”, which reaffirmed its commitment against UCG, but rather tantalizingly “recognize the right of our people to peacefully express their will against oppressive systems”³¹. It was unclear how such peaceful expression would be treated or what the acceptable limits on it could be, if any. While the AU has established the popular will through elections as the preferred basis for retention of power, it seems ambivalent on the question whether they are the sole means for bringing the legitimate exercise of political power to an end. This issue creates some uncertainty as to the scope of the prohibition against UCG in the African-inter-state system. In this connection, the AU's own Africa Governance Report, 2023, complains about “situations of 'popular uprisings' that lead to UCGs”, implying that there may be popular uprisings resulting in overthrow of governments which may not, however, be described as UCGs.³²

The Constitutive Act of the African Union prioritizes among other things, “respect for democratic principles, human rights, the rule of law and good governance”³³; and “condemnation and rejection of unconstitutional changes of governments”³⁴. In particular, article 30 of the Constitutive Act makes it clear that “Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union”³⁵. These commitments have been described as both “quite far reaching and long overdue”³⁶, crystalizing a quarter century of incremental evolution dating back to the foundation of ECOWAS. It is useful to recall the essential landmarks in the evolution of this pan-continental norm. It bears noting that the meaning of UCG was left undefined in the Constitutive Act, which appears to have left its meaning to evolve from the practice of African States. Its emergence as the dominant method for instituting government in the immediate aftermath of independence took place in the shadows

³⁰African Union, Peace & Security Council, Final Report of the African Union High-Level Panel for Egypt, SC/AHG/4.(CDXVI), p. 31 (2014)

³¹African Union, 50th Anniversary Solemn Declaration, adopted by the 21st Ordinary Session of the Assembly of Heads of State and Government of the African Union, Addis Ababa, 26 May, 2013, para F(ii), available at https://au.int/sites/default/files/documents/36205-doc-50th_anniversary_solemn_declaration_en.pdf, accessed 4 Mar, 2023.

³²ACG-23, para 68

³³The Constitutive Act of the African Union, adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government, 11 July, 2000, Lomé, Togo, CAB/LEG/23.15, entered into force, 26 May, 2001 (hereafter called ‘the Constitutive Act’), Art 4(m)

³⁴*Id.*, Art 4(p)

³⁵*Id.*, Art. 30

³⁶Chidi Anselm Odinkalu, “Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa”, 47:1 *J. African Law*, 1 at 13 (2003)

of a doctrinal disposition in regionalism in Africa which valorized self-regarding sovereignty over democratic pluralism. This history deserves attention. In tracing it, will be important to distinguish between “unconstitutional” and “extra-constitutional” change in government. This distinction roughly approximates to the distinction in regional norms and practice between UCG on the one hand and “popular uprising” on the other. While the former is currently well crystallized in regional lore, the latter is still contested and controversial.

3.1 *Non-Interference and The UCG*

In popular parlance, what is now called UCG is better known as a *coup d'état* and the continent has experienced a lot of it. At the beginning of 2022, it was said that “of 486 attempted or successful coups carried out around the world since 1950, Africa has seen 214, the most of any region, with 106 of them successful”³⁷. This means that at least 108 were unsuccessful. The continent accounted for 44.03% of the global epidemiology of coups, including 43.8% of the successful ones and 44.26% of the unsuccessful ones. While Sudan accounts for the highest number of attempts (both successful and unsuccessful), with 17, Burkina Faso, with eight successful coups out of nine attempts accounts for the highest number of successful coups as well as highest success rate. Of the top ten countries in Africa with the highest number of coup attempts and successful coups, only three – Comoros with nine (four successful); Burundi with 11 (five successful); and Sudan with 17 (six successful) are not in West Africa. Of the remainder, Ghana and Sierra Leone have had ten coup attempts each, resulting in five changes of government in each; Benin, Guinea-Bissau, Mali, and Nigeria, have each had eight coup attempts with success rates of six, four, five, and six respectively. Togo has reported three successful coups from seven attempts.³⁸

The above trend is evidence for the proposition that in the immediate aftermath of the age of independence in Africa in the decade of the 1960s, a contagion of constitutional instability appears to have beset the continent with both domestic and regional dimensions.³⁹ Ali Mazrui explains that African states at independence confronted two major challenges respectively of civic integration and achieving political legitimacy.⁴⁰ Integration on the one hand was a problem of hewing together diverse peoples into mutual coexistence and shared recognition of common citizenship. The challenge of legitimacy on the other hand addressed the problem of an acceptance by the peoples and citizens of the new countries of the authority to rule of the post-colonial political leadership.⁴¹ Neither of these could

³⁷Megan Duzor & Brian Williamson, “By the Numbers: Coups in Africa”, VOA News, 2 Feb. 2022, available at <https://projects.voanews.com/african-coups/>, accessed 12 March, 2023.

³⁸*Id.*

³⁹Aderanti Adepoju, “The Dimension of the Refugee Problem in Africa”, 81:3 *African Affairs*, 21, 22 (1982)

⁴⁰Ali Mazrui, “Thoughts on Assassination in Africa”, 83:1 *Pol Sc Q.*, 40 (1968)

⁴¹*Id.*, pp 45-47

be taken for granted at the formal end of colonialism. Both were conducive to a rise in what has been called “post-formation instability”.⁴²

The result was that domestically, the egalitarian promise of independence and liberation struggles around the continent was quickly followed after independence by what has been described as a “proliferation of authoritarian regimes in newly independent African countries”⁴³ built on the back of a succession of nation-building projects, which institutionalized in many countries the phenomenon of interminable or life presidencies.⁴⁴ Regionally, the countries of post-colonial Africa quickly retreated behind a curtain of domestic jurisdiction, the highpoint of which was the prohibition in the Charter of the Organization of African Unity (OAU) against “interference in the internal affairs of states.”⁴⁵ This prohibition put beyond the pale of supra-national inquiry the question of how a government came to power in any country.

When 15 Member States of the OAU created the ECOWAS in 1975, they effectively set up regional integration as an exception to the rule in the OAU Charter on sovereignty and non-interference.⁴⁶ The only question became how deep or extensive the scope of this exception would be to the habits of somewhat anarchical sovereignty within the OAU. It is somewhat ironic that the founding treaty of ECOWAS was the first breach in the armor of absolutist domestic jurisdiction ultimately leading to the emergence of the prohibition of UCG in Africa, because eight of the fifteen original signatories to the treaty were military rulers. The second chink in this armour was the adoption in 1981 of the African Charter on Human and Peoples' Rights, incidentally, finalized in Banjul, The Gambia.⁴⁷

The onset of the Liberian Civil War contemporaneously with the collapse of the Berlin Wall in 1989 eventually triggered an overdue re-evaluation of the doctrinal foundations of Africa's inter-state system. At its Summit in Addis-Ababa, Ethiopia, in July 1990, the Assembly of Heads of State and Government of the OAU adopted the Declaration of the Assembly of Heads of State and Government

⁴²Monty Marshall, *Conflict Trends In Africa, 1946-2004*, (London, DfID, 2006), 15 *et seq*

⁴³Bonny Ibhawoh, *Human Rights in Africa: New Approaches to African History*, (Cambridge, Cambridge University Press, 2018), 175

⁴⁴SKB Asante, “Nation Building and Human Rights in Emergent African Nations”, 2 *Cornell Int'l L. J.* 47, (1969); Vincent Nmeihelle, *The African Human Rights System: Its Laws, Practice, And Institutions*, (Den Haag/London, Martinus Nijhoff Publishers, 2001), 17-29; Yemi Akinseye-George, “New Trends in African Human Rights Law: Prospects of an African Court of Human Rights”, 10 *U. Miami Int'l & Comp. L. Rev.* 159, (2002)

⁴⁵Charter of the Organization of African Unity, OAU, May 25, 1963, 479 *U.N.T.S.* 39, (hereafter called the “OAU Charter”), Art III(2)

⁴⁶Treaty Establishing the Economic Community of West African States (ECOWAS), May 28, 1975; UN Treaty Series 1010, 17; reprinted in 14 ILM 1200 (1975). The member states at inception were Benin Republic, Burkina Faso, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo. Cape Verde joined the Community in 1976 while Mauritania denounced the treaty, leading it to leave the Community in 2000. For a history of the formation of ECOWAS, visit <https://ecowas.int/history-2/#:~:text=In%201976%2C%20Cape%20Verde%2C%20one,2000%2C%20Mauritania%20withdrew%20its%20membership,> accessed 03 March, 2023.

⁴⁷African Charter on Human and Peoples' Rights, adopted June 27, 1981, *CAB/LEG/67/3* rev. 5, 21 I.L.M. 58

of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the fundamental Changes Taking Place in the World, in which they declared themselves to be:

...fully aware that in order to facilitate this process of socio-economic transformation and integration, it is necessary to promote popular participation of our peoples in the processes of government and development. A permitting political environment which guarantees human rights and the observance of the rule of law, would ensure high standards of probity and accountability, particularly on the part of those who hold public office. In addition, popular-based political processes would ensure the involvement of all including in particular women and youth in the development efforts. We accordingly recommit ourselves to the further democratization of our societies and to the consolidation of democratic institutions in our countries.⁴⁸

Very importantly, the Heads of States and Governments also affirmed that “democracy and development should go together and should be mutually reinforcing”⁴⁹. This represented a major shift in the doctrines of the OAU and its member states. In the same year, ECOWAS established a plurinational Ceasefire Monitoring Group (ECOMOG), to intervene in Liberia, marking the first time a regional institution in Africa would undertake intervention in this way.⁵⁰ One year later, Assembly of Heads of State and Government of the ECOWAS followed suite with the adoption of the Declaration of Political Principles, in which they undertook, among other things:⁵¹

We will respect human rights and fundamental freedoms in all their plentitude including in particular freedom of thought, conscience, association, religion or belief for all our peoples without distinction as to race, sex, language or creed.

We will promote and encourage the full enjoyment by all our peoples of their fundamental human rights, especially their political, economic, social, cultural and other rights inherent in the dignity of the human person and essential to his free and progressive development.

We believe in the liberty of the individual and in his inalienable right to participate by means of free and democratic processes in the framing of the society in which he lives. We will therefore strive to encourage and promote in each our countries, political pluralism and those representative institutions and guarantees for personal safety and freedom under the law that are our common heritage.

⁴⁸AHG/Decl.1 (XXVI), para 10.

⁴⁹*Id.*

⁵⁰The ECOMOG became a standing regional mechanism under the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, (1999), Art. 17.

⁵¹A/DCL.1/7/91), adopted in Abuja, Nigeria, 4-6 July, 1991, paras 4-6

Contemporaneously, in 1991, Uganda's President Yoweri Museveni, who was then the Chair of the OAU's Assembly of Heads of State and Government, together with Nigeria's then former military Head of State, Olusegun Obasanjo jointly hosted a conference. They co-convened a high level Conference on Security, Stability, Development and Co-Operation in Africa (CSSDCA), resulting in the Kampala Document, which declared that “[t]here should be periodic renewal of the mandate of political leaders. At the same time, the tenure of elected leaders in various branches of government should be constitutionally limited to a given number of years”⁵².

A mere four years following the Kampala Document of the CSSDCA, up to “37 African states had revised their constitutions and all but four of them inserted presidential term limits”⁵³. This development is quite significant because it demonstrates that the norm against UCG in Africa evolved as part of a composite of norms to address authoritarian rule and its manifestation in the phenomenon of the interminable or life presidency. Any fruitful examination of pathologies of governance and development in Africa must take account of the two dimensions to the issue: UCGs on the one hand and the phenomenon of the interminable presidency on the other. Juxtaposed besides the 14 UCGs reported in the continent since 2002, at least 16 countries have successfully lifted term limits to confer interminable presidencies on themselves, including 13 since 2015⁵⁴. In 2020, Joseph Siegle and Candace Cook pointed out that this “lack of effective term limits has resulted in Africa having 10 leaders who have ruled for over 20 years and two family dynasties that have been in power for more than 50 years”⁵⁵. The sense of correlation between authoritarian or interminable rule on the one hand and the phenomenon of the UCG on the other appears inescapable. The implication of this is that a focus on UCGs may be fruitless without an effort to effectively address interminable rule. Both have to go hand-in-hand.

3.2 *Emergence of a Prohibition of UCG as Regional Norm*

Thus, at the beginning of the decade of the 1990s, it appeared that a broad continental consensus was emerging with three elements. First was the recognition of an organic nexus between democracy and development. The second was also a recognition that government had to be founded on popular will grounded in both human rights and popular participation. The third element of this consensus was an

⁵²“Africa Moves to Launch a Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA)”, Kampala Document, p. 5, available at http://www.au2002.gov.za/docs/key_oau/cssdca.pdf accessed, 4 March, 2023

⁵³Chidi Anselm Odinkalu & Ayisha Osori, *Too Good to Die: Third Term and the Myth of the Indispensable Man in Africa*, (Lagos, Kachifo, 2018), 95; Adrienne LeBas, “Term Limits and Beyond: Africa's Democratic Hurdles”, *Current History*, May 2016, p. 169 at 170

⁵⁴Joseph Siegle & Candace Cook, “Circumvention of Term Limits Weakens Governance in Africa”, Africa Centre for Strategic Studies, available at <https://africacenter.org/spotlight/circumvention-of-term-limits-weakens-governance-in-africa/>, accessed, 5 March, 2023.

⁵⁵*Id.*

affirmation of a commitment to presidential term limits. If they held, these elements together could dis-incentivise the tendency towards coups around the continent and potentially outlaw them. There was still some way to go before this outcome could be realized, however.

On the back of these developments, the OAU by 1995 evolved the outlines of a norm against UCG but the meaning was not assigned to it. These norms were first deployed by the OAU in response to the 1997 coup d'état in the West African state of Sierra Leone.⁵⁶ In its Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, the Member States of the OAU "agreed on the following definition of situations that could be considered as situations of unconstitutional change of government:

- i) military coup d'état against a democratically elected government;
- ii) intervention by mercenaries to replace a democratically elected government;
- iii) replacement of democratically elected governments by armed dissident groups and rebel movements;
- iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.⁵⁷

This definition was a partial adoption of a much wider ranging definition recommended by a Sub-Committee of the Central Organ (of the OAU Conflict Resolution Mechanism), which was constituted in 1995 and reported in 2000. The typologies of unconstitutional changes in government recommended by the Sub-Committee, included, in addition to the four adopted eventually by the Assembly:

- (a) the refusal by a government to call for general elections at the end of its term of office;
- (b) any manipulation of the Constitution aimed at preventing a democratic change of government;
- (c) any form of election rigging and electoral malpractice, duly established by the OAU or ascertained by an independent and credible body established for that purpose;
- (d) systematic and persistent violation of the common values and principles of democratic governance referred to above; and
- (e) any other form of unconstitutional change as may be defined by the OAU policy.⁵⁸

⁵⁶Solomon Dersso, "Unconstitutional Changes of Government and Unconstitutional Practices in Africa", World Peace Foundation, Occasional Paper No. 2, available at <https://sites.tufts.edu/wpff/files/2017/07/2.-UCG-Dersso-f.pdf>

⁵⁷AHG/Decl.5(XXXVI), adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU, Lomé, Togo, 2000

⁵⁸See OAU, "Report of the Sub-Committee of the Central Organ on Unconstitutional Changes in Africa", 25 (2000). Also "Report of the OAU Central Organ Sub-Committee on the Preparation of a Blueprint for Dealing Unconstitutional Changes of Government in Africa", Sub-Cttee/Central Sub-Cttee/Central Organ/Rpt. (III), 1996.

Two other developments occurred contemporaneously with these developments in 2000. First, on the margins of the Lomé Summit, a consensus position was issued in the form of the Lomé “Solemn Declaration” on the CSSDCA, based on the principles in the Kampala Document from nearly one decade earlier in 1991, wherein the African Heads of State merely undertook to “adhere to the provisions of the law and other legislative enactment promulgated by National Assemblies” and to “respect their national constitutions and adhere to the provisions of the law and other legislative enactment promulgated by National Assemblies”.⁵⁹

Second, following his ouster from power by soldiers in 1994, Gambia's former president, Dauda Jawara, undertook proceedings before the African Commission on Human and Peoples' Rights questioning the powers of the military government to take certain decisions including the exclusion of members of his government from rights of participation in government. In deciding on this complaint, the Commission addressed for the first time the question of the compatibility of UCGs with the African Charter on Human and Peoples' Rights, declaring that:

It is true that the military regime came to power by force, albeit, peacefully. This was not through the will of the people who have known only the ballot box since independence, as a means of choosing their political leaders. The military coup was therefore a grave violation of the right of Gambian people to freely choose their government as entrenched in Article 20(1) of the Charter. Article 20(1) provides: All peoples shall ... freely determine their political status... according to the policy they have freely chosen.⁶⁰

By the turn of the millennium, therefore, a norm against UCG was well established in the African Union and foundational to its membership. The full scope of this norm was far from entirely clear. At the core of it, the African Commission was able to establish in the *Jawara case* that the continent would no longer tolerate uniformed military rule or the overthrow of elected government by mercenaries or armed dissidents. It was also the case that a government could no longer be allowed to stay in power after losing elections. The African Charter on Democracy, Elections and Governance, (ACDEG) promulgated these into a

⁵⁹African Union, CSSDCA Solemn Declaration, para. 11(a), AHG/Decl. 4 (XXXVI), available at <http://www.peaceau.org/uploads/ahg-decl-4-xxxvi-e.pdf>, accessed, 24 April, 2017.

⁶⁰Communication 147/95; 149/96, *Sir Dawda K. Jawara v. The Gambia*, decision of the African Commission on Human and Peoples' Rights, 11 May, 2000, para 73, available at

<https://africanlii.org/sites/default/files/judgment/afu/african-commission-human-and-peoples-rights/2000-achpr-17/Jawara%20v.%20Gambia%2C%20Decision%2C%20147%20of%2095%3B%20149%20of%2096%20%28A%20CmHPR%2C%20May.%202011%2C%202000%29.pdf>

definition of UCGs, together with a prohibition against “any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government”⁶¹. The Charter also prohibits the perpetrators of UCG from participating in elections for the restoration of democratic form of government and criminalizes the act of perpetrating UCG.⁶²

In 2014, the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which formally creates the crime of UCG in Africa.⁶³ This defines the crime of UCG to mean “committing or ordering to be committed” acts with the aim of illegally accessing or maintaining power through:

- (a) a putsch or coup d'état against a democratically elected government ;
- (b) an intervention by mercenaries to replace a democratically elected government;
- (a) any replacement of a democratically elected government by the use of armed dissidents or rebels through political assassination;
- (b) any refusal by an incumbent government to relinquish power to the winning party or a candidate after free, fair and regular elections;
- (c) any amendment or revision of the constitution or legal instruments, which is an infringement of the principles of democratic change of government or is inconsistent with the constitution;
- (d) any substantial modification of the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.⁶⁴

There would be legitimate questions whether these provisions provide sufficient clarity to define the elements of a crime but those questions may have to wait until a court has the opportunity to determine those issues. For now, however, two points may be made. First, it seems quite clear that a consensus has crystallized around a norm prohibiting UCGs in Africa. Second, that said, the scope of this

<https://africanlii.org/sites/default/files/judgment/afu/african-commission-human-and-peoples-rights/2000-achpr-17/Jawara%20v.%20Gambia%2C%20Decision%2C%20147%20of%2095%3B%20149%20of%2096%20%28A%20CmHPR%2C%20May.%202011%2C%202000%29.pdf>, accessed, 04 Mar, 2023.

⁶¹African Charter on Democracy, Elections, and Governance, adopted 30 Jan., 2007, entered into force 15 Feb., 2012, Article 23(5), available at <https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf>, accessed, 4 Mar, 2023.

⁶²*Id.*, Arts 25(4)-(5)

⁶³Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted 7 June, 2014, Art. 14., available at <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> accessed, 4 Mar, 2023. This provision introduces the crime of UCG as Article 28A(1)(4) of the Protocol to what will be known as the African Court of Justice and Human and Peoples' Rights.

⁶⁴*Id.*, Article 28E

norm remains far from fully evolved. This later point is demonstrated by the uncertainties as to whether or not the concept of “popular uprising” is or is not part of the norm against UCG.

3.3 “Popular Uprising”: An Extra-Constitutional Phenomenon

The onset at the beginning of the second decade of the millennium of the uprisings in the countries of North Africa now widely described as the Arab Spring, presented the African Union an opportunity to address an issue which was not before foreseen in the annals of the organization.⁶⁵ The Africa Governance Report, 2023 notes “a trend towards popular uprisings in Africa”⁶⁶, suggesting that this implies “profound state- or -nation-building challenges in the countries concerned”.⁶⁷

The concept of “popular uprising” has never quite been coherently defined or operationalized in the practice of the African Union or any of the Regional Economic Communities (RECs). In August 2019, the Peace and Security Council of the AU cautioned that “the concept is not provided in any of the existing AU normative frameworks, in this regard, it is an invention that needs to be interrogated and reflected upon before it is embraced by the Union”⁶⁸, describing it as “complex, contested and controversial”. At least two issues arise with reference to the subject of popular uprisings. One is the substantive scope or elements of the concept. The second is whether this concept is itself embodied within the meaning of UCG or whether it is beyond the scope of the UCG.

With reference to the former, the High-Level Panel on Egypt in 2014 proposed some elements as guidelines in framing the concept of popular uprising. These include:

- (a) the descent of the government into total authoritarianism to the point of forfeiting its legitimacy;
- (b) the absence or total ineffectiveness of constitutional processes for effecting change of government;
- (c) popularity of the uprisings in the sense of attracting significant portion of the population and involving people from all walks of life and ideological persuasions;
- (d) the absence of involvement of the military in removing the

⁶⁵See, J. Shola Omotosho, “Legitimacy Crisis and 'Popular Uprisings' in North Africa”, 36:5 *Strategic Analysis*, 713 (2012)

⁶⁶ACG-23, para 62

⁶⁷Id.

⁶⁸AU Peace & Security Council, 871st Meeting, 22 Aug, 2019, Press Release, PSC/PR/BR.(DCCCLXXI), p. 2, available at <https://www.peaceau.org/uploads/psc.871.press.statement.popular.uprisings.22.08.2019.pdf>, accessed 4 Mar, 2023.

- government; and
- (e) peacefulness of the popular protests.

Many of these elements are malleable at best and not easily ones in which foreigners or foreign entities can get involved without encountering resistance from citizens or official institutions of any country going through them. Some of the requirements are also somewhat hopeful or fanciful. For instance, it is difficult to see how a protest that is “peaceful” can force out of power an authoritarian government or one lacking in legitimacy or effective control of the instrumentalities of government. The question here may be one of degree rather than absolutes.

The Africa Governance Report 2023 appears to engage with the subject in this spirit, proposing four different scenarios:

- (a) a popular civilian uprising resulting in the resignation of an incumbent government;
- (b) the military stepping into a power vacuum created by the resignation of an incumbent government;
- (c) the military takes over a civilian mass movement's demand for resignation of an incumbent government, leading to the resignation of an elected leader;
- (d) a popular uprising leads to an armed conflict or a civil war.⁶⁹

In terms of the report, the first scenario will not be treated as a UCG. The second scenario would be addressed by issuing the military with a deadline to return to constitutional normalcy. The third would be a UCG; while the fourth would be treated as an armed conflict.⁷⁰ According to the report, therefore, a popular uprising could be characterized as:

The collective actions of a variety of non-collective actors from a broad section of society, which embody shared concerns of large numbers of ordinary people, whose fragmented but concerted activities trigger socio-political change, irrespective of whether the concerns are guided by an ideology or recognizable leadership. The definition will also include 'popular military coup' which refers to a situation in which large numbers of ordinary people publicly support a UCG undertaken by the military.⁷¹

⁶⁹AGR-23, para 72.

⁷⁰*Id.*

⁷¹*Id.*, para 71

On this rendering, the proposal in the report is that a popular uprising may or may not be classed as a UCG depending on the facts of each case. This suggestion of a fact-specific determination which appears to be the favoured practice of regional institutions at the moment achieves an outcome that appears on its face credible by conflating a regime termination with regime replacement and avoiding an important conceptual distinction between “unconstitutional” and “extra-constitutional”. The former relates to a means of taking power while the latter relates to the means of losing it. A popular uprising does not necessarily set up a government; it terminates one. If and when that happens, the likelihood of a power vacuum is high as is the possibility of an outbreak of a contest among diverse actors to replace the regime. By contrast, a *coup d'état* does not just stop at terminating a government; it engineers regime change in order to deliberately install another. A popular uprising that is faithful to the characteristics outlined in the AU's attempted definition would not be a UCG. This is because a popular uprising sets out to bring down a government, not necessarily to install one. It is complete upon the downfall of the regime against which it takes place. The character of any government that results thereafter and the manner of diplomatic or other response that should follow in its wake is liable to be calibrated to the facts and evidence available. The attempt at a definition by the AU at the moment appears to conflate a popular uprising with the resulting regime. While convenient, this is flawed.

It must be said that the popular uprising is itself evidence of the failure of both national governments and regional institutions in Africa to hold states accountable to the standards of good government set up in regional treaties and other relevant laws. Judge president Edward Amoako of the ECOWAS Court of Justice implicitly calls attention to this when he speaks of UCGs as disruptions “indicative of a malaise with our approach to multi-party democracy, whose normative underpinnings such as zero tolerance for unconstitutional change of government, abolition of tenure elongation beyond the two terms of office, the conduct of free, fair and credible elections as well as the scrupulous adherence to the separation of powers are under threat”⁷².

4.) ECOWAS and UCGs

At the adoption of the revised ECOWAS Treaty in 1993, these commitments towards human rights and democratic government became norms of regional treaty law.⁷³ In particular, Article 4(j) of the Revised ECOWAS Treaty transformed

⁷²“ECOWAS Court President Warns of Dangers of Recent Political Developments in the Region”, *ECOWAS Court Blog*, *supra*.

⁷³Revised ECOWAS Treaty, 1993, Art 4(g)

the Declaration of Political Principles by reference into a foundational treaty commitment of the Community, committing state parties to the "promotion and consolidation of a democratic system of governance in each Member State as envisaged by the Declaration of Political Principles adopted in Abuja on 6 July, 1991". For the Member States of ECOWAS, the continental developments concerning the prohibition of UCG are now distilled in the ECOWAS Constitutional Convergence Principles, contained in the Supplementary Protocol on Good Governance, the foremost of which include the following:

Every accession to power must be made through free, fair and transparent elections.

Zero tolerance for power obtained or maintained by unconstitutional means. Popular participation in decision-making, strict adherence to democratic principles and decentralization of power at all levels of governance.

The armed forces must be apolitical and must be under the command of a legally constituted political authority; no serving member of the armed forces may seek to run for elective political.⁷⁴

The Protocol also prohibits any "substantial modification" to electoral laws in the six months preceding an election except with the consent of the major political actors involved in the contest.⁷⁵ It also provides an extensive menu of sanctions for UCGs, including:

Refusal to support the candidates presented by the Member State concerned for elective posts in international organizations;

Refusal to organize ECOWAS meetings in the Member State concerned; and Suspension of the Member State concerned from all ECOWAS decision making bodies.⁷⁶

The fact that ECOWAS established these standards within the framework of its Conflict Management Framework is the surest evidence of the link between UCG and instability in the region. In practice, the implementation of the norm has not been without challenges. For one, co-ordination between regional institutions in the implementation of these norms has not always been seamless. The AU complains about "a strong suggestion of an overlap of mandates between the AU and ECOWAS in responding to military coups"⁷⁷, expressing the hope that "the two institutions must thus coordinate their efforts."⁷⁸ There are similar overlaps and contradictions between regional institutions in West Africa. For instance, in the case of Mali, the Court of Justice of the Economic and Monetary Union of West

⁷⁴See, Protocol on Democracy and Good Governance, (Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping, and Security, (A/SP1/12/01), Art. 1(b)-(e)

⁷⁵*Id.*, Art. 2(1)

⁷⁶*Id.*, Art. 45(2)

⁷⁷ACG-23, para 64.

⁷⁸*Id.*

Africa (UEMOA) lifted the sanctions imposed by West African states for the UCG in that country.⁷⁹ With eight of the 15 member states of the ECOWAS also party to, and bound by the orders of the UEMOA Court of Justice, the regional sanctions regime against Mali became unsustainable.

A second issue is the effect of the sanctions levied by regional institutions on states which experience UCGs. Again, with reference to Burkina Faso, Mali, and Guinea, the Court of Justice of ECOWAS on 30 September 2021, suspended all cases from both countries, which were under sanctions from the Community as a consequence of respective cases of UCG. The court took this decision under Rule 78 of its Rules of Procedure. Some groups criticized this at the time as an act of “obstruction of justice for victims of human rights violations”⁸⁰. This suspension lasted for nearly 14 months until 22 November, 2022, when the Court lifted it.⁸¹ This was odd at best because the ECOWAS Supplementary Protocol on Good Governance makes it clear among other things that while states are under sanctions for UCG “ECOWAS shall continue to monitor, encourage and support the efforts being made by the suspended Member State to return to normalcy and constitutional order”⁸². The effect of this, it should be clear, has to be that the ECOWAS Court shall retain jurisdiction over the country for the purpose of supervising return to Community law and standards, including standards of compliance with human rights, in particular, during the period of the suspension. In any case, the Court cannot afford to yield up jurisdiction over violations alleged to have taken place prior to the suspension, including, in fact, over the legality of the UCG.

Thirdly, the appearance of inconsistency in the implementation of sanctions against UCG around the continent could also feed regional contagions. The AU, for instance, sanctioned as UCGs military takeovers in Burkina Faso, Guinea, and Mali, but failed to do so in Chad where the military clearly by-passed constitutional mechanisms after the killing of the incumbent president in April 2021. In Egypt also, the perpetrators of a UCG were allowed to contest and transmute themselves into leaders with electoral legitimacy. These inconsistencies could inspire tendencies conducive to a contagion of UCG or intransigence on the part of regimes that come to power by that means. This subject may be suitable for the

⁷⁹“West African Court Orders Lifting of Some Sanctions against Mali”, Reuters, 24 March, 2022, available at <https://www.reuters.com/world/africa/w-african-court-orders-suspension-some-sanctions-against-mali-2022-03-24/>, accessed, 4 March, 2023.

⁸⁰FIDH, “All Proceedings Concerning Mali and Guinea Suspended: An Act of Obstruction of Justice for Victims of Human Rights Violations”, Press Release, of 3 Dec. 2021, available at <https://www.fidh.org/en/region/Africa/mali/all-proceedings-concerning-mali-and-guinea-suspended-an-obstruction>, accessed 5 March, 2023,

⁸¹Joshua Odeyemi, “ECOWAS Court Lifts Suspension on Mali, Guinea, Burkina Faso's Cases”, Daily Trust, 25 Nov. 2022, available at <https://dailytrust.com/ecowas-court-lifts-suspension-on-mali-guinea-burkina-fasos-cases/>, accessed, 5 Mar, 2023.

⁸²ECOWAS Supplementary Protocol on Good Governance, Article 45(3)

exercise of the advisory jurisdiction of regional courts and tribunals in Africa including the Court of Justice of ECOWAS and the African Court on Human and Peoples' Rights, to provide coherent judicial guidance for the deployment of regional inter-governmental capabilities in managing UCGs.

Fourthly, there are considerable uncertainties as to the meaning of the UCG itself arising from or connected with the idea of popular uprising. The popular uprising in many cases is an extraordinary last resort that ensues when all lawful options for removing an ineffective, unpopular, or illegitimate government have failed. This calls attention to the need for a prophylactic approach to the phenomenon of UCGs in the form of consistent application and implementation of regional norms governing elections and good governance. It is often because the implementation of these norms is uneven and patchy that UCGs and popular uprisings ensue.

5.) Conclusion

The emergence of the norm against UCG in Africa is perhaps the greatest evidence of the exponential change that has occurred in the landscape of regional inter-governmental and governance norms in Africa since the independence of African states in the 1960s. From behind the veil of the doctrine of sovereignty and non-interference, there is now a firmly established norm that outlaws UCGs as basis for the exercise of political power. This norm has an affirmative element in the proposition that elections are the normative ideal for accession to power. In cases where elections prove to be chronically ineffective or manipulated, countries where popular uprisings have occurred as means of bringing to an end governments that no longer have sustainable legitimacy.

The concept of popular uprising itself proves the limits of the lore of UCGs as well as the flaws in the implementation of regional norms on good governance. If these norms were applied or implemented effectively, populations would be able to change lawfully governments that no longer have legitimacy or which prove to be no longer fit for purpose. But when governments can perform badly, afflict their people with manifestly malign outcomes, or manipulate elections chronically in order to retain power without consequences, they make popular uprisings inevitable.

This argues for both consistency in the implementation of the norm against UCG and also in the regional supervision of elections in (West) Africa. When regional institutions consistently certify crooked elections or ballots that are manifestly lacking in credibility, they lose standing as credible arbiters on questions of UCGs. This calls for greater clarity concerning the applicable standards to govern the credibility of elections. The African Court on Human and Peoples' Rights offered an example of what is possible in this direction with its 2021 advisory opinion on elections and COVID-19. A regional Court of Justice, like the ECOWAS Court, can play a role in this direction.

UCGs are in many ways both cause and consequence. It is clear that the UCG undoubtedly causes a setback to the pursuit of development in the region. The UCG could also be a consequence or evidence of the failure of regional compliance with standards of good governance. Returning to the language of public health with which this study began in the description of UCGs as a regional “epidemic”, it seems clear that an effective approach to addressing this problem requires both prophylactic and therapeutic approaches to dimensions. By way of prophylaxes, regional supervision of elections must be returned to a place of credibility which is not the case presently. That would make it possible to assert and implement the sanctions against UCGs much more firmly. Absent a credible prophylactic programme, it is will be difficult for the region to fully preclude the opportunism of UCGs or the desperation of popular uprisings.

SUB-THEME 1

**RULE OF LAW,
DEMOCRACY AND GOOD
GOVERNANCE**

**RULE OF LAW, DEMOCRACY AND GOOD GOVERNANCE:
ECOWAS CONSTITUTIONAL CONVERGENCE PRINCIPLES
IN PERSPECTIVE
BY
DIANA ASONABA DAPAAH**

DEPUTY ATTORNEY-GENERAL AND DEPUTY MINISTER FOR JUSTICE,
REPUBLIC OF GHANA

1. Introduction

Democracy, rule of law, and good governance are inter-related concepts and essential pillars for sustainable development in any society. Generally, we think of democracy as a system of governance where power is vested in the people and is exercised through representatives who are elected through free and fair elections. The rule of law means that laws should be made democratically, everyone should be held accountable to the law regardless of their status, there should be clear and fair mechanisms for enforcing the law, judges should be independent and impartial, and fundamental human rights should be respected. In a system of good governance, the rule of law is at the centre. This means that the rule of law is crucial for good governance, as it provides a framework for a legitimate government that upholds human rights and promotes accountability.

In West Africa, the Economic Community of West African States (ECOWAS) has taken significant steps to promote these principles through its Protocol on Democracy and Good Governance, 2001 (Protocol on Democracy and Governance). The Protocol on Democracy and Governance has several provisions that aim to promote democracy and good governance in West Africa. These include the promotion of the separation of powers, judicial independence, respect for human rights, and the rule of law. The Protocol also encourages free and fair elections, the participation of civil society in governance, and the promotion of gender equality. Furthermore, it establishes mechanisms for conflict prevention, management, and resolution. Overall, the Protocol seeks to ensure that all Member States maintain democracy and good governance by upholding the rule of law. To this end, article 33 of the Protocol recognises that the rule of law requires not only good laws that conform to human rights, but also a good judicial system, a good system of administration, and good management of the State apparatus. Member States acknowledge that a system that guarantees the smooth running of the State and its administrative and judicial services contributes to the consolidation of the rule of law.

2. Prohibition of Unconstitutional Changes of Government

One of the most significant threats to democracy, good governance, and the rule of law in Africa has been coups d'état and other violent or unconstitutional means of changing government. The Protocol recognises this, and as such, one of its most

critical provisions is the prohibition of unconstitutional changes of government. Article 1 of the Protocol provides a fundamental principle that 'every accession to power must be made through free, fair, and transparent elections' and that there shall be 'zero tolerance for power obtained or maintained by unconstitutional means' ⁸³The Protocol is however not explicit on what it means to obtain or maintain power by unconstitutional means. Additional guidance on this issue may need to be sought from other relevant instruments that African States have subscribed to regarding democracy, good governance, and the prohibition of unconstitutional changes of government. One such instrument is the Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, adopted during the 36th Ordinary Session of the OAU Assembly held from 10 to 12 July 2000, in Lomé, Togo. The Lomé Declaration identifies the following situations as examples of unconstitutional changes of government:

- (i) military coup d'état against a democratically elected government,
- (ii) intervention by mercenaries to replace a democratically elected government,
- (iii) replacement of democratically elected governments by armed dissident groups and rebel movements, and
- (iv) refusal by an incumbent government to relinquish power to the winning party after free, fair, and regular elections.

⁸³Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security, Article 1(b) and ©.

The African Charter on Democracy, Elections and Governance, adopted in 2007, expands on this definition by including the phenomenon of undemocratic constitutional or legal manipulations by incumbents to win or maintain power, such as extending or abolishing term limits. Article 22 of the Charter codifies and expands on the Lomé Declaration's definition of unconstitutional change of government, stating that the following illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union:

1. Any putsch or coup d'état against a democratically elected government;.
2. Any intervention by mercenaries to replace a democratically elected government;
3. Any replacement of a democratically elected government by armed dissidents or rebels;
4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
5. Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.

These provisions of the Lomé Declaration and the African Charter on Democracy, Elections and Governance illuminate the zero tolerance for unconstitutional change of government enshrined in the ECOWAS Protocol on Democracy and Good Governance. To enforce this prohibition and ensure adherence to democratic principles, the Protocol includes a sanctions regime to be implemented in the event of an unconstitutional change of government. Article 45 of the Protocol therefore provides:

1. In the event that democracy is abruptly brought to an end by any means or where there is massive violation of human rights in a member state, ECOWAS may impose sanctions on the state concerned.
2. The sanctions which shall be decided by the Authority may take the following forms, in increasing order of severity:
 - Refusal to support the candidates presented by the Member State concerned for elective posts in international organisations;
 - Refusal to organise ECOWAS meetings in the Member State concerned; and
 - Suspension of the Member State concerned from all ECOWAS decision-making bodies. During the period of the suspension the Member State concerned shall be obliged to pay its dues for the period.

3. During the period of suspension, ECOWAS shall continue to monitor, encourage and support the efforts being made by the suspended Member State to return to normalcy and constitutional order.

The African Charter on Democracy, Elections and Governance 2007 to which majority of ECOWAS Members are parties impose more elaborate and stiffer sanctions for unconstitutional changes of government. Under Article 25 of the Charter, the sanctions regime comprise the following measures and liabilities:

- i. If the Peace and Security Council determines that there has been an unconstitutional change of government in a State Party and diplomatic efforts have failed, it shall immediately suspend the State Party from participating in Union activities.
- ii. The suspended State Party must still fulfill its obligations to the Union, especially those related to respecting human rights.
- iii. Despite the suspension, the African Union will maintain diplomatic contacts and take action to restore democracy in the suspended State Party.
- iv. Those responsible for the unconstitutional change of government are prohibited from participating in elections or holding positions of power in political institutions of the state.
- v. Perpetrators of unconstitutional change of government may be tried in an African Union court.
- vi. The African Union Assembly may impose sanctions on any Member State that has instigated or supported unconstitutional changes of government in other states.
- vii. The Assembly may also apply other sanctions, such as economic measures, on the perpetrators of unconstitutional change of government.
- viii. State Parties are prohibited from giving refuge or shelter to those responsible for unconstitutional changes of government on the pain of sanctions by the African Union Assembly.
- ix. State Parties must prosecute or extradite those responsible for unconstitutional changes of government.

But despite the prohibition of unconstitutional changes of government with a sanctions regime, at both the subregional and regional levels, West Africa has experienced a resurgence of military coups. Since August, 2020, power has changed hands unconstitutionally five times in four West African countries: Guinea (September, 2021); Mali (August, 2020 and May, 2021); and Burkina Faso

(January, 2022 and September, 2022). Two other ECOWAS countries saw thwarted coup attempts in this period—Niger in March, 2021, and Guinea-Bissau in January, 2022. Currently, Burkina Faso, Guinea and Mali are under military rule. More specifically, Burkina Faso suffered two successful coup attempts in 2022. The first was led by Junta Leader Lieutenant Colonel Paul-Henri Sandaogo Damiba, who removed the then President Roch Marc Christian Kabore in a coup on 24 January, 2022. The second was carried out by his military colleague, Captain Ibrahim Traore, on 30 September, 2022.

Indeed, the problem has taken more root than we may want to admit. Between 2001 (when the Protocol on Democracy and Governance was adopted) and 2023, one may count at least 12 coup d'états in West Africa: Guinea Bissau (September, 2003 and April, 2012); Niger (February, 2010); Mali (March, 2012, August 2020, and May 2021); Guinea (December, 2008 and September, 2021); and Burkina Faso (October, 2014, September, 2015, January, 2022 and September, 2022). These coups pose a significant threat to the stability and development of the sub-region. They undermine democracy and the rule of law, and they often lead to human rights violations and economic stagnation.

3. The Problem of Democratic Backsliding in West Africa

The resurgence of coup d'états in West Africa, particularly in the last three years, despite the subregional and regional frameworks on democracy and governance, is symptomatic of a failure to consolidate the democratic renewal of the 1990s and early 2000s. To put it bluntly, West Africa is experiencing a period of democratic backsliding.⁸⁴ On some level, one could view the recent military interventions in the politics of certain countries in the sub-region as attempts to fix dysfunctional democratic experiments that political elites have failed to reform due to the benefits they and their allies derive from the malfunction.

Gyima-Boadi, for instance observes, that 'while the ballot box has remained the chief mechanism for choosing leaders, election quality is declining'.⁸⁵ Incumbent leaders have become bolder in election rigging schemes.

⁸⁴See E. G Boadi, *'Democratic backsliding in west africa: nature, causes and remedies'* (Kofi Annan Foundation, December 2021).

⁸⁵Boadi (n 2) 12.

These are achieved through means such as populating election management bodies or election dispute tribunals with loyalists;⁸⁶ using violence and intimidation to suppress voter registration and voter turnout in opposition strongholds; and banning electable opposition candidates from contesting including by making late changes to candidate eligibility or prosecuting them on politically motivated charges.⁸⁷

The phenomenon of changing or reinterpreting constitutional term limits to allow incumbents to run for third or other multiple terms is also gaining roots. In Guinea, President Alpha Conde engineered an undemocratic and widely unpopular changes to the Guinean Constitution that allowed him to run for a third term in a controversial election that was marred by violence.⁸⁸ Though he won, the discontent generated by the constitutional changes and the election led to a military overthrow of his government and the Constitution about a year later in September 2021.⁸⁹ In Côte d'Ivoire, President Ouattara equally managed to procure a reinterpretation of the Ivorian Constitution to allow him run for a third term in an election in which some opposition candidates were barred from contesting⁹⁰ and others boycotted in protest. In Togo, despite opposition protests,⁹¹ the Parliament approved a constitutional amendment that capped the presidential mandate at two five year terms but limited its application only to future elections. With that amendment, the incumbent who already served three

⁸⁶See Gyima, as above, 13 discussing how President Talon of Benin 'put his former personal lawyer in charge of the country's previously distinguished Constitutional Court' to consolidate ostensibly to guarantee victory in electoral disputes before the Court and consolidate his grip on power.

⁸⁷An example is the trial in absentia and conviction of Guillaume Soro, former Ivorian Speaker of the National Assembly, that ensured that he would be arrested and jailed if he returned to the country to contest President Ouattara in the October 2020 elections: Ange Aboa, 'Ivory Coast presidential candidate Soro sentence to 20 years in prison' (Reuters, 29 April 2020), <https://www.reuters.com/article/us-ivorycoast-politics-soro-idUSKCN22A2E0> (accessed April 10, 2023)

⁸⁸'Guinea President Alpha Condé wins controversial third term' France24 (24 October 2020) <https://www.france24.com/en/africa/20201024-guinea-president-alpha-cond%C3%A9-wins-re-election-with-59-5-of-vote> (accessed April 10, 2023)

⁸⁹K Höije, 'Uncertainty in Guinea after military coup removes Alpha Conde', Al Jazeera (11 September 2021) <<https://www.aljazeera.com/news/2021/9/11/uncertainty-in-guinea-after-military-coup-topples-alpha-conde>> (accessed April 10, 2023)

⁹⁰Ivory Coast court clears president's third-term bid' Deutsche Welle (DW) (15 September 2020) <<https://www.dw.com/en/ivory-coast-court-clears-president-ouattaras-contentious-third-term-bid/a-54928804>>

⁹¹'Ivory Coast election: Alassane Ouattara wins amid boycott' BBC (3 November 2020) <https://www.bbc.com/news/world-africa-54778200> (accessed April 10, 2023)

terms since ascending the presidency after his father's death in 2005 is eligible to run for election and stay in office until 2030.⁹² And in what appears to be ground works to reinterpret the Senegalese Constitution to allow him run for a third term,⁹³ the incumbent president of Senegal has secured changes to the country's 'election and defamation laws to constrain the opposition and the media.'⁹⁴

By itself, democracy is not a self-sustaining system of government. Its development and consolidation require a deliberate effort to promote a democratic culture that encompasses respect for the rule of law, human rights, and fundamental constitutional principles, such as the separation of powers, checks and balances, judicial independence, credible elections, and peaceful transfer of power. Sometimes, the vigilance of a politically conscious population and the accountability demanded by a free press and an active civil society can provide the necessary oversight for State institutions and people in power to act democratically and responsibly.

However, as history and experience have shown, this is not always the case, especially where there is a significant uneducated population and the media or civil society is divided along political, religious, or ethnic lines. This real likelihood that the centre might not hold at the national level is why sub-regional and regional bodies, such as ECOWAS and the AU, establish external systems to intervene if necessary.

⁹²See 'Togo changes law to let president stand for two more terms' Al Jazeera (9 May 2019) <https://www.aljazeera.com/news/2019/5/9/togo-changes-law-to-let-president-stand-for-two-more-terms> (accessed April 10, 2023)

⁹³See 'Senegal president says controversial third term constitutional' France24 (20 March 2023) <<https://www.france24.com/en/live-news/20230320-senegal-president-says-controversial-third-term-constitutional>> (accessed April 10, 2023)

⁹⁴Boadi (n 2) 14. See also Bate and N Dione, 'Senegal rocked by more unrest as police quell protests' Reuters (17 March 2023) <https://www.reuters.com/world/africa/more-unrest-senegal-police-clash-with-opposition-supporters-2023-03-16/> (accessed April 10, 2023)

It appears, however, that the roles of ECOWAS and the AU to provide surveillance for compliance with their democracy and good governance norms have not been satisfactorily executed. Gyima Boadi, for instance, attributes the democratic backsliding in West Africa partly to the 'lax enforcement of democracy and clean-election protocols by African continental and subregional bodies'⁹⁵. Another commentator observes that the AU and ECOWAS have a credibility problem which stems from the fact that they 'are not denouncing those who flout laws to hold on to power; they complain only when the military seizes it'.⁹⁶ Condemning coup makers and imposing sanctions is all well and good; however, it is often a belated response to the real problem that could be prevented by strictly enforcing relevant ECOWAS and AU norms to forestall election rigging schemes, elimination of term limits, and other undemocratic practices by incumbents, which often precipitate military interventions.

4. The Way Forward

To reverse the spate of military interventions in West Africa, various measures need to be taken. First, ECOWAS needs to promote democratic consolidation in Member States. This can be achieved by providing technical assistance and support for electoral processes, promoting the participation of civil society in governance, and strengthening the capacity of national human rights institutions. By promoting democracy and good governance, ECOWAS can create a conducive environment for the peaceful transfer of power through elections.

Second, it must enforce the existing ECOWAS and AU instruments on democracy and governance by imposing sanctions, not only on coup makers, but also on autocratic civilian incumbents who manipulate constitutional and electoral rules to win elections or extend their mandates. The lack of sanctions for those leaders complicit in the constitutional and legal manipulation aspect of the prohibition of unconstitutional changes of government certainly has a contamination effect. It emboldens leaders in other countries to try similar tactics.

⁹⁵Boadi (n2) 12.

⁹⁶A K. Abebe, 'The African Union's hypocrisy undermines its credibility'. (27 August 2020), *Foreign Policy*, (27 August 2020) <<https://foreignpolicy.com/2020/08/27/the-african-unions-hypocrisy-undermines-its-credibility/>> (accessed April 10, 2023)

Third, ECOWAS and the AU may also need to plug a loophole in their Democracy and Governance instruments which some leaders are exploiting. The ECOWAS Protocol requires 'strict adherence to democratic principles'⁹⁷. Under the AU Charter on Democracy, Elections and Governance, unconstitutional change of government is defined to include 'any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.'⁹⁸ However, neither instrument defines what is meant by 'democratic principles' or 'principles of democratic change of government'. Thus, for instance, it is debatable whether a constitutional amendment by an incumbent to abolish presidential term limits, violates democratic principles or principles of democratic change of government. Similar doubts exist about the exclusion of electable opposition candidates from an election through various machinations, including politically motivated prosecution. To prevent the exploitation of the vagueness of these principles, ECOWAS and the AU must flesh out their content by spelling out bright-line rules or standards on matters like presidential term limits and other legal or constitutional changes that violate democratic principles. Such standards will provide clear benchmarks of democratic behaviour for States and their leaders and better assist ECOWAS and/or the AU in detecting or determining non-compliance for the purpose of sanctions.

Fourth, ECOWAS must increase the cost of unconstitutional changes of government. By increasing the cost of coups, ECOWAS can deter future coup plotters. This can be achieved by imposing economic sanctions on coup leaders and their supporters, while targeting the sanctions to minimise the impact on ordinary citizens. One way to minimise the impact of sanctions on coup leaders and the State is to require that the State and its military leaders continue to comply with human rights obligations despite suspension from subregional or regional bodies. Under the African Charter on Democracy, Elections and Governance, the imposition of sanctions on a Member State in which an unconstitutional change of government has occurred does not suspend the Member's human rights obligations.

⁹⁷ECOWAS Protocol on Democracy and Governance, article 1(d).

⁹⁸African Charter on Democracy, Elections and Governance 2007, article 23(5).

Thus, article 25(5) provides that a State that is sanctioned, including by suspension from AU activities 'shall continue to fulfill its obligations to the Union, in particular with regard to those relating to respect of human rights.' The ECOWAS Protocol on Democracy and Governance does not contain a similar provision. This creates uncertainty about whether an ECOWAS Member that is suspended for unconstitutional change of government is still bound by its Community obligations relating to human rights, and whether the suspended member is still subject to the jurisdiction of the ECOWAS Court in human rights cases during the period of suspension. An amendment to the ECOWAS Protocol on Democracy and Governance is required to bring clarity to the issue and ensure that sanctions imposed on a State and its coup leaders do not undermine the enjoyment of fundamental human rights by ordinary citizens.

In conclusion, democracy, rule of law, and good governance are essential for sustainable development in West Africa. ECOWAS has taken significant steps to promote these principles through the Protocol on Democracy and Good Governance, including the prohibition of unconstitutional changes of government. However, the recent surge of military coups in the region highlights the need for more concerted efforts to promote democracy and good governance. ECOWAS must take proactive measures to prevent coups by promoting democratic consolidation in Member States and strictly enforcing its norms not only against coup makers but also against pseudo-democratic civilian leaders who create the conditions for coups in the first place. Only by doing so can West Africa achieve its full potential for sustainable development.

**ECOWAS' ZERO TOLERANCE FOR UNCONSTITUTIONAL
CHANGE OF GOVERNMENT**

BY

**HON. JUSTICE DR. ABOU BHAKARR
M. BINNEH-KAMARA**

JUSTICE OF SIERRA LEONE'S SUPERIOR COURT OF JUDICATURE

1. Introduction

My task in this auspicious occasion is to do a presentation on the topic: 'The Rule of Law, Democracy and Good Governance – ECOWAS' Constitutional Convergence Principles in Perspective'. Mr. Chairman, please permit me to rather do a presentation on 'ECOWAS' Categorical Imperative Principles of Governance in Regional International Law'. The presentation is so re-named, because in the context of West Africa's regional international law, the entire membership of The Economic Community of West African States (ECOWAS) is bound by its Revised Treaty, signed in Cotonou, Benin, on the 24th July, 1993, and its subsisting Protocols and Declarations, ratified and/or domesticated, pursuant to the appropriate provisions of its Member States' respective constitutions.

Thus, the paper presents the case that the current worrisome trend in global politics, regarding the resurgence of political authoritarianism, has had serious ramifications for regional integration and the fundamental political and legal architecture upon which ECOWAS is built.⁹⁹ This trend has manifestly heightened the potential for intra-states conflicts¹⁰⁰ that would undermine regional cooperation, security and peaceful coexistence in the sub-region. Further, the paper reiterates the significance of the ECOWAS' zero tolerance policy of unconstitutional change of government¹⁰¹ in projecting its interlocking fundamental ideals of democratisation and constitutionalism, the rule of law, human rights and good governance. Meanwhile, the surge of military interventions in West Africa's body-politic is undemocratic, unconstitutional and manifestly antithetical to the sub-region's democratic progression. This retrogression is unacceptable; it is a digression from West Africa's resolve to relegate political authoritarianism to the doldrums.¹⁰²

⁹⁹The Revised Treaty of 1993, The Protocol on the Community Court of Justice (1991/1996); The Supplementary Protocol Amending the Protocol Relating to the Community Court of Justice (2005); The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (1999); The Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (2001/2008); The Protocol Relating to the Free Movement of Persons, Residence and Establishment (1979/1980) and all its supplementary protocols adopted between 1985 and 1999; Declaration on the Fight Against Trafficking in Persons (2001), Accra Declaration on War-Affected Children in Africa (2000); The Declaration of ECOWAS' Political Principles (1991); etc.

¹⁰⁰See Chapter X of the Revised Treaty, regarding Cooperation in Political, Judicial and Legal Affairs, Regional Security and Immigration: Article 58 (1) (a).

¹⁰¹See Section 1: Constitutional Convergence Principles- Article 1 (c) of the Supplementary Protocol on Democracy and Good Governance (2001/2008).

¹⁰²See Section 1: Constitutional Convergence Principle- Article (1) (e) and Section 4: The Role of the Armed Forces, the Police and Security Forces in a Democracy.

The presentation condemns the military's unwarranted intrusion into politics; and simultaneously espouses their disdain for ECOWAS' core democratic ideals, while locating the military's role in its actual constitutional and democratic context.. The paper also contextualises ECOWAS' unprecedented positive strides since the 1990s, in the projections of democratisation through constitutionalism in the sub-region; and how those positive strides have impacted the need for having strong democratic institutions, reasonably fair democratic processes and credible democratic cultures in the Sub-region. The paper concludes that despite its challenges, the security and socioeconomic development of West Africa, in this era of postmodernism and Information Technologies (ICTs), are still in the hands of ECOWAS, which has a crucial role to play in bringing West Africa together; and thereby projecting it as Africa's beacon for the implementation of democratic initiatives and good governance ideals.

2. Constitutionalism And Governance In Human Affairs

Humanity has always grappled with the philosophical issues of how to organise and govern a political community and the fundamental ideals upon which society should be built. These issues are compounded by the fact that human nature is underpinned by two extremes: cooperation and conflict. Thus, humanity has always pushed for cooperation over conflict, because of its tendency to foster man's relative security, bring a political community together, and simultaneously propel it to development and prosperity. Analytically, it is upon cooperation that the concepts of Statehood and Sovereignty are built; it is upon cooperation that the international community and its regulatory regimes are constructed; and it is upon cooperation that even ECOWAS and its *sui generis* legal order, which Member States are bound to constitutionalise and enforce, has emerged in the context of regional international law. Invariably, conflict can cause miseries and devastating scourges at the micro and macro levels.

¹⁰³As above

¹⁰⁴Above article 1 (a)- (l).

¹⁰⁵See Section 2: Elections- articles 2-10

¹⁰⁶See Section 6: Education, Culture and Religion- articles 29-31

In fact, conflict has become the world's greatest challenge in this third decade of the Twenty-First Century. And humanity's existence is even threatened by potential nuclear wars, rooted in political and ideological conflicts, that have sent shock waves, across the World's Community of Nations, about the future of the human race. West Africa's governance experiences, had been fraught with a plethora of debacles, including the devastating effects of colonialism and imperialism, one-party oligarchies and political authoritarianisms, endemic corruption and ethno-regional considerations in the allocation of States' resources, military coups and rebellions, and a general sense of hopelessness in international relations. Nonetheless, the final decade of the Twentieth Century, witnessed a liberal democratic transition in international relations that impacted the evolution of general and regional international laws.¹⁰⁷ Thus, the need to strengthen regional integration, democratisation and constitutionalism, the rule of law, human rights and good governance, became the principal thrusts of West Africa's governance architecture and development initiatives.¹⁰⁸ Meanwhile, it is in this context that ECOWAS developed its Political Principles, rationalised in Declaration A/DCL./1/7/91 adopted in Abuja, Nigeria on 6th July 1991. This Declaration was followed by the adoption of the ECOWAS Revised Treaty in 1993, which signaled a clear retreat from political authoritarianism and its manifest challenges in the socioeconomic, political and legal spheres of West Africa.

3. Conceptual Framework

Conceptually, political authoritarianism is rationalised in Statism (in the name of Sovereignty); whereas democracy is rationalised in liberalism (in the name of constitutionalising the limitations of the overwhelming political powers of the State). The political realists (the so-called statist) still believe that politics is underscored by the quest for, consolidation and use of State power, to project the multidimensional interests of the ruling class (political realism). And the political idealists (liberals and moralists) believe that politics is about upholding the fundamental ideals, upon which a political community is constructed.¹⁰⁹ What are those ideals, upon which peaceful, stable and developmentally-oriented political communities are built?

¹⁰⁷D Armstrong, T Farrell and H Lambert, *International law and international relations* (2nd edn). Cambridge University Press) ²⁻³.

¹⁰⁸See Article 4 (a) and (i) of The Revised Treaty of 1993.

¹⁰⁹This conceptual dichotomy has been explored by theorists in domestic and international relations/law, including, R Morgenthau, *Politics among nations: the struggle for power and peace* (7th edn.) New York; Alfred A. Knopf); J Alder, *Constitutional and administrative law* (6th edn.) Palgrave Macmillan) ¹⁹⁻⁴³; O Nnoli, *Introduction to politics* (1st edn.) Longman Singapore) ⁷⁻¹⁰; C W Kegley Jr., *World politics: trend and transformation* (11th edn.) Thompson and Wadsworth) ²⁵⁻³²; B Dupre, *50 political ideas you really need to know* (Quercus) ³.

Thus, justice and constitutionalism, democracy and the rule of law, human rights and freedom and by extension good governance, are the most salient. Analytically, notwithstanding ECOWAS' strives towards political and constitutional liberalism, political realism has continued to influence West Africa's political and constitutional landscapes; and it has threatened peaceful coexistence in the sub-region, with a diabolical potential to resuscitate intra-states conflicts, that would undermine the sub-region's stability. The political realists consider State Sovereignty as the basis of its laws; and that the overwhelming political and constitutional powers of the State, must invariably surpass the rights and freedoms of citizens and their legitimate socioeconomic and political organisations and institutions (including political parties in opposition, the media and civil society).

This is how they (the statist) would rather want their Superior Courts of Judicature to interpret and enforce their laws and constitutions; so that the ruling elites can disguise their political shenanigans under the rule of law; and hereby adulterate the constitutional ideals of limited government. What are the fundamental paraphernalia of limited government? Again, the most notable are the rule of law, separation of powers, judicial independence, decentralisation of State administration and the power of the Legislature in its oversight functions of the Executive's Ministries, Departments and Agencies (MDAs). Contrariwise, the political liberals believe in the conception that one of the fundamental considerations upon which the State is built is to protect and enforce the fundamental rights and freedoms of the individual (personal autonomy).

Therefore, the State must not (in the name of Sovereignty) overwhelmingly exercise its powers to infringe on the rights and freedoms of its citizens, as guaranteed and protected by the State's constitutional and legal regimes. The political liberals conscientiously clamour for limited government, through democratisation and constitutionalism. They also believe that the foregoing paraphernalia of limited government are the architecture of a functional democracy. Constitutionally, it is the Judiciaries of Member States of ECOWAS, pursuant to their adjudicative functions, that should enhance the balance between the constitutional positions of the political realists and the political liberals in the political and constitutional debates. This constitutional balance, recognises the Sovereignty (Supremacy) of the State and simultaneously protects and enforces democratic citizenship and human rights, freedoms and liberties. This balance is rationalised in the constitutionalism of political pragmatism. Significantly, this discrete and sacred constitutional responsibility of Judiciaries, must be conscientiously exercised without fear or favour, affection or ill-will.

As stated above, there is a clear connect between democracy and limited government. And the most significant paraphernalia of limited government, are arguably the most prominent characteristics of good governance. Good governance is characterised by participation, the rule of law, transparency, responsiveness, consensus oriented, equity, effectiveness and efficiency, accountability, and strategic vision.¹¹⁰ Thus, despite democracy's challenges in the Twenty-First Century, it is upon these good governance ideals that it has successfully continued to thrive. Democracy reflects a governance system that constitutionally empowers the electors to freely and fairly elect their President (The Chief Executive and Head of State) that implement the law;, and their Parliamentary Representatives (Legislature), that make and unmake the law, which are interpreted and enforced by the Judiciary, to uphold the supremacy of the constitution; maintain social order and control; protect fundamental rights, freedoms and liberties; preserve the State, its resources and culture ; and settle disputes.

The following inferences are discernible from this conception. First, there is a nexus between democracy and constitutionalism. That is, democracy must be constitutionally sanctioned. And in a democracy, the constitution is the supreme law. Therefore, every other legal doctrine – statute or the common law – is subservient to the constitution. Secondly, governance in a democracy is about the rule of law. It is about the rule of law making; The rule of law implementation; and the rule of law interpretation and enforcement. Thirdly, elections are fundamentally crucial to democracy. They are the tectonic plates, upon which the democratic architecture is constructed. They are the forces that propel the functions and functionalities of the State and its operatives. They are as well the basis for democratic legitimacy and the constitutional and legal powers of the occupants of political offices.

¹¹⁰The United Nations Development Programme (UNDP: 1997): A Brochure on Good Governance, page 3.

Fourthly, the concept of separation of powers is cognate with democracy. The principal thrust of this concept is that the cardinal governance architecture: Legislature, Executive and Judiciary are constitutionally bound to be kept separate of each other in terms of functions, personal and control, but there must as well be legal and constitutional regimes, preventing one organ of government, from infringing on the functions of the others; while creating a room for the apposite checks and balances, consonant with law. Laws are implemented by the Executive, through MDAs. They are made by Parliament, consonant with constitutional processes and procedures. And they are interpreted and enforced by the Judiciary, which principal constitutional responsibility is rooted in the administration of justice. Fifthly, fundamental human rights, freedoms and liberties, must be recognised, guaranteed, protected and enforced. The judiciary's functionality as an arbiter of justice and dispute settlements is crucial here.

Sixthly, democracy is not only about the functions and functionalities of democratic institutions; it is also about the processes, underscoring the exercises of democratic functions in the context of the apposite democratic culture. So, the ideals of true democracy are realised when the democratic trilogy: institutions, processes and culture, converge and work in the interest of the electorate.¹¹¹ Seventhly, there must as well exist an independent institution that monitors the credibility of the democratic institutions as they exercise their functions; examine whether the democratic processes are honoured; and uphold the democratic cultures; thereby giving succour to the notions of democratic legitimacy and accountability. Undoubtedly, this institution is the media, which should exercise interlocking functions with Civil Society Organisations (CSOs) in the context of democratic citizenship. Analytically, the above constitutional and institutional safeguards in liberal democracies uphold the ideals of justice.

¹¹¹AB. M. Binneh-Kamara, *The nexus between conflict and democratic good governance in Sierra Leone*, Paper Delivered at the National Consultative Conference on Building a United and Cohesive Nation, 20-22 March 2013, Bank Complex, Freetown, Sierra Leone.

Justice is the constant and perpetual will to render to others what is due to them. Justice is the crowning glory; it is the sovereign mistress and queen of all the virtues.¹¹² So, justice is the most cardinal or supreme political and legal virtue.¹¹³ It is the only justification for law.¹¹⁴ A fortiori, humanity's clamour for justice has been viewed through lenses coloured by the promotion of virtues and values, the maximisation of societal welfare and the protection and enforcement of rights, freedoms and liberties.¹¹⁵ Thus, justice in the judicial sense should be justified in this trilogy. Judicially, justice has a context and a content. The context being the facts underpinning every case; and the content is the applicable laws (the legal doctrines).¹¹⁶ Therefore, justice in the eyes of the Courts is viewed in a concrete (not in an abstract) sense. Constitutionally, justice must be seen done, through credible, fair and judicious public hearing processes by independent, impartial, incorruptible and neutral judicial institutions.¹¹⁷

Pragmatically, it is through law that justice can triumph and reign supreme; it is through law that rights and liberties are enforced. In fact, the manifestation of truths for peaceful coexistence in society is tied to law and justice: Justice, peace and truth are an inseparable triplet unconnected with Natural Law. Natural Law is indeed the ultimate test of justice and liberty in all human affairs.¹¹⁸ The political idealists and liberals believe in the core truths of Natural Law. So, the influence of Natural Law on State affairs is inextricably linked to liberalism in modern democracies. The ideas of Natural Law are anchored by the belief that the validity of human law (Positive Law), must approximate to a higher law, rationalised in morality. That higher law is secularly discovered by human reason and theologically through the scriptures.¹¹⁹ Thus, there is a connect between morality and human reasoning. There is also a connect between nature and reason; for reason governs the universe. So, humanity is part of the universe and of nature. Thus, to coexist naturally, humanity must live by reason. Therefore:

... True law is right reason in agreement with nature. To curtail this law is unholy, to amend it is illicit, to repeal it impossible. One and the same law, eternal unchangeable, will bind all people and all ages. What of the many deadly, the many

¹¹²Cicero, *Political speeches*: a new translation by D.H. Berry Oxford World's Classics (Oxford University Press, 2006).

¹¹³M Tebbit, *Philosophy of law*: an introduction (2017) 6-7.

¹¹⁴G. H. Sabine, *A history of political theory* (3rd ed., New York: Holt, Rinehart & Winston, (1961) 558

¹¹⁵M. J. Sandel, *Justice: what is the right thing to do?* (Penguin Books, 2010) 19-21.

¹¹⁶Lord Donaldson MR in *R v. Secretary of State for Home Department ex parte Cheblak* {1991} 2 All ER 319.

¹¹⁷See Section 17 (1) (a) and subsections (5), (6) and (7) of section 120 of Act N0.6 of 1991}

¹¹⁸PJ Stanlis *Edmund Burke and the natural law* (1958) 34-36.

¹¹⁹M Tebbit, (n15) 11- 12.

pestilential statutes which nations put in force? These are no more deserve to be called laws than the rules a band of robbers might pass in their assembly. Law is the distinction between things just and unjust, made in agreement with most primal and ancient of all things, nature.¹²⁰

Thus, human laws are deemed unjust when they are made to protect the fundamental interests of the political status quo; when they transcend the powers of their makers ; when they impose unequal burdens on the people;¹²¹ and when they contravene the fundamental ideals on which States' constitutions are built. Thus, unjust laws have become the juristic weapons of political authoritarianisms in the name of sovereignty to suffocate humanity's basic freedoms, rights and liberties.¹²² But power and authority (Sovereignty) without justice, is a complete manifestation of criminality on the part of the governors over the governed.¹²³ Therefore, liberalism's core legal truths of justice and the protection of citizens' fundamental freedoms and liberties, must be the principal concern of the Sovereign. Unlike the case in political authoritarianisms, this is exactly the idea underscoring the ideological foundation of the liberal democracies, upon which ECOWAS' constitutional convergence principles are anchored.

Thus, the connection between Natural Law and liberalism has been made quite salient. Despite the juristic challenges posed to Natural Law,¹²⁴ liberalism has continued to find solace in its revived thesis, which confirms that Natural Law's normative principles, reflect what is evidently good for humanity and are derived from the practical experience of one's natural and personal inclinations. Man's objective goods (life, knowledge, play, aesthetic experience, friendship or sociability, practical reasonableness and religion), are clearly not discernible in any moral evaluations of goodness. They are rather those practical things that really make one's life worthwhile. This is man's objective knowledge of what is right; the basis of human flourishing. The possibility of realising objective goods, depends on a legal system that upholds the common good.¹²⁵ Thus, the essence of law making, law implementation and law interpretation and enforcement, is to ensure that the common good is upheld.

¹²⁰Cicero (1928 {54-52 BCE}) *De Republica and De Legibus*, trans. C.W. Keyes, London: Heinemann.

¹²¹Above

¹²²H LA Hart, *Concept of Law*, (1961) 205-206.

¹²³Augustine, *The city of god*: Book XIX (Chapter 21) in S. M. Cahn (Ed)'s *Classics of political and moral philosophy*, (2011) 306-307;

¹²⁴Particularly during the 18th and 19th centuries by David Hume, Adam Smith, Baron de Montesquieu, Jeremy Bentham, John Austin and Hans Kelsen.

¹²⁵J Finnis, '*Natural law and natural rights*' (Clarendon Press, 1980). See analysis in particularly chapters III, IV and V

This is the Sovereign's principal responsibility. And unjust laws which work against the common good may be valid, but do not resonate with the Sovereign's authority.

The existence of unjust laws in the legal system amounts to nothing, but corruption of law. Thus, contemporary human history, is replete with evidence of how political authoritarianisms, have corrupted law to achieve their diabolical and anti-humanistic objectives (again in the name of Sovereignty). The legality accorded to the statutes of the criminal Nazi regime of Hitler in Germany; the recent attempts to rejuvenate the manifestly overwhelming power of the State to curtail civil liberties and human freedoms;¹²⁶ the global decline of economic and social security; the threats of modern political authoritarianisms;¹²⁷ etc., lend credence to liberalism's quest for constitutionalising the limitations of the overwhelming political powers of the State, thereby giving succour to the ideals of justice, democratisation, constitutionalism, and the rule of law and human rights: Ecowas' constitutional convergence principles. Thus, the basic forms of human flourishing (basic goods), are the solid pillars of juristic considerations, on which liberalism will continue to build its justifications for limited government.

4. Analytical Exposition: Towards Constitutionalising Democracy, the Rule of Law and Good Governance in ECOWAS Member States

A fortiori, ECOWAS is a non-state actor in international relations and a subject of general international law with juridical status.¹²⁸ Essentially, the distinction between general and regional international law must be made quite salient at this stage. General international law has universal and global applicability; whereas the rules of regional international law, have restrictive applicability to the communities of States that have created them.¹²⁹ Analytically, the legal significance of ECOWAS is manifested in customary international law and its 1993 Revised Treaty and adopted Protocols and Declarations.¹³⁰ The Revised Treaty is accordingly registered with the Secretariat of the United Nations Organisation (UNO), pursuant to Article 102 (1) of the latter's 1945 Charter.

¹²⁶H Kennedy, *Just law: the changing face of justice and why it matters to us all* Vintage Books, London, (2005).

¹²⁷E Frantz, *Authoritarianism: what everyone needs to know* (2018) Oxford University Press

¹²⁸B A Simmons and LL Martin, *International organisations and institutions*, in Walter, T Risse, B A Simmons (Ed), *Handbook of International Relations*, (2013) 132.

¹²⁹T Hillier, *Principles of public international law* (1998) 2 edn. Cavendish Publishing Ltd.) 202- 93.

¹³⁰See articles 6 and 26 of the Vienna Convention on the Law of Treaties of 1969.

This means that the Revised Treaty can thus be invoked by its entire membership or any of its members, before any organ of the UNO. And in situations that necessitate regional intervention to maintain international peace and security in any Member State, ECOWAS can as well invoke Article 52 of the UNO's Charter, seeking the Security Council's mandate. Thus, treaties in themselves are sources of international law,¹¹¹³

And, in general, treaties establishing international organisations bind their entire membership. They do not bind third States, without their consents.¹³⁴ However, the modern conception of relative normativity,¹³⁵ seems to contradict this notion on the applicability of treaties in general international law.¹³⁶ Nevertheless, the law-making processes of international law, enable States to create rules within a narrow compass, binding its membership (regional international law). In this context, the constitutional regime of ECOWAS have emerged as a *sui generis* legal order that binds its entire membership.¹³⁷ So, ECOWAS' impacts and competencies in influencing the constitutional and institutional reforms processes of Member States cannot therefore be overemphasised. Meanwhile, the revision of ECOWAS' 28 May 1975 Treaty, was not unconnected with the evolving dynamics of contemporary international relations/law, which have challenged the concept of Sovereignty. The principal challenge to State Sovereignty is justified in the political liberals and idealists' agenda to constitutionalise the limitations of the overwhelming powers of the State.

¹³¹On the legality of treaties as sources of international law, see Article 38 of the Statute of the International Court of Justice (1945).

¹³²See article 53,

¹³³S Besson & J Tasioulas, *The philosophy of international law* (2010) Oxford University Press) 10; see also T Endicott, *The logic of freedom and power* (2010) 245.

¹³⁴See articles 26 and 34

¹³⁵D Shelton, International Law and 'Relative Normativity' in International Law in M D Evans' *International Law* (4 edn. Oxford University Press)) at 137- 135; P. Weil, Towards Relative Normativity in International Law, *American Journal of International Law*, 77 (1983), 413; J Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case, *Oxford Journal of Legal Studies* 16 (1996), 85.

¹³⁶D Shelton, 'International law and "relative normativity" in international law' in M D Evans' *International law* (4 edn. Oxford University Press)) at 137- 135; P. Weil, *Towards relative normativity in international law*, (1983), 77 *American Journal of International Law*, 77 413; J Tasioulas, 'In defence of relative normativity: communitarian values and the Nicaragua case, (1996), 16 *Oxford Journal of Legal Studies* 16 (1996), 85.

¹³⁷G Schwarzenberger, *International law as applied by international courts and tribunals*, (Volume 1 (3 edn. London: Stevens & Sons Ltd., 1957) 20.

Sovereignty denotes absolute independence externally, and full State power as a juristic person.¹³⁸ Sovereignty was the basis for the creation of the fundamental regimes of international law.¹³⁹

The criteria for Statehood; the need to protect their independence, sovereignty and territorial integrity; and their principal functions, are manifested in the Westphalia Treaty (1648) and the Congress of Vienna (1814-15) but rationalised in Articles 1 and 3 of the Montevideo Convention on the Rights and Duties of States (MCRDS: 1933). These instruments are still crucial to the dynamics of contemporary international law. Thus, Article 3 of the MCRDS reads:

The political existence of the State is independent of recognition by the other States. Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to defend the jurisdiction and competence of its court. The exercise of these rights has no other limitation than the exercise of the rights of other States according to international law.

Significantly, though Article 3, articulates the rights and powers of States; it equally stipulates the principal circumstances in which such rights and powers are restricted. This points to the fact that even in international law sovereignty is never absolute¹⁴⁰ (though the political realists think it is). First, this legal truism is endorsed in general international law in Chapter VII of the UNO's Charter (1945) in the context of protecting international peace and security, and its numerous Human Rights Conventions and Instruments, that have attained the *jus cogens* status.¹⁴¹ Secondly, in regional international law, Sovereignty's restrictions is endorsed in Articles 3 and 4 of the African Union's (AU's) Constitutive Act (2001) and its Conventions and Protocols on democratisation and constitutionalism, the rule of law, human rights and good governance in Africa.¹⁴²

¹³⁸T Endicott, (n.35) 245- 256.

¹³⁹D Archibugi & A Pease, *Crimes and global justice: the dynamics of international punishment* (1 edn) 3.

¹⁴⁰J L Cohen, 'Sovereignty in the Context of Globalisation: A Constitutional Pluralist Perspective', in S Besson & J Tasioulas (ed.) *The Philosophy of International Law*, (2010) at 265.

¹⁴¹The Universal Declaration of Human Rights (1945); The International Covenant on Civil and Political Rights (1966); The International Covenant on Economic, Cultural and Social Rights; The Genocide Convention (1948), The Nuremberg Principles (1949); The Convention on the Elimination of All Forms of Discrimination Against Women (1979); The Convention on the Rights of the Child (1989); etc.

¹⁴²The African Charter on Human and Peoples Rights and Its Optional Protocols (1981/1986); The OAU's Solemn Declaration Security, Stability, Development and Cooperation in Africa adopted in Abuja, Nigeria on 8th and 9th May, 2000; The Decision of AHG Declaration 142 (XXX) on the Framework of OAU's Reaction to

This same position is rationalised in Article 4 (g) and (i) of the ECOWAS Revised Treaty, concerning the fundamental principles upon which the organisation is built; and the prominent ECOWAS' Protocols and Declarations on the above liberal democratic ideals. In fact, paragraph five (5) of the Preamble to the Revised Treaty clearly articulates the point about the need to restrict State Sovereignty in West Africa:

CONVINCED that the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will.

Thus, the concept of regional integration, has made it mandatory for Member States, to be bound by duly ratified and domesticated treaties, constituting the building blocks of regional international law.¹⁴³ Thirdly, the evolution of the principle of universal jurisdiction, invoked in the trial of Chilean dictator, Augusto Pinochet in London (1998-2000), confirms the principle that territorial sovereignty, does not shield even political leaders from prosecution for heinous crimes against humanity. And the former Liberian President, Charles Taylor, was convicted and sentenced by the Special Court for Sierra Leone (SCSL) on the basis of the principle of universal jurisdiction.¹⁴⁴ Fourthly, the concept of humanitarian intervention in the name of human rights protectionism, led the General Assembly of the UNO to adopt its Resolution on the Responsibility to protect', in justification of the limitation of the sovereignty of independent States for the protection of the lives of its citizens against despicable human rights violations.

This evolving principle in international law, was brought to the fore after the commission of genocides in Rwanda and the former Yugoslavia and the indiscriminate killings in conflict-afflicted zones. Fifthly, the idea of cosmopolitanism, can as well account for another limitation to sovereignty. Cosmopolitanism is antithetical to the notion that States are the only legitimate political organisations in international relations.

Unconstitutional Change of Government adopted in Algiers in July 1991; The African Charter on Democracy, Elections and Governance ((2007/2012);, Aspiration 3 of Agenda 2063 (The Africa That We Want), the Declaration on the Principles of Freedom of Expression and Access to Information in Africa (2019) and the Work of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, the African Convention on Cyber Security and Personal Data Protection (2014); etc.

¹⁴³See The AU's Constitutive Act, 2001 and The ECOWAS' Revised 1993 Treaty, for example.

¹⁴⁴C Jalloh, *The legal legacy of the special court for Sierra Leone*, (2020)

Cosmopolitanism, the bastion of civil society activism, calls for active democratic citizenships and their involvements on issues of national and international importance that affect their varied interests.¹⁴⁵ Thus, the quest for global peace and justice, leading to the creation of the International Criminal Court (ICC), is not also unconnected with the cosmopolitan project in international relations. Notwithstanding the fact that sovereignty in international law has been circumscribed by the exigencies of time and the foregoing conceptual phenomena in global politics, which are in themselves liberal ideals; the World's most powerful and populous nations, have vehemently clung on to Sovereignty, while undermining the operations of the ICC. They are not a signatory to the Rome Statute and would never (at this time) subject their nationals to the Court's jurisdiction.

Thus, in the context of international criminal justice, Sovereignty still protects the pike and leaves the minnows vulnerable to prosecution. How does this uphold the ideal of international criminal justice in the quest for human rights? However, Sovereignty was a fundamental weakness of ECOWAS' functionality as a vibrant and robust regional economic organisation at its inception. The peremptory norm of States' Sovereignty and the protection of their independence and territorial integrity was rationalised in the doctrine of non-interference in the internal affairs of States. The prevalence of this norm, manifested a clear inability of ECOWAS, to generate the apposite legal norms that would have fostered the requisite cooperation and integration in the Sub-region. Thus, effective regional integration, would have helped to address the multidimensional socioeconomic, political and legal obstacles that have crippled West Africa's progression to development and prosperity.

Thus, the framework of the original ECOWAS Treaty was devoid of the concept of supranationalism, which was never considered as having any place in the context of Africa's regional international law. Again, it was clear that ECOWAS States were ill-prepared to cede their sovereignty, so it was hard for ECOWAS to develop a coherent legal order, binding its entire membership. Thus, the establishment of institutions, such as the ECOWAS Community Court of Justice, has been crucial in developing the jurisprudence of ECOWAS law. Meanwhile, ECOWAS' Revised Treaty, Protocols and Declarations, together with the decisions of the Community Court of Justice, constitute a plethora of rules that now bind West African States.

¹⁴⁵D Hirsh, *The law against genocide: cosmopolitan trials* (2003) London: Glasshouse Press); A Franceschet, *Four cosmopolitan projects: the international criminal court in context* (2009).

Therefore, it is incumbent on them to conduct their politics and design their constitutions and other legal regimes, consonant with the converging constitutional principles of ECOWAS.¹⁴⁶ Thus, the nature and legal significance of regional rules were accordingly enunciated in the locus classicus of the International Court of Justice (ICJ) in the *Columbian-Peruvian Case* of 1950 as follows:

1. Regional rules are not necessarily subordinate to general rules of international law, but may be in a sense 'complementary' or 'correlated' thereto; and
2. An international tribunal must as between States in the particular region concerned, give effect to such regional rules as and duly proved to the satisfaction of the tribunal.

Therefore, inferentially, the regional rules of international law (regarding democratisation and constitutionalism, the rule of law, human rights and good governance), which ECOWAS has created for its Members, are not in contradistinction to popular demands in global politics and contemporary international law. Moreover, ECOWAS, since its formation (almost five decades ago) has made incredible progress in its quest for the above ideals in the governance processes of West Africa. Thus, when ECOWAS was formed, eight (8) of its Member States were governed by brutal military dictators that defiled their respective States' constitutions, sanctioned impunity and committed widespread human rights violations. In fact, throughout the cold war period and beyond, West Africa was notorious for unconstitutional change of government. The Sub-region was nicknamed 'Africa's coup belt'.

Thus, with the emergence of the Third Wave of democratisation¹⁴⁷ and the need for the formation of strong regional groupings (this time in the name of political and economic integration) in the 1990s, the unconstitutional practice of usurping State power was abandoned for democratisation and constitutionalism in the Sub-region. Thus, it was clear that economic growth and development (the principal thrusts of the Community's existence), could never be achieved in an environment marred by instability, violence and rebellion, injustice and poor governance: The principal factors that caused and exacerbated the civil wars in Liberia and Sierra Leone, which ECOWAS, alongside the international community commendably resolved, thereby preventing the spillover effects on a Sub-region, already trapped in abject poverty and underdeveloped. Meanwhile, it was against this backdrop, that ECOWAS' Heads of State and Government, three (3) months after the commencement of the civil war in Sierra Leone and at the peak of the rebellion in Liberia, adopted its Declaration of Political Principles (Declaration A/DCL. /1/7/91) in Abuja, Nigeria on 6th July, 1991.

¹⁴⁶Article 1 Paragraphs (a) – (i) on ECOWAS Protocol on Democracy and Good Governance (A/ASP1/12/O1.

¹⁴⁷SP. Huntington, *The clash of civilisation and the remaking of world order*, Simon & Schuster UK Ltd. (1997).

This Declaration is justified in the rationale for democratisation and constitutionalism, the rule of law, human rights and good governance in West Africa's body-politic. The Declaration was followed by the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Protocol A/P1/12/99), signed in Lomé, Togo, on 10th December, 1999, when it entered into force. Analytically, the above political and constitutional ideals, constitute the pillars upon which the Protocol is built.

Thus, Paragraph thirteen (13) of Protocol A/P1/12/99 states, in its elaborate Preamble, that 'good governance, the rule of law and sustainable development are essential for peace and conflict prevention'. Progressively, ECOWAS' Heads of State and Government adopted the Protocol on Democracy and Good Governance (Supplementary to Protocol A/P1/12/99).¹⁴⁸ Thus, it is this ECOWAS Protocol that finally laid the bedrock for the practice of democratic good governance in Africa's regional international law. In fact, the African Charter on Democracy, Elections and Governance, adopted by the African Union (AU) in Addis Ababa, Ethiopia, on 30 January 2007 and entered into force on 15 February 2012, was inspired by the ECOWAS Protocol on Democracy and Governance (2001/2008); with which it shares so many commonalities. Suffice it to say that virtually all the conceptual issues of democratic good governance distilled from the ECOWAS Protocol are found in the AU's Charter on Elections, Democracy and Governance (2007/2012).

Section 1 of the Protocol on Democracy and Good Governance (2001/2008), contains Article 1, which relates to the Community's constitutional convergence principles. Article 1 is quite generic and establishes the basic governance principles, underscoring democracy and constitutionalism in West Africa. A fortiori, the principles of democratisation and constitutionalism: separation of powers, the rule of law, judicial independence, the conduct of periodic free, fair and transparent elections, decentralisation of State administration at all levels, the exercise of parliamentary oversight functions over Executive actions and decisions, the free media's functionality in promoting democratic institutions and the need to monitor the credibility and reliability of the democratic processes and cultures, mass democratic participation through civil society activism (the paraphernalia of limited government) conceptualised 1.3, are generically referenced in Article 1. But the essential characteristics underpinning the concepts and the respective safeguards, pursuant to which their democratic utility can be felt in a functional democracy are articulated between Articles 2 and 50.

¹⁴⁸Signed in Dakar, Senegal, on 21 December 2001, and entered into force on 10 February, 2008

Moreover, Section 2 deals with elections. The section spans between Articles 2 and 10. The respective articles indicate the processes, resonating with the conduct of periodic free, fair and transparent elections by independent, neutral and impartial electoral commissions (bodies). Section 3 covers election monitoring and ECOWAS assistance. This Section encompasses articles 11-18. The section makes ECOWAS' role in monitoring the electioneering processes in Member States quite salient. The section is analogous to the provision in Article 42 (1) of Chapter 11 of Protocol A/P1/12/99, dealing with ECOWAS institutional capacity for peacebuilding. The Article thus states:

To stem social and political upheaval, ECOWAS shall be involved in the preparation, organisation and supervision of elections in Member States. ECOWAS shall also monitor and actively support the development of democratic institutions in Member States.

The criticality of elections to democratic governance, peaceful coexistence and regional stability, which are the cornerstone of ECOWAS' existence and essence in this Twenty-First Century cannot therefore be underestimated. Section 4 contains the role of the Armed Forces, the Police and the Security Forces in a democracy. The section spans between articles 19 and 24. The section swirls around their independence and neutrality in the exercise of their constitutional and statutory functions; and simultaneously pontificates the rationale of their apolitical functionality in maintaining law, order and social control throughout the pre-electioneering, electioneering and post-electioneering phases. Section 5 concerns poverty alleviation and the promotion of social dialogue. The Section covers articles 25-28. Thus, poverty alleviation and the promotion of frank social dialogue through the public sphere, sustained by the media, are crucial for peace and national development.

Section 6 extends to education, culture and religion. The Section purls around articles 29 and 31. There is a clear interconnectedness between education and culture in a democracy. It is through the right, proper, genuine and exact education, that citizens can imbibe the apposite cultures, geared towards democratic legitimacy and accountability; the need to abide by law and order without coercion; and the essence of upholding the ideals of democratic pluralism and diversity. Section 7 takes in the rule of law, human rights and good governance. The section swirls between articles 32 and 39. In fact, the significance of these concepts in the democratisation process, has been laid bare. Nevertheless, what is really laudable about Section 6 is the provision in Article 39, which is quoted herein for ease of reference:

Protocol A/P. 1/7/91 adopted in Abuja on 6 July 1991, relating to the Community Court of Justice shall be reviewed as to give the Court the power to hear, inter alia, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed.

The legal significance of this Article is seen in ECOWAS' unflinching preparedness to embrace the importance of supranationalism in the context of West Africa's regional international law. As espoused above, the drive towards supranationalism at the formative years of ECOWAS was forestalled by Sovereignty. Now, Member States have consented to the functionality of ECOWAS' formal judicial institution (the Community Court of Justice), to preside over matters of human rights violations in the interest of justice. Moreover, it should be noted that the applicability of human rights norms by national judicial institutions in Africa is a *sine qua none*. This is an obligation that binds African States. Article 1(3) of the UNO's Charter and the entire African Charter on Human and Peoples' Rights (1981/1986) are quite instructive on this point.

Thus, irrespective of whether a State is monist or dualist in international law, it is bound to give effect to human rights norms, consonant with the spirits and intendments of their creating international legal instruments. This is the essence of the Bangalore Principles on the Domestic Application of International Human Rights Norms (1998). In fact, human rights provisions in international instruments are of *jus cogens* status in general international law. They are part of customary international law; and are an authoritative interpretation of the UNO's Charter.¹⁴⁹ So, in circumstances wherein Justices of the Superior Courts of Judicature of West Africa are determined to uphold the ideals of human rights in their respective countries, the Community Court of Justice will never be inundated by human rights cases. Furthermore, Section 8 concerns women, children and the youth. The section swirls around articles 40 and 43. The Section is by extension a reflection of the same human rights issues made quite valent between articles 32 and 39. The human rights issues emphasise between articles 40 and 43, dovetailed with the basic rights of women and children in a democracy.

The ultimate thrust of the said articles are reflected in the Universal Declaration of Human Rights (1948), the Convention on the Political Rights of Women (1952), the International

¹⁴⁹J Rehman, *International human rights law: a practical approach* (Pearson Education Ltd.2003) 57-61.

Covenant on Civil and Political Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the UNO's Convention on the Rights of a Child (1989), the African Charter on Human and Peoples Rights (1981/1986), Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (The Maputo Protocol) (2003/2005), and the African Children's Charter (1990/1999). Meanwhile, articles 44 and 45 resonate with the modalities for the implementation of the Protocol and its requisite sanctions to be invoked to enhance compliance. Moreover, the provisions between articles 46 and 50, engulf issues relative to amendments, withdrawal, entry into force and depositary authority.

5. The Critical Perspective: The Constitutional Challenges of ECOWAS States in the Context of Global Politics

The foregoing analysis points to the unprecedented positive strides, which ECOWAS has made since the end of the cold war in embracing supranationalism in the context of West Africa's regional international law. Analytically, ECOWAS' determination and commitments to influence the functions and functionalities of States' institutions and their operatives, consonant with sound democratic processes and cultures, have somewhat transformed the political and constitutional landscapes of the Sub-region. ECOWAS States have ratified Protocol A/P1/12/99 and its profound Supplementary Protocol on Democracy and Good Governance (2001/2008), containing the Community's constitutional convergence principles, which are a *sine qua non* for West Africa's governance infrastructure. Moreover, the constitutions of Member States have domesticated the essential paraphernalia of democracy and limited government. Thus, constitutionalising the limitations of the preponderance powers of the State in the name of political and constitutional liberalism is quite essential for the practice of democratic good governance.

This does not presuppose an effort to weaken the State, but it is directed at striking the appropriate balance, between the rights and powers of the State, rationalised in articles 1 and 3 of the Montevideo Convention of 1933 and the protection of the rights, freedoms and liberties of citizens in the interests of justice, democratic citizenship and mass political participation. This has been the essence of the constitutional jurisprudence of political pragmatism, to which the Courts are mandated to play a crucial role, consonant with the ideals of the Bangalore Principles on the Domestic Application of Human Rights Norms (1988), found in the numerous international human rights instruments referenced above. The questions that arise at this stage are how determined and committed are the Judiciaries of Member States to interpret international human rights instruments

with the requisite profundity, in tandem with the sprits and intendments of the conventions, protocols and declarations, pursuant to which they are made?

Have the Courts been really interpreting the law to uphold the ideals of justice, democratisation and constitutionalism, the rule of law, human rights and good governance, the very virtues and values on which the World's most prosperous States have prided their developmental orientations and inclinations? Regrettably, the resurgence of political authoritarianisms, in this era of State security, neo-nationalism and terrorism, have threatened the practice of democratic good governance at a global scale. Presently, around 40% of the World's population lives under some form of authoritarian rule, and authoritarian regimes govern about a third of the World's countries.¹⁵⁰ This worrisome trend in the World's Community of Nations is increasingly becoming complex for political and constitutional practices in West Africa; a sub-region that has really progressed beyond the scourges of the political authoritarianisms of the cold war era.

What is now even more worrisome is the extent to which the political authoritarians (realists) have shrouded their dictatorial tendencies, postures and outbursts in democratic constitutionalism. They have constitutionalised the notable democratic institutions and processes; but because the apposite democratic cultures, rationalised in the democratic ideals, are lacking, they have been constantly interfering with the functions and functionalities of democratic institutions and operatives, while manipulating the democratic processes, hereby slaughtering the democratic ideals and cultures at the altar of bigotry and dictatorship. As espoused in 1.2 above, governance is about constitutionalism and the rule of law. But how does the rule of law really work? The law must be accessible and so far as possible intelligible, clear and predictable; questions of legal right and liability should be ordinarily resolved by application of the law and not by discretion; the laws of the State should apply equally to all, save to the extent that objective differences justify differentiation. Ministers and public officers at all levels must exercise the powers conferred on them in good faith and fairly and for the purpose for which the powers are conferred, without exceeding the limits of such powers and not unreasonably. The law must afford adequate protection of fundamental human rights; means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes, which the parties themselves are unable to resolve; the State's

¹⁵⁰Frantz (n29) 1-16.

adjudicative procedures should be fair; the rule of law requires compliance by the State with its obligations in international law as in national law.¹⁵¹

Do West African States sanctify and uphold the above criteria for the workability of the rule of law as sanctioned by their constitutions? Thus, efforts are being made to give credence to the rule of law, but such efforts are being thwarted principally because of executive interferences into the law machine of some States in West Africa. In fact, in certain instances ethno-political considerations are undermining the workings of the rule of law. There are instances in the Sub-region, when the law has been used to protect the pike of ruling political parties and their stalwarts, but the minnows in opposition parties, are left vulnerable. In fact, the evidence is there, that some political opponents are being arbitrarily arrested and injudiciously detained for raising critical issues against the ruling elites. Are West African States really complying with their obligations to ECOWAS' *sui generis* legal order in regional international law?

Again, there has been compliance, but there are so many instances in which ECOWAS' Protocols and Declarations have been violated. The military coups in Mali, Guinea and Burkina Faso, are clear instances in which Section 4 of the ECOWAS Protocol on Democracy and Good Governance (2001/2008) was blatantly violated (I will return to this frustratingly thorny issue later). The reluctance of Member States to domesticate the conventions and treaties, which they have ratified in general and regional international law, undermines the rule of law. Even the failure of Member States to meet their financial obligations with ECOWAS contravenes the rule of law. Furthermore, elections are fundamentally crucial to democracy. If elections are that crucial to democracy, why is it that the Justices of the Superior Courts of Judicature of West Africa's democracies are unelected? Why should the discrete and sacred task of judicial adjudication in the name of law interpretation and enforcement be entrusted to unelected Judges, who are being accused of not being apolitical, because the law guarantees their political right to exercise their franchise in free, fair and credible elections; making it hard for them not to be interested in the political dynamics of the State? If this is so, are they independent, impartial and neutral of the political dynamics of the State? Do their political orientations and inclinations influence their decisions?

¹⁵¹T Gingham, *The rule of law* (Penguin Books, 2010) 37-90.

Again how are elections conducted? How credible and legitimate are the electioneering processes as sanctioned by the constitution and the other laws of a democracy? Of what significance are elections to the culture of democratic citizenship? The above questions are cognate with two issues: judicial independence and the conduct of periodic free, fair and transparent elections. I will analyse the first in the context of judicial independence later. Nonetheless, elections are the only means of ascending to power in a democracy. This is a constitutional prerequisite. So, a government is clothed with democratic legitimacy and accountability only when it is freely, fairly and transparently elected. Article 1 (b) of the Protocol on Democracy and Good Governance (2001/2008) is salient on this point. And the conduct of periodic free, fair and transparent elections is a valent component of ECOWAS' constitutional convergence principles. That is why the same Article 1(d) emphasises 'zero tolerance for power obtained or maintained by unconstitutional means'.

So, the credibility of electioneering processes in the Sub-region's law texts, must reflect the provisions between articles 2 and 10 of Section 2 of the above Protocol. Because elections are fundamentally crucial to power ascendancy in a democracy, it has always been a potential source of conflict in the Sub-region. In some Member States, elections have become only a win affair, because the winners always take all, at the expense of the losers. In multiethnic States, elections have unhelpfully fanned the flames of ethno-regionalism. Thus, forthcoming elections, if not properly monitored by ECOWAS, pursuant to Section 3 and the provisions between articles 11 and 18 of the Protocol on Democracy and Good Governance (2001/2008) and Article 42 (1) of Protocol A/P1/12/99, together with the internal regulatory regimes of such States, the Sub-region would likely witness, other devastating conflicts that might threaten regional peace, security and stability. Some of those States are quite prone to conflicts. And it is easy for countries that have been through brutal wars to be plunged into more dangerous wars. Thus, electoral violence is indeed a cause for concern in the Sub-region. So, the bodies responsible for the conduct of elections must be independent, neutral and impartial in exercising their national statutory mandates. Article 3 of Section 3 of the Protocol is quite instructive on this point. The judiciary's role in West African democracies is paramount for regional stability. Judiciaries are the bastions of justice. Their independence, neutrality and impartiality in the political dynamics of Member States are assessed by the reliability and credibility of their decisions, directions, rulings, orders and judgments, based on the rule of law as opposed to any other extraneous considerations in Member States. The constitutions of Member States expressly guaranteed judicial independence, but critics believe

that, in some ECOWAS States, judicial integrity and independence are compromised by mostly executive inferences, because of their constitutional powers to appoint Justices of Superior Courts of Judicature.

Critics also believe that judiciaries are States' superstructures used by ruling elites to maintain the so-called ideals of the status quo, which are considered as ordeals for ordinary men. Thus, unfairness in the administration of justice, fuels disenchantments and conflicts at the micro and macro levels. In Sierra Leone for example, its Truth and Reconciliation Commission's Report (TRC), makes it very clear that unfairness in the administration of justice was a notable factor that caused and exacerbated the decade long civil war (1991-2002). Meanwhile, what about separation of powers? Do the constitutions of Member States make provisions for it? The constitutions of Nigeria (1999¹⁵² with Amendments through 2011), Sierra Leone (1991¹⁵³), Ghana (1992¹⁵⁴ with Amendments through 1996), Guinea (2010¹⁵⁵), Mali (1992¹⁵⁶), The Gambia (1997¹⁵⁷) etc. contain clear and unambiguous provisions on separation of powers. But have such provisions been upheld?

To a large extent, they have been, but the executives of some Member States have become too powerful. Why is it that executive powers, are so manifest that, one begins to wonder how strong are West Africa's democratic institutions? Why is it that ECOWAS is calling for strong democratic institutions, when the concept of separation of powers is already enshrined in the constitutions of Member States? Is it that ECOWAS is aware about issues of executive overreach in the activities and operations of the other arms of government in some of its Member States? Laws are implemented by the executives, but how do executives implement the law? Do they implement it as it is, or seek to implement it in ways that suit their whims and caprices, prejudices and idiosyncrasies or deprecations? These questions are a pointer to some of the political dynamics in some Member States. What are the consequences for State security and peaceful coexistence, when the rule of law is not justly, fairly and reasonably implemented? The answer is simply that the rule of law is undermined.

Invariably, when this is widespread, the foundations of conflict and instability are laid.

¹⁵²See provisions between Chapters 5 and 7.

¹⁵³See provisions between Chapters 5 and 7.

¹⁵⁴See provisions between Chapter 8 and 11.

¹⁵⁵See provisions between Titles 3 and 7.

¹⁵⁶See provisions between Titles 3 and 8

¹⁵⁷See provisions between Chapters 5 and 7.

Do citizens whose fundamental rights are infringed by the illegal and unconstitutional actions of executives get justice from their courts? Also, Parliament makes and unmakes laws, but how does parliament make and unmake laws? What are the processes of law making, amending or repealing? Are they adequately provided for in the national constitutions of Member States? What happens when such processes are circumvented? Is law really a law, when its enactment processes are circumvented? Do the things done under such a law, have any legitimacy? What happens when parliament cannot exercise its oversight functions, because of manifest executive overreach? These questions are also a pointer to how in some West African States, parliamentary procedures and processes are circumvented with impunity, when the ruling elites are poised to enacting laws that opposition parties are not comfortable with.

In recent times, the oversight functions of parliaments are being crippled by the executives. West Africans have witnessed situations in which members of ruling political parties in parliaments have been subsequently denied party symbols for being vibrant and vocal against the wrongful actions and decisions of the ruling elites. And the modern trend in party politics has made political parties stronger in West Africa. In these circumstances, can Parliaments really exercise their oversight functions in the midst of the growing powers of the Executives in West Africa? Moreover, in constitutional democracies, Sovereignty belongs to the people from whom governments, through their respective constitutions, derive their powers, authorities and legitimacies. This constitutional principle is confirmed in Article 1 (g) of Section 1 of the ECOWAS Protocol on Democracy and Good Governance (2001/2008). The people's power to elect their Presidents and Legislators, justifies the centrality and inevitability of freedom and diversity in a constitutional democracy. Invariably, to be free is the desire of every man. No man wants to be imprisoned, enslaved or prevented from enjoying his human rights and freedoms. Every man wants to enjoy the beauties of freedom of expression, conscience, assembly, movement, association etc. The liberty of everyman is paramount. No man is desirous of being treated unjustly in society. No region, ethnic group or district is desirous of being discriminated against in the allocation of the State's economic resources. Thus, freedom manifests human dignity and sanctity.

Analytically, the judiciary's functionality as an arbiter of justice and dispute settlements is crucial here. Thus, a right is only as powerful as its justification makes it. The numerous human rights instruments referenced above are a manifestation of the international community and ECOWAS' commitment in protecting people's fundamental rights in the Sub-region. And the national

constitutions of Member States contain adequate human rights provisions, which can also be enforced by the Community Court of Justice, when domestic remedies have been exhausted.¹⁵⁸ Thus, the State must not infringe on the rights of citizens and political opponents in the name of consolidating power and frightening the opposition. When a political community allows the basic rights, freedoms and liberties of human beings to be violated with impunity, the consequences are dire for peaceful coexistence, national security and stability. In such circumstances, disgruntled persons would stop at nothing to satisfy their unmitigated selfishness and rapacity.

Further, information and communication, which lie at the heart of any society to govern itself¹⁵⁹ are inextricably linked to constitutional democracies. A fortiori, there subsists an independent and interlocking relationship, between media and democracy. Democracy needs media for the regular flow of information; and media needs democracy for the protection of its freedoms and independence.¹⁶⁰ Thus, media freedoms enable mediated communicators to impart information and ideas,¹⁶¹ through the public sphere, without fear of being prosecuted and/or persecuted.

They offer the citizenry, the opportunity of making the most appropriate choices, resonating with their varied socioeconomic and political interests and simultaneously constitute the platform, for civil society activisms. They can as well influence and shape public opinions on issues of national¹⁶² and international importance.¹⁶³ The principal function of the media in a democracy, is in summary, based on the clamour for democratic legitimacy and accountability in the governance processes of the State, through the dissemination of reliable and credible information and the sustenance of constructive debates, on particularly issues of socioeconomic and political importance; to actualise the ideals of democratisation and constitutionalism, the rule of law, human rights and good governance (the very legal and political architecture that can propel the wheels of justice, truth and peaceful coexistence in West Africa).

¹⁵⁸See article 39 of Section 5 of the Protocol on Democracy and Good Governance (2001/2008)

¹⁵⁹M. Andrejevic, *Automated media* (New York: Routledge, 2020) 162.

¹⁶⁰J Stromback, 'In search of a standard: four models of democracy and their normative implications' {6 (3) Journalism Studies} 331-345; W Dizard. Jr. *Old media new media, mass communications in the information age* (3 edn. Longman) 67-70; L Edwards, *Law, policy and the internet* (1 edn.) HART Publishing) 213-228; M Schudson, *The power of news* (1996) Harvard University Press) 204

¹⁶¹J Akpasubi, *A practical guide to investigative journalism* (2010) Mirror Color Prints Limited) 208.

¹⁶²A Denning, *Due process of law* (1980) Butterworths) 28; D Denning, *What next in the law* (1982) Butterworths) 326-328; K H Jamieson and P Waldman, *Press effects: politicians, journalists, and the stories that shape the political world* (2003) Oxford University Press) xiii; R M Entman, 'Media in the distribution of power' (2007) 57 *Journal of Communication* 163- 173 International Communication Association); C H. de Vreese, *News framing: theory and typology, information design journal and document design* 13 (1), 51-62; © John Benjamin Publishing Company, p. 1; E Griffin, *A first look at communication theory* (6th edn.) McGraw Hill) 395-406.

¹⁶³P Robinson, 'Theorizing the Influence of Media on World Politics (European Journal of Communication', 2001 16 (4): SAGE Publications) 523-544.

Analytically, this principal function of the media in modern democracies, resonates with Goal Sixteen of the UNO's 'Sustainable Developments Goals (SDGs: 2016) and Aspiration 3 of Africa's Agenda (2063): The Africa That We Want'. In fact, this phenomenal role, essentially dovetails with the media's centrality, in communicating the ideals of the Seventeen SDGs and Africa's Seven Aspirations which, if realised, should make the World and Africa a better place. Thus, the media should, in this context, be seen as a partner in national and international developments. This functional (as opposed to its conflictual¹⁶⁴) role, has invariably made the media a primal social institution, attracting sociopolitical, legal and communications research in national and global contexts. Explicatively, whereas the functional perspective of the media (as a social institution), emphasises the constructive role, which it can play in national and international developments; its conflictual perspective, establishes how the media can foment renewed conflicts, in particularly post-conflict societies, undergoing democratic transformations.¹⁶⁵

However, it is the conflictual tendency of the media that has arguably heightened the quest for effective media regulations in constitutional democracies. But regulation should not be exploited to the detriment of the media's functionalities and communications exercises in general; neither should it inhibit free speech; nor prevent citizens from accessing the most sensitive information that should guide the choices they make. In a post-conflict governance context, the media serves as a functional mechanism, for consolidating justice, peace and reconciliation.¹⁶⁶ So, media freedoms are indubitably crucial to media operations in post-conflict democracies. Invariably, the constitutions of liberal democracies, guarantee a relative degree of media freedoms, with mostly clearly defined paraphernalia for regulations.¹⁶⁷ This trend is arguably reflective of the constitutional safeguards of the media and its regulatory regimes in West Africa. Thus, Article 38 of Section 7 of the Protocol on Democracy and Good Governance (2001/2008), concerns issues of communications rights and media freedoms; and the role of Member States to capacitate the independent media in the exercise of its functions.

¹⁶⁴R T Schaefer, *Sociology* (8 edn.) McGraw Hill) 159-164; S L Carruthers, *The media at war* (2000) Palgrave Macmillan) 23-108.

¹⁶⁵R Howard, 'Conflict Sensitive Journalism' *International Media Support and Institute for Media Policy and Civil Society*, 1-4.

¹⁶⁶A B M Binneh-Kamara, *Media reporting of war crimes trials and civil society responses in post-conflict Sierra Leone* (University of Bedfordshire, Ph.D. Thesis) 53-54.

¹⁶⁷J D Derbyshire and I Derbyshire, *World political systems: an introduction to comparative government* (1st edn.) W & R Chambers, Ltd.) 34; S Chiumbu and D Mayo, *Media institutions, regulation and governance in a global south context in media studies* (1st edn. Oxford University Press, South Africa) 2020).

Meanwhile, the fight against corruption should not be left to fester unaddressed in democratic settings. Article 38 (1) and (2) of Section 7 of the same Protocol thus states:

Member States undertake to fight corruption and manage their resources in a transparent manner, ensuring that they are equitably distributed. In this regard, Member States and the Executive Secretariat undertake to establish appropriate mechanisms to address issues of corruption within the Member States and at the Community level.

Corruption which is increasingly becoming endemic and almost uncontrollable in some Member States, is now a serious systematic problem, that can be robustly addressed with the involvement of every player in the democratic milieu, through a holistic approach. Issues of financial mismanagement, misapplication and misappropriation in particularly the public sectors of West African countries, have caused serious economic burdens for some Member States; and can fuel conflict at the macro level. When States' resources are irresponsibly plundered, misallocated and mismanaged, governance institutions are left in ruins, because they are deprived of the requisite resources to execute the functions for which they are created. And the underprivileged are left to languish in abject poverty. Thankfully, efforts are being made by Member States to curb corruption. Some of them have institutionalised profound anti-corruption strategies and enacted laws, being used to prevent and address the scourges of corruption; while deploying the prosecutorial approach in other circumstances. However, in some West African countries, the fight against corruption is being manifestly selective. This idea of selective justice in dealing with anti-corruption matters is again influenced by political interference.

Frustratingly, the main threat to ECOWAS' constitutional convergence principles is the unwelcome and ugly development of the recently unwarranted resurgence of military intrusions into the Sub-region's body politic. This unfortunate development is horrific for democratisation and constitutionalism in West Africa. The Sub-region had long transcended the bounds of ruthless military interventions and their concomitant dangerousness. West Africa was seriously prone to military coups. Countries that experienced the horrors of brutalities and atrocities, human rights violations and extra-judicial killings of their loved ones by terrible military dictators, are still being haunted by the horrors of that era. Elderly Sierra Leoneans for example, are yet to forget about how the Armed Forces Revolutionary Council (AFRC) brutally sized power in a bloody coup de 'tat on 25 May 1997, broke into the central maximum prisons and threw open the gates, letting out all sorts of criminals and convicts; and simultaneously invited the barbaric Revolutionary

United Front (RUF) to form the most feared and ignominious junta that Africa had ever seen.

That unconstitutional and illegal regime practically transformed Sierra Leone into a killing field. The military's infiltration into the politics of Mali, Guinea and Burkina Faso, in this era of post-modernism is undemocratic, unconstitutional, unacceptable and politically retrogressive for the Sub-region. Section 4 of the ECOWAS Protocol on Democracy and Good Governance (2001/2008), deals with the role, of the armed forces, the police, and other security forces in a democracy. Thus, Article 19 (1) and (2) states:

The armed forces and police shall be non-partisan and shall remain loyal to the nation. The role of the armed forces shall be to defend the independence and the territorial integrity of the State and its democratic institutions. The police and other security agencies shall be responsible for the maintenance of law and order and the protection of persons and their organisations.

This provision is analogous to the principal thrust of Title 12 of the Constitution of Guinea. The provisions between articles 141 and 145 are instructive on this point. This is also the case of the provisions of Chapter 17 of Ghana's 1992 Constitution (see Article 210-215). Again, see Chapter 11 of Sierra Leone's Constitution Act N0.6 of 1991(Sections 165-168) and Nigeria's 1999 Constitution (Articles 217-2020) etc. As it stands, the constitutions of Mali, Guinea and Burkina Faso have been suspended and the said ECOWAS Member States are now being governed by military decrees, which in the context of the rule of law, are made in violations of parliamentary procedures and processes. Military regimes have never been good for West Africa. The sub-region's history is replete of evidence of the military's destructions of the critical governance infrastructure, constitutional virtues and values, human capital and the economic resources of Member States. And the spillover effects of the resurgence of military coups to other Member States can destabilise the Sub-region.

It is frustrating to note that, despite ECOWAS¹⁶⁸ and the AU's efforts to convince the juntas to relinquish power and return their countries to constitutional rule, they are still being recalcitrant and intransigent to comply.

¹⁶⁸See article 45 (3) of Protocol A/P1/12/ 1999.

Thus, the situations in all three Member States, illegally governed by juntas, fall within the purports of Article 25 of Chapter 5 of Protocol A/P1/12/1999, for appropriate actions. Pursuant to this, ECOWAS imposed sanctions on the juntas. The sanctions were imposed in accordance with Article 45 (1) of the Protocol on Democracy and Good Governance (2001/2008). The provision reads:

In the event that democracy is abruptly brought to an end by any means or where there is massive violation of human rights in a Member State, ECOWAS may impose sanctions on the State concerned.

Thus, the sanctions imposed on the juntas, are accordingly provided for in Article 45 (2) of same. The most notable is suspension of the memberships of the affected countries. What is also worrisome is the fact that the coupists in Mali, have banked on the seemingly popular support, which the junta has gained from the populists. Their position is that democratic governance is about the people's political will. This is a weak defence; and it is contrary to Mali's obligations to the ECOWAS Revised Treaty, Protocols and Declarations. Again, Article 1(c) of the Protocol on Democracy and Good Governance (2001/2008), concerns ECOWAS' zero tolerance for power retained or maintained by unconstitutional means. Furthermore, Article 45 (4) of same provides that, on the recommendation of the Mediation and Security Council, a decision may be taken at the appropriate time to proceed as stipulated in Article 45 of Protocol A/P1/12/1999. This provision deals with restoration of political authority in situations where such authority is absent or has been seriously eroded. And according to Article 52 of Chapter 11 of same, in accordance with Chapters VII and VIII of the UNO's Charter, ECOWAS shall inform the UNO of any military intervention in pursuance of the objectives of the same Protocol.

This was the procedure that ECOWAS invoked in 2017, when it intervened in The Gambia, to forestall the undemocratic efforts of its erstwhile President to maintain power unconstitutionally, after having conceded to losing the Presidential election, but eventually failed to relinquish power, until he was forced into exile by ECOMOG. The question being asked is why was ECOWAS that swift in invoking its legal procedures for restoring constitutionality in The Gambia, but somewhat slow in restoring constitutionality to Mali, Guinea and Burkina Faso. In fact, Mali has even threatened to withdraw its membership from ECOWAS. However, ECOWAS must strengthen its resolve to do all in its powers to restore constitutionality to the said Member States in the interest of regional security and stability.

6. The Way forward

Pragmatically, the institutionalisation of ECOWAS' constitutional convergence principles in West Africa's governance systems, is perceived as safeguards for conflict prevention and resolution in the Sub-region. The constitutional principles of limited government are also humanity's best known antidotes against the scourges of political authoritarianism and tyranny. They constitute credible legal processes, pursuant to which the ideals of justice are realised: The promotion of virtues and values of a State; the maximisation of the welfare of its citizens;; and the extent to which their rights, freedoms and liberties are guaranteed, protected and enforced. The constitutional principles of limited government are a prerequisite for peaceful coexistence. It is in them that the core truths of human governance are manifested. They suffocate the ills of injustice, vengeance and rebellion. They are a means of ensuring that everyone gets what they deserve from the system.

They are a motivation for all to tread in the paths of development and prosperity. They propel the indolent into actions; for they know that the system is well structured and constructed on rules that cannot be circumvented for whatever considerations. It is the rule of law that prevails in such a system. They create a fair environment in which everyone is relatively secured. They are a means of efficient allocation of resources. Arguably, it is the stringent applicability of the principles of limited government that have undoubtedly motivated hundreds of thousands of people from Africa, Asia and South America, risking their lives in dangerously perilous journeys, through the Mediterranean Sea and other unsafe routes to get to the Western hemisphere. Those leaving for the West are not like persons swimming in fresh waters, carrying they are thirsty, when all that they seek is all around them. But, they are deeply conscious that there is nothing in their respective systems for them.

So, risking their lives to get to the 'promise land' is the only thing that is left for them. In this era of post-modernism and ICTs, ECOWAS still has a role to play in bringing West Africa together in the name of regional solidarity and security, socioeconomic and political developments, upholding the constitutional principles of limited government, and making the Sub-region a bastion of African democracy and good governance.

**RULE OF LAW, DEMOCRACY AND
GOOD GOVERNANCE IN ECOWAS
BY
FEMI FALANA, SAN**

HUMAN RIGHT LAWYER

1.) Introduction

The military regimes which dominated the politics of the majority of the Member States of the Economic Community of West African States (ECOWAS) were compelled to hand over power to civilian regimes in the 1990s. As democracy was handed over to autocrats, the region has witnessed official impunity, abuse of human rights, economic mismanagement, grand and systemic corruption, flagrant disregard for national constitutions and grinding poverty. Other legal and constitutional infractions include unconstitutional revisions of national constitutions to keep political leaders in power, and manipulation of electoral and other laws to disqualify political opponents and enhance electoral success for the incumbent.

The persistent failure of the leadership of ECOWAS to take a preventive and active role in dealing with these threats to democracy, human rights and rule of law has continued to contribute significantly to recurring coups and unconstitutional change of governments in the region. Having regards to the undeniable fact that some influential leaders are involved in the manipulation of national constitutions it has been difficult for the ECOWAS to maintain political stability in the region. In this presentation, we are going to interrogate the topic of our discourse because 'rule of law', 'democracy' and 'good governance' are not neutral terms. In conclusion, we shall call on progressive civil society organisations to mobilise community citizens to defend democracy and human rights in the Member States of the ECOWAS.

2.) Rule of Law

Former Secretary General of the United Nations, Kofi Anan, once gave a comprehensive definition of the rule of law as follows:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness

in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁶⁹

In the Member States of ECOWAS, the rule of law is said to refer to the supremacy of law. In other words, it relates to the obligation that every legal and natural person, especially all entities of government, has to submit to the constitution as well as the laws that are derived from it. The precept of adherence to the rule of law is underlain by the presupposition that laws have to be published and applied equally to everyone – that subjects of the law have the right to be treated as equals. It is believed that a rule of law-based society should reflect a fair legal framework that enforces laws impartially, a system that protects fundamental human rights and a framework that guarantees the independence of the judiciary.

Apart from adopting the African Charter on Human and Peoples Rights for the protection of the human rights of community citizens, the Member States of ECOWAS signed the ECOWAS Protocol on Democracy and Good Governance (the Protocol) adopted in 2001, (the 2001 Protocol), which stipulates as follows:

1. Member states recognize that the rule of law involves, not only the promulgation of good laws that are in conformity with the provisions on human rights, but also a judicial system, a good system of administration, and a good management of the state apparatus.
2. They are also convinced that a system that guarantees the smooth running of the State and its administrative and judicial services, contributes to the consolidation of the rule of law.¹⁷⁰

¹⁶⁹Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).

¹⁷⁰. (Article 33 of the Protocol on Democracy and Good Governance)

The rule of law is not an abstract phenomenon; it simply means a society that is governed according to law. However, the rule of law is anchored on the class interest of the makers of the law, the interpreters of the law and the enforcers of the law. In every class society, the rule of law means the 'rule of rulers' as the law is the corpus of regulations imposed by the ruling class. Professor Issa Shivji has rightly observed that:

... laws can be used to suppress freedom, and to impose the most dreadful tyranny. The question we have to ask ourselves constantly is: whose rule of law, in whose interest and for what purpose. We cannot simply sing the chorus of rule of law and good governance without identifying who is setting the theme, composing the music and conducting the orchestra. In other words, who are the governors of good governance?¹⁷¹

Instead of making good laws that are in conformity with the provisions on human rights, bad laws are made to subvert human rights, the judicial system is not independent, impunity is institutionalised while neoliberal economic policies promote poverty and deprivation in the Member States of ECOWAS. Judgments delivered by domestic courts upholding the human rights of citizens are disregarded by governments. Opposition figures, media houses and civil rights activists who expose oppression of the people and exploitation of the Member States are victimised by despotic regimes. Decisions of regional courts are disobeyed without sanctions. Sadly, this is the experience of the African People under the rule of rulers.

I am therefore compelled to concur with the Honourable Justice Dupe Atoke of the ECOWAS Court, who has opined that:

... in order to help change the landscape of impunity by Member States that exhibit outright disregard for the decisions of the Court, Justice Atoki argued in the paper that the time is apt to exercise the powers of the ECOWAS court to impose sanctions in line with the provisions of the 2012 Supplementary Protocol of the Community on sanctions for failure by Member States to fulfill their obligations to the Community and consistent with practices of other international courts.¹⁷²

¹⁷¹www.academia.edu/23569758/whose_law-rules_under_the_Rule_of_Law_and_who_are_the-Governors_of_Good_Governance_The_Tasks_of_a_Journalist_Intellectual

¹⁷²<http://www.courtecowas.org/2020/09/14/ecowas-court-judge-proposes-new-approaches-to-improve-on-the-enforcement-of-decisions-of-the-court/> (accessed April 10, 2023)

Generally, victims of human rights abuses are left without any effective remedy in the majority of Member States. Having lost confidence in the judicial systems at national and regional levels, citizens are forced to look for alternative ways of removing authoritarian civilian regimes. When such regimes are sacked or overthrown by opportunists in military uniforms, people feel 'liberated' and usually troop to the streets to celebrate their newly found 'freedom'. But, as soon as the military dictators settle down, they too, turn round to impose brutal dictatorship on the people. The vicious circle cannot be halted by ECOWAS leaders but by strict adherence to constitutionalism and respect for human rights and control of the resources of member states in the interest of community citizens.

Although human rights have been entrenched in the Constitutions of the member states of the ECOWAS they are limited to civil and political rights. Hence, majority of poverty stricken people are disabled from enjoying any of the guaranteed human rights. The marginalization of the people has been compounded by the implementation of neo-liberal programmes imposed on member states by imperialism. Thus, in the midst grinding poverty that is prevalent in the region, good governance has eluded the people.

In order to preserve the *status quo*, the human rights debate in Africa has concentrated on the legal and philosophical. It is high time the debate was moved to the social and political planes. This can only be done successfully if African lawyers and judges are prepared to reconceptualise human rights ideology from the standpoint of the working people in Africa. Needless to say that such a study cannot be politically neutral or intellectually uncommitted. In particular, our judges should break ties with the courts of former colonisers and henceforth pay special attention to decisions of Indian courts which are more relevant to our environment as they have taken cognizance of poverty and deprivation confronting poor people.

African judges should jettison technicalities based on common law and interpret human rights in a way that victims of human rights abuse are given legal redress where there is evidence of infringement. Judges in domestic and regional courts should embrace judicial activism in order to give appropriate remedies to victims of injustice. A former Chief Justice of India, Justice Bhagwati once recalled that:

With a legal architecture designed for a colonial administration and a jurisprudence structured around a free-market economy, the Indian judiciary could not accomplish much in fulfilling the constitutional aspirations of the vast masses of underprivileged people during the first three decades of freedom. During the last five or six years however, social activism has opened up a new dimension of the judicial process, and this new dimension is a direct emanation from the basic objectives and values underlying the Indian Constitution.¹⁷³

¹⁷³PN Bhagwati, 'Judicial Activism and Public Interest Litigation', (1985) 23 *Column. Transnat'l L.* 561, 568

3.) Democracy

The seizure of political power via coups and counter coups by military officers and other armed rebels and gangs in the majority of Member States in the 1960s disrupted the democratic process and facilitated complete control of the economy by imperialism. The crisis of political instability compelled the Member States of the ECOWAS to revise the ECOWAS Treaty on July 24, 1993. Specifically, Article 4 of the Revised Treaty calls for:

1. The recognition, promotion and protection of human rights in West Africa in line with the African Charter on Human and Peoples' Rights.
2. The promotion and consolidation of a democratic system of governance in line with the Declaration of Political Principles adopted in Abuja on July 6, 1991; and
3. Accountability, economic and social justice and popular participation in development.

ECOWAS Member States took a step further by adopting the Protocol Relating to the Mechanism for Conflict Prevention, Management Resolution, Peace Keeping and Security 1999. Essentially, the Protocol provided a mechanism to prevent, manage and resolve internal and inter-state conflict. It has been said that the Protocol:

outlines 12 constitutional convergence principles that promote the rule of law with autonomy for the parliament and judiciary, free and fair elections and political participation, civilian supremacy over military forces, and civil liberties, with special provisions for women and youth.¹⁷⁴

The significance of the Protocol has been emphasized by Diallo when he said that;

The Supplementary Protocol represents both a defining point and an important dimension in the regional process of building a democratic political governance framework for supporting economic and social development in West Africa.¹⁷⁵

¹⁷⁴. As above.

¹⁷⁵Workshop on 'Processes for ending the crisis in West Africa: The Place of Political dialogue in reforming the Security Sector', Bissau, (Guinea Bissau) 16-18 November, 2005 by West African Network on Security and Democratic Governance (WANSED)

The main shortcoming of the Protocol is that like 'previous treaties, the Mechanism Protocol does not expand on the process for strengthening democracy, human rights and good governance'.¹⁷⁶ However, ECOWAS has over the years developed some impressive norms and standards to promote, advance and entrench the rule of law, democracy and good governance across the sub-region. In particular, the **2001** Protocol which entered into force in 2005 provides for a 'trigger mechanism' that automatically suspends States from ECOWAS in the event of an unconstitutional change of government and contains several progressive provisions relating to electoral law and constitutional transfers of government.

The Protocol also provides for the independence of election-monitoring bodies and the maintenance of electoral registers to allow people to vote equally, irrespective of race or gender. Article 1(k) of the Protocol guarantees 'the freedom of the press'. The Protocol promotes 'constitutional convergence' suggesting the clear commitment of Member-States to embrace and institutionalise these provisions within their domestic legal systems. Indeed, the Protocol provides that there shall be 'zero tolerance for power obtained or maintained by unconstitutional means'.

It is also provided that Member States that fail to effectively implement these provisions may face ECOWAS sanctions. Specifically, Article 45 of the Protocol empowers ECOWAS to impose sanctions on Member States 'when democracy is brought to an end by any means or where there is massive violation of Human Rights in a Member State'. But, under the provisions, the only sanctions that ECOWAS can directly impose are limited political sanctions relating to individual states' membership of ECOWAS, such as suspension from ECOWAS meetings. Other wider economic sanctions are contingent upon the agreement of the heads of government and actions that may be taken by multilateral bodies.

The provisions of the 2001 Protocol are similar to the OAU's Declaration of Unconstitutional Changes of Government and the AU Constitutive Act which also prohibit unconstitutional change of government. But despite the progressive provisions of the 2001 Protocol, systematic human rights violations, lack of respect for the rule of law and authoritarianism remain common features of the legal and political realities of several ECOWAS Member States.

¹⁷⁶F Aggad & L Miyandazi, 'Understanding ECOWAS efforts in promoting a governance agenda' p. 6, see *Compendium of Seminar Papers Presented at the International Conference Organised By The ECOWAS Community Court Of Justice at Accra, Ghana 21st - 24th October, 2019, on the theme: 'Economic integration in West Africa: challenges and prospects,'* online: <http://www.courtecowas.org/wp-content/uploads/2023/02/ACCRA-REPORT-ENGLISH-VERSION-FOOTNOTES-FINAL-fcn-28.01.2023.pdf> (accessed 20 April, 2023)

The recommendations of the African Commission on Human and Peoples Rights on human rights abuse by Member States are ignored without sanctions. ECOWAS leaders rarely criticise constitutional violations, human rights abuse, corruption, lack of respect for the rule of law, bad governance, and mockery of elections taking place across the region. The resulting tragedy is that ECOWAS has not effectively responded to the crises of constitutionalism and democracy in some of its Member States.

No doubt, Burkina Faso, Guinea and Mali were suspended from the ECOWAS as a result of unconstitutional changes of government carried out by military officers. Limited sanctions were also imposed. The suspension will not be lifted until democracy is restored in each of the three Member States. Unconstitutional change of government has continued as the individual military officers who overthrew democratic regimes in the past were not brought to book. Not only were such anti-democratic elements not sanctioned, some of them staged a comeback or even took part in political transition elections conducted under their supervision and won. Thus, ECOWAS has failed to demonstrate 'zero tolerance for power obtained or maintained by unconstitutional means'.

Unfortunately, it has become routine for ECOWAS leaders to act after-the-fact human rights, the rule of law, and end impunity of political leaders of personal gain. Specifically, ECOWAS did not oppose President Alassane Ouattara of Cote d'Ivoire when he amended the national constitution to give himself a third term. Similarly, ECOWAS did not oppose the tenure elongation carried out by President Conde of Guinea. The political adventure boomeranged as the regime was sacked by a group of military officers. So far, ECOWAS has failed to call President Macky Sall of Senegal to order as he has commenced moves to prosecute a third term agenda.

Professor Jibril Ibrahim recently recalled that:

West Africa has taken the leadership position on the continent in developing the tools and dynamics for democratisation, since the 1990 Benin Sovereign National Conference, and ECOWAS has played a very active role in the process, developing and operationalising the normative framework for democratic sustenance. The Supplementary Protocol on Democracy and Good Governance that it developed became the model for the African Union to produce its own Charter. Today, West Africa is facing a drastic regression

of its democratic order. Three countries in the region – Mali, Guinea and Burkina Faso – have recently suffered the indignity of coups and military come back. The democratic recession in West Africa is occurring within a global context in which democracy is under siege and authoritarian systems and arbitrary rule are galloping through many countries all over the world.

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While recognising the strides made in the region since the 1990s, especially the professionalisation of election commissions, observation by local civil society organisations and marked improvement in electoral processes, a group of civil society groups has observed that:

,most states in the region have not made enough progress against poverty, lack of economic opportunities, insecurity, and corruption. The multiplication of controversial third terms can also be a trigger for coups to remove unpopular leaders who hang on to power beyond their due dates.¹⁷⁸

Some Member States have also engaged in sham elections and manipulation of constitutional courts and election petition tribunals to legitimise the results of questionable elections. Reports of ECOWAS Election monitoring groups are ignored while the winners of such elections are admitted to the Summits of the Authority of Heads of States and Government!

4.) Poverty and Economic Crisis

In principle, human rights and the rule of law have been enshrined in the national constitution of each of the Member States of the ECOWAS. The Member States have also ratified the African Charter on Human and Peoples Rights and adopted the ECOWAS Revised Treaty and the ECOWAS 2001 Protocol, which require that governments be operated under the rule of law. However, majority of community citizens are excluded from the dividends of democracy due to the implementation of neo-liberal policies dictated by the International Monetary Fund supervising the national economy of each of the Member States.

¹⁷⁷. <https://www.premiumtimesng.com/opinion/587081-elections-with-guns-to-the-head-reversing-judicial-induced-democratic-regression-by-jibrin-ibrahim.html> (accessed 20 April, 2023)

¹⁷⁸. <https://www.kofiannanfoundation.org/electoral-integrity/coalition-democratic-reform-west-africa/> (accessed 20 April, 2023)

Hence, access to justice and economic prosperity remain a tantalizing reality in the West African region. My submission is that in the midst of poverty and deprivation in the region, the rule of law and governance constitute prime factors in economic development. But the economy has to be freed from imperialist control and taken over by governments in the overall interest of the people in line with Articles 21(1) and 5 of the African Charter on Human and Peoples' Rights which provide:

21(1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

1. Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Contrary to the legal obligation on each Member State to promote prosperity through the control of natural resources, the national economy of each Member State is controlled by imperialism. For instance, the resolution of the ECOWAS to have a common currency has been frustrated by one of the former colonial masters. And through the imposition of the Structural Adjustment Programme on African States in the 1980s the economy collapsed while poverty increased phenomenally. Notwithstanding the rate of underdevelopment of the region the International Monetary Fund (IMF) has insisted on the implementation of neo-liberal policies by each of the Member States of the ECOWAS.

But for the opposition of Nigeria and The Gambia, the ECOWAS would have adopted the EU-ECOWAS Partnership Agreement, a neo-colonial agenda that could have completely ruined the infantile industries in the Member States of ECOWAS. In urging Africans to take control of their political and economic destiny, Nkrumah had noted that:

Africa is a paradox which illustrates and highlights neo-colonialism. Her earth is rich, yet the products that come from above and below the soil continues to enrich not Africans predominantly but groups and individuals who operate to Africa's impoverishment.¹⁷⁹

¹⁷⁹(K Nkrumah: *Neo colonialism: the last stage of imperialism*, Nelson & Sons Ltd. London (1965).

It is indisputable that the crisis of underdevelopment in the region has since been compounded by corruption, money laundering and capital flight. To address the economic crisis, the Member States of ECOWAS will have to jettison the mode of development dictated by external forces. The effective promotion and protection of human rights clearly contributes to the entrenchment of democratic principles, and the rule of law, which in turn guarantee popular participation and provide for good governance. ECOWAS Member-States would need to begin to demonstrate the political will through their words and actions to internalise within their territories, a culture of democracy, rule of law and good governance where the people can freely participate in their own government.

5.) Good Governance

Good governance is the commitment of government to uphold full respect for the rule of law, democratic participation, transparency, accountability, respect for human rights, separation of powers and the independence of the judiciary. Good governance entails the existence of effective, efficient and accountable institutions—political, judicial, administrative, economic, corporate—and entrenched rules that promote development, protect human rights, respect the rule of law, and ensure that people are free to participate in, and be heard on, decisions that affect their lives. Good governance also means the use of political authority and exercise of control in a society in relation to the management of its resources for social and economic development. When the majority of the population fully participates in determining key choices for the polity, the guarantees for good governance are rendered more sustainable.

Despite the treaties and protocols on democracy and human rights, the ECOWAS has continued to tolerate Member States with significant democratic and rule of law deficits. These Member States regularly conduct elections that are neither fair nor free. More worrisome is the fact that political opponents and activists who oppose illegal constitutional amendment and other infractions are either jailed or killed. Despite the illegality and grave human rights violations in many of these Member States, the ECOWAS has continued to send election observers to these Member States who usually endorse questionable and seriously flawed elections under purported constitutional amendment.

Furthermore, the lack of political will to respect human rights, reject impunity, and obey the rule of law is exacerbated by the failure of the Community Court to enforce its decisions in accordance with the 2012 Supplementary Act which has empowered the Court to impose political and judicial sanctions on States that refuse to comply with judgments of the Court. The obligation of ECOWAS leadership to take preventive and effective measures to address democratic and rule of law deficits in several Member States is a central part of the 'responsibility to protect'. Unfortunately, it has become routine for ECOWAS leaders to act after-the-fact rather than taking preventive measures to enforce respect for human rights, the rule of law, and end impunity of political leaders who frequently seek to change their national constitutions for personal gain.

Exercising the responsibility to protect would enable Member States to address these deficits, as the responsibility to protect incorporates and embraces three important elements: firstly, the responsibility to prevent: to address both the root causes and direct causes of coups and unconstitutional change of government. Secondly, the responsibility to react: to respond to situations of leaders of ECOWAS Member States unlawfully changing national constitutional to suit their personal ambitions, blatantly violating the human rights of their own people, and failing to obey the rule of law. Thirdly, the responsibility to rebuild a culture of respect for democratic principles, human rights and the rule of law should be the order of the day.

The failure to take effective and meaningful preventive measures to address these democratic and rule of law deficits will continue to undermine the legitimacy and ability of the ECOWAS to consistently deal with military coups and unconstitutional changes of government in the sub-region. The primary responsibility for implementing human rights lies with Governments. But ECOWAS leaders can no longer use as pretext the ground of 'national sovereignty' for their failure to respond to gross and systematic violations of human rights that affect community citizens, and reject impunity where States fail to perform their legal and constitutional duties.

More worrisome is the fact that political opponents and activists who oppose illegal constitutional amendment and other infractions are either jailed or killed. Despite the illegality and grave human rights violations in many of these Member States, the ECOWAS has continued to send election observers to them and these observers usually endorse questionable and seriously flawed elections under purported constitutional amendment. Perhaps, no other issue raises greater passion in political and legal discussions in the ECOWAS sub-region than the question of respect for basic human rights. The protection of fundamental human rights within

a society is ordinarily thought to be a primary concern of the legal and judicial system. In the ECOWAS Member States, working toward establishing the rule of law should include a discussion about how the legal and judicial system should act – or should be made to act – to recognise and protect internationally recognised human rights, including economic, social and cultural rights.

It is however disturbing to note that poverty is on the ascendancy in spite of the abundant resources of the Member States of the ECOWAS. To address the economic crisis every Member State should end the foreign domination of their economy. Indeed, the ECOWAS' expressed commitment to good governance can only be meaningful if the rule of law is understood as part of a broader goal of enhancing democracy along with respect for human rights. Therefore, the Protocol on Democracy and Good Governance should be amended to reflect a broader concept of participation and integrate a human rights approach to good governance as well as popular control of the economy of Member States.

Over the years, the African Development Bank Group has given, due recognition to the issue of good governance for two main reasons. First, from broader perspective, good governance, which promotes accountability, transparency, rule of law and participation, is central to creating and sustaining an enabling environment for development. Second, from the Bank's perspective, it is inextricably related to the efficacy of the investment that it helps to finance, and is in line with the Institution's vision for sustained African development into the 21st Century.

In its strategy for economic growth in Africa the Bank recognizes the continued centrality of good governance to economic growth and development. Its focus on economic governance, not necessarily political governance, which lies outside the remit of the Bank (Subsequent use of the term governance in this document therefore refers to economic governance, defined as the institutions, processes, policies, behaviors, and regulatory settings adopted to manage an economy.) The Bank's policy distils governance into five core principles: transparency, accountability, participation, ant-corruption, and rule of law.

No doubt, the Bank has provided some needed fund for development in many African countries, it has not succeeded in promoting sustained development on account of its political neutrality. While not advocating interference in the internal affairs of African countries the Bank should identify the people as engine of growth and development and fund them through their organisations.

¹⁸⁰. <https://www.afdb.org/en/documents/document/bank-group-policy-on-good-governance-27134> (accessed 20 April, 2023)

6.) Tenure Elongation by Heads of State

The progressive steps taken by the ECOWAS Authority of Heads of State and Government to amend the ECOWAS 2001 Protocol to strengthen constitutional and representative government, and improve respect for human rights and the rule of law is long overdue. The move to amend the Protocol is aimed at ensuring that Heads of State and Government do not change the constitutions of their countries to stay beyond two terms in office, which is the common constitutional requirement in several Member States. The proposed amendment would require Member States to 'adopt provisions in their respective Constitutions to ensure that no President of the Republic shall exercise more than two (2) terms or extend his term for any reason or in any form'.

It is not surprising that Cote d'Ivoire, Senegal and Togo are opposing the progressive amendment to the Protocol. It is very important for the majority of Member States to reject the moves by the minority Member States, and show leadership and political will by swiftly adopting the amendment to the Protocol as currently proposed, especially given the recent experiences of unconstitutional change of governments in some countries. The proposed amendment to the Protocol on term limit is entirely consistent with ECOWAS foundational treaties, and the African Union Constitutive Act, and would be a positive, effective and satisfactory response to the recent unconstitutional change of governments in some Member States.

As the African Charter on Democracy, Elections and Governance (ACDEG) states: unconstitutional change of government amounts to 'a serious threat to stability, peace, security and development'. The ACDEG indeed aims to 'promote the universal values and principles of democracy, good governance, human rights and the right to development,' and to 'entrench in the Continent a political culture of change of power based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies.'

Many Member States of ECOWAS, including Côte d'Ivoire and Togo have ratified the ACDEG. Senegal has signed the ACDEG . The ECOWAS and its members should show that they are willing and able to promote and achieve constitutional and representative government, and improve respect for the rule of law and human rights in the sub-region. Rejecting the reported moves by Cote d'Ivoire, Senegal and Togo to truncate the proposed amendment to the protocol would send a powerful message to rogue governments in the sub-region that the ECOWAS is willing and able to apply its foundational instruments and principles faithfully, consistently, and effectively.

If the reported moves by Cote d'Ivoire, Senegal and Togo are allowed, it will encourage dictators who seek to amend and manipulate their constitutions to elongate their terms of office. It will also lead to escalating attacks on political opponents and activists who oppose such illegal constitutional amendment. We are compelled to urge Member States of the ECOWAS to remain resolute in the face of opposition by a minority of Member States, and to move swiftly to adopt the proposed amendment on term limit to the 2001 Protocol. If necessary, Member States may invoke Article 20 of the Rules of Procedure of the Conference of Heads of State and Government to ensure that the amendment to the Protocol is adopted without any delay.

The ECOWAS leadership should put pressure on all Member States to respect, protect, promote and fulfill the human and peoples' rights guaranteed under the African Charter on Human and Peoples' Rights. It is however painful to note that the intervention of the ECOWAS Court has been substantially reduced by lawyers to the defence of the rights to personal liberty, dignity of the human person, fair hearing, freedom of speech, freedom of association, freedom of movement, political participation and other civil and political rights. Unlike the national courts of Member States which are always reluctant to entertain cases relating to socio-economic rights, the ECOWAS Court has not hesitated to uphold the social, economic and cultural rights guaranteed by the African Charter on Human and Peoples' Rights whenever it is called upon to do so.

The ECOWAS should be able to assert its mandates under its Treaties and Protocols to immediately push for full and effective respect for democratic principles, human rights, transparency and accountability, as well as the rule of law in each of its Member States. ECOWAS should also make the meaningful and effective implementation of its Treaties and Protocols on democracy and human rights, and obeying the rule of law a condition for retaining the membership of the institution. To prevent members of the armed forces from hiding under the pretext of fighting insecurity to sack constitutional governments the Multinational Joint Task Force (MNJTF), (a combined multinational formation, comprising units of the armed forces from Benin, Cameroon, Chad, Niger, and Nigeria) should be revived, expanded and funded to fight insurgency in the region.

It is submitted that the primary responsibility for implementing human rights lies with Governments. But ECOWAS leaders can no longer use, as pretext, the ground of 'national sovereignty for their failure to respond to gross and systematic violations of human rights that affect their citizens, and reject impunity where States fail to perform their legal and constitutional duties. Unless ECOWAS

undertakes radical changes and put pressure on Member States to effectively implement their human rights commitments within their domestic legal systems, it will continue to engage in mere human rights rhetoric, which cannot constitute a genuinely new human rights dispensation.

7.) Conclusion

In this presentation, I have attempted to question the accepted definitions of rule of law, democracy and good governance. In the process, it has been shown that these terms are not neutral and that they are currently influenced by the neoliberal ideology. As far as ECOWAS leaders are concerned, democracy and good governance are guaranteed once elections are conducted even if the national constitutions have been manipulated. The rule of law permitted to exist may justify disobedience of court orders and the abridgment of human rights of citizens under the pretext of maintaining national security.

But the establishment of the rule of law in the sub-region requires the development of a relatively autonomous institutional legal and judicial structure at the national level to counter-balance the political power of the authorities across the sub-region. In other words, the national judicial systems of Member States should be strengthened to render justice to all aggrieved individuals and corporate bodies. It has to be realised that the rule of law in a normative sense is impossible without judges who can act independently, lawyers who have the freedom to represent their clients vigorously, and legal academics who can conduct research and educate students without political interference.

As rule of law, democracy and good governance mean nothing to the majority of poverty community citizens, progressive forces should mobilise and organise the people to demand for dividend of democracy. The trade unions should lead the workers to fight privatisation of public assets, retrenchment of workers and allocation of the commonwealth to a group of local and foreign investors. In particular, workers should wage a battle against the allocation of oil blocks and other mineral resources to private individuals which turn them into instant billionaires. Otherwise, inequality and poverty will make it impossible for governments to fund social services. The human rights community and the legal profession in the Member States of ECOWAS should embark on the mobilization of community citizens to defend their human rights instead of relying on the sacrifice on a few civil rights defenders and generosity of foreign donors. History has shown that the collective approach is the most effective way to defend human rights and address impunity in any society.

**RULE OF LAW, DEMOCRACY AND GOOD GOVERNANCE
IN ECOWAS: THE PRINCIPLES OF
CONSTITUTIONAL CONVERGENCE OF ECOWAS
IN PERSPECTIVE
BY
NAREY OUMAROU**

ASSOCIATE OF LAW FACULTIES, PROFESSOR OF PUBLIC LAW,
ABDOU MOUMOUNI UNIVERSITY, NIAMEY-NIGER

1. Introduction

The Economic Community of West African States (ECOWAS) is the work of law – primary law,¹⁸¹ before being subjected to law – principle of legality¹⁸² – and becoming a source of law – secondary law.¹⁸³ Indeed, in this ECOWAS context, the existence of a pre-established law has allowed that of the Community, of which the West African States are, both, the authors and the subjects. This legal context, more than political, 'is based on law and made by law'.¹⁸⁴ It is, therefore, a question of establishing a 'Community of values'. The primary ideal of this Community is based on the rule of law, that is to say, the very one which aims to subordinate its action to higher standards.¹⁸⁵ In other words, it is the State which affirms itself 'simultaneously as the master of the law'¹⁸⁶, a State constituted by the law, which acts by the law or acts in accordance with the law by submitting itself to all legal standards or, more specifically, to strict respect for human rights. Then, the West African Community is also based on democracy, which sets out a political ideal: that of the exercise of political power by the people. It is etymologically defined as the 'government of the people by the people for the people'¹⁸⁷. This ideal has a very diverse fortune in time and space, imposing itself first in the West, before spreading to the rest of the world. Even today:

¹⁸¹This is the original law, made up of all the institutional and material rules in the founding and amending treaties.

¹⁸²Here, the principle of legality means a requirement for compliance with Community law for any act, legality not then designating the laws, but the international commitments and other similar acts (community acts) which are binding on the laws.

¹⁸³Secondary law, made up of acts adopted by the Community institutions with a view to achieving the objectives of the Treaty to which they are subordinate.

¹⁸⁴The words are borrowed from the French Council of State, January 1, 1993.

¹⁸⁵De VILLIERS, M., Le DEVILLEC, A., *Dictionary of Constitutional Law*, 9th edition, Paris, Sirey, 2013, p. 152.

¹⁸⁶As above.

¹⁸⁷Abraham Lincoln, President of the United States of America from 1860 to 1865 quoted by B MERCIER,, A Duhamel, *Democracy; its foundations, history and practices*, Québec, The Chief Electoral Officer, 2000, p. 13 and 15.

Democracy is essential to the freedom of each and everyone, in the sense, that it guarantees that the authorities derive, more or less directly, from the population and, consequently, that they are not totally monopolized by a form of political "elite"¹⁸⁸.

Finally, the last element of this trilogy is good governance. This is a: term of prestige today in favor [...] conveying an Anglo-Saxon concept, but which, interfering with the notions of power in the State [...], nourishes a fashionable reflection on a certain way to take decisions and harmonize interests, by strengthening consultation and negotiation between social partners and, for the common good, transparency and control.¹⁸⁹

This concept is anchored in the preambles of several constitutions which recall classic principles, such as, the denial of personal power, the rejection of arbitrariness and corruption, the prohibition of political parties of an ethnic or regional nature, respect for the public proclaimed sacred and inviolable, respect for the rule of law, etc. It is the sum of these values that contributes to the formulation of the 'principles of constitutional convergence' for all ECOWAS Member States, insofar, as only those who respect these principles can be authorised to remain, permanently, in the Community.

Thus, initially created for a purely economic purpose, ECOWAS is now not indifferent to the political life of its Member States. Indeed, the recurrence of political crises jeopardising peace and security in the community area has prompted the Organization to search for solutions. It no longer hesitates to propose, and even impose, rules on Member States, particularly in the way they appoint rulers, the functioning of institutions, and the promotion of principles, such as, the rule of law or good governance, respect for rights and fundamental freedoms, necessary for the proper functioning of any State.

¹⁸⁸L Gonin, *Swiss constitutional law, foundations, institutions and challenges*, (2015), 54.

¹⁸⁹G Cornu, *Legal vocabulary*, 10th updated edition, Paris, PUF, 2014, p. 493.

Conscious of this state of affairs, the Member States seek a kind of protection of their constitutional order from it; an order liable to be upset, at any moment, through a non-consensual revision of the fundamental law or by a military coup. Reinforced by this observation, ECOWAS opted for a harmonisation of the constitutional order of its Member States. Thus, apart from the principles of economic convergence,¹⁹⁰ ECOWAS has identified those of constitutional convergence in legal instruments such as the revised ECOWAS Treaty,¹⁹¹ the Protocol relating to the Mechanism for the Prevention, Management, Resolution of Conflicts, Maintenance of Peace and Security¹⁹² and its Additional Protocol on Democracy and Good Governance.¹⁹³

The reflection will focus on the guarantee and protection of the constitutional/political governance of the Member States through supranational rules now coexisting with the rules at the national level. These rules are applied by supranational courts and, in a number of cases, also by local judges. The ECOWAS treaties and protocols also create rights directly applicable to individuals. All these changes raise questions about 'the very usefulness of constitutionalism as a privileged method of expressing and guaranteeing fundamental rights and forms of political organization capable of realizing the idea of individual and collective freedom'¹⁹⁴ Indeed, it is easy to believe that 'the idea of a constitution has been extended beyond the States [...] and their internal laws'¹⁹⁵, that is to say that through Community law, there is a constitutionalisation of supranational law.

¹⁹⁰Among these principles of economic convergence, we can cite the free movement of goods, the free movement of people, the free movement of services, the free movement of capital and payments, the customs union with a common external tariff, and perhaps a single currency, etc.

¹⁹¹The revised ECOWAS Treaty was signed in Cotonou on July 23, 1993.

¹⁹²The Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security was signed in Lomé on December 10, 1990 (hereinafter referred to as the Mechanism). See ECOWAS Commission, *Regulation MSC/REG.1/01/08. ECOWAS Conflict Prevention Framework*, Abuja, Nigeria, January 2008.

¹⁹³Protocol A/SP1/12/01 on Democracy and Good Governance additional to the Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security was signed in Dakar on 21 December 2001 and entered into force on February 20, 2008.

¹⁹⁴D Baranger, *The constitution. sources. interpretations. reasoning*, Paris, Dalloz, (2022) 473.

¹⁹⁵As above.

It follows, therefore, that there has been a transposition of the constitutional principles and values of the internal order towards the supranational order so that:

constitutionalism [has become] like a reality whose scope goes beyond the State. It is, no longer, self-evident that the state is the key unit within the overall system of distribution of authority, the home of constitutionalism and the guarantor of its relevance.¹⁹⁶

This migration has allowed the emergence of a supranational constitution¹⁹⁷ whose values, concepts and rules are identical to what the constitution is in the domestic legal order.

It is interesting to analyse, on one hand, this tendency towards: the communitarisation of the constitutional order; and, on the other, to consider this change as a steep path which remains strewn with challenges.

2. Communitarisation of the Constitutional Order

ECOWAS promotes certain common guiding principles that it seeks to anchor within Member States. In so doing, it sets itself up as a formidable guardian of the *internal* constitutional order of States, rejecting any unconstitutional change of government.

2.1 Confirmed Common Guiding Principles

The establishment of the 'constitutional principles common' to all the Member States in the Supplementary Protocol of 2001, testifies to an unprecedented approach which characterises the process of communitarisation of the constitutional orders of the West African sub-region.¹⁹⁸

¹⁹⁶As above, p. 474.

¹⁹⁷IM Fall and A Sall, 'A regional constitution for the ECOWAS space: the protocol on democracy and good governance', available at the following address: https://jaga.afrique-gouvernance.net/docs/pr_sentation_et_analyse_du_protocole_sur_la_d_mocratie_de_la_cedeao.pdf (7 pages; accessed on 28 February, 02/28/2023).

¹⁹⁸Article 1 of the ECOWAS Protocol on Democracy and Good Governance stipulates:

“The following principles are declared constitutional principles common to all ECOWAS Member States:

a) - Separation of executive, legislative and judicial powers

Through this establishment, ECOWAS seeks to build a constitutional model set out around a certain number of principles and values which will bring about a new relationship between the State and its citizens, with new responsibilities and a redistribution of roles in order to guarantee political stability. These considerations lead to a certain doctrine to qualify the protocol as a 'regional constitution'¹¹⁷. The objective of the Protocol is to achieve convergence towards a common set of constitutional standards, a base of values

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- the enhancement, strengthening of parliaments and the guarantee of parliamentary immunity;
 - the independence of the Judiciary: the judge is independent in the conduct of his cases and the pronouncement of his judgments;
 - the freedom of the Bars is guaranteed; the Lawyer enjoys immunity from pleadings without prejudice to his criminal or disciplinary liability in the event of a hearing violation or common law offences;
 - a) Any accession to power must be through free, fair and transparent elections.
 - b) Any unconstitutional change is prohibited, as well as, any undemocratic mode of accession or maintenance of power.
 - c) Popular participation in decision-making, strict adherence to democratic principles, and decentralization of power at all levels of government.
 - d) The Army is apolitical and subject to regularly established political authority; any active soldier cannot aspire to an elective political mandate.
 - e) The State is secular and remains entirely neutral in matters of religion; each citizen has the right to practice freely, and within the framework of the laws in force, the religion of his choice in any place of the State. The same secularism applies to all the branches of the State, but it must not deprive the State of the right to regulate, with respect to the Human Rights, the various religions on the States, nor to intervene in cases of disturbances to public order resulting from a religious activity.
 - f) The State and all its institutions are national. Consequently, none of their decisions and actions must be based on, or aim at, ethnic, religious, racial or regional discrimination.
 - g) The Rights contained in the African Charter on Human and Peoples' Rights and International Instruments are guaranteed in each of the ECOWAS Member States; any individual or any organization has the option of obtaining this guarantee from the Courts of common law, or from a special Court, or from any national institution created within the framework of an international human rights instrument.
In the absence of special jurisdiction, this Additional Protocol gives jurisdiction to the judicial bodies of civil or common law.
 - i) Political parties are created and exercise their activities freely within the framework of the laws in force. Their formation and activities must not be based on any racial, ethnic, religious or regional considerations. They participate freely and without hindrance or discrimination in any electoral process. Freedom of opposition is guaranteed. Each State may set up a political party financing system, based on criteria determined by law.
 - j) Freedom of association, assembly and peaceful demonstration is also guaranteed.
 - k) Freedom of the press is guaranteed.
 - l) Any former Head of State enjoys a special status including freedom of movement. He benefits from a pension and material benefits befitting his status as a former Head of State.

FALL and SALL, above (n17).

unanimously shared by the Member States of this community, and which, ultimately, constitutes a real 'common constitutional heritage'¹⁹⁹ for these West African States.

Thus, the summoning of the proclaimed principles, such as, the rule of law, democracy and good governance, as well, as, the prohibition of unconstitutional changes of government, results from this process of seeking political stability within the Member States of this Institution. These principles of constitutional convergence are now essential, and are displayed as the minimum common standard that all States must respect. They have become criteria for judging the credibility of States, both regionally, and internationally.

This 'Rule of Law, Democracy and Good Governance' trilogy is a body of standards that coexist with each other and present common objectives, such as equality, accountability, citizen participation and government effectiveness. These principles are not directly called into question by the rulers since they are found almost everywhere in the speeches and internal legal instruments.²⁰⁰ But it is true that the rule of law, democracy and good governance remain principles whose outlines and content are still vague or difficult to grasp for the ordinary West African citizens.

Therefore, ECOWAS must establish priorities consisting in clearly distinguishing what it can protect and defend in the short, medium and long terms. For example, it must focus more on the problem linked to the limitation of the number of presidential terms, the non-consensual revision of constitutions, electoral transparency and corruption, the non-respect of which is easily observed or measurable. Apart from the security aspect, all the recent military coups and violent demonstrations within the Community are linked, rightly or wrongly, to one of these issues. Recent elections in Niger, Ivory Coast, Togo, Guinea Conakry and Guinea Bissau have all been marred by violent protests. Admittedly, elections are becoming more and more periodic within the Community,

¹⁹⁹See D Rousseau,., 'The notion of european constitutional heritage"', in *Collections in honor of Philippe Ardant, law and politics at the crossroads of cultures*, (1999) 27-46.

²⁰⁰For example, the Preamble to the Nigerien Constitution of November 25, 2010 proclaims that the sovereign people of Niger are 'resolved to build a lawful State guaranteeing, on one hand, the exercise of collective and individual rights, freedom, justice, dignity, equality, safety and well-being as fundamental values of our society and, on the other, democratic alternation and good governance'. It emerges from the Preamble to the revised Beninese Constitution of December 11, 1990 that the people of Benin reaffirm their, 'fundamental opposition to any political regime based on arbitrariness, dictatorship, injustice, corruption, extortion, regionalism, nepotism, confiscation of power and personal power'. Through the preamble of the revised Constitution of January 7, 2001, the people of sovereign Senegal proclaim 'their attachment to transparency in the conduct and management of public affairs, as well as, to the principle of good governance [...] separation and balance of powers designed and exercised through democratic procedures'.

but they are criticised for being disputed elections²⁰¹ or even 'ratification elections'²⁰², where there is no alternation in power. Hence, the condemnation or rejection of unconstitutional changes of government, that is to say, changes which follow the dismissal of a democratically elected government, or the unconstitutional retention in power of a Head of State, or a President of the Republic at the end of his mandate.

2.2 Rejection of Unconstitutional Changes of Government

Like the African Union²⁰³, ECOWAS hammers home, in Article 1(c) of the Supplementary Protocol, its categorical rejection of any unconstitutional change, as well as, any undemocratic mode of accession or maintenance of power.²⁰⁴ These changes include any act tending to acquire, or preserve power by unconstitutional means. This rejection results in the adoption of a policy of zero tolerance towards these changes. In this regard, ECOWAS condemned the successive coups in Mali, Burkina Faso and Guinea Conakry; conviction followed by a series of sanctions against them. Indeed, the additional protocol²⁰⁵ stipulates that it can be decided, at an appropriate moment, to impose sanctions which can go by graduation from the refusal to support the candidatures presented by the Member State concerned for elective posts in international organisations, to the suspension of the State concerned from all ECOWAS bodies, including the refusal to hold any ECOWAS meeting in the State concerned.

²⁰¹DK Kokoroko, "'Disputed Elections: Successes and Failures', (2009), No 129 *Regulations*, .. 115-125.

²⁰²FJ Aivo, 'The President of the Republic in French-speaking black Africa. essay on the institutional evolutions of the function in Benin, Cameroon, Gabon and Togo', Thesis in law, University Jean Moulin Lyon 3, May 2006, 626, 48.

²⁰³See article 4 (p) of the Constitutive Act of the African Union adopted in Lomé in 2000 which stipulates that the African Union operates in accordance with the following principles: 'condemnation and rejection of unconstitutional changes of government'; article 23 of the African Charter on Democracy, Elections and Governance adopted on January 30, 2007, and entered into force on February 15, 2012, which stipulates: States agree that the use, inter alia, of the following means to gain or remain in power constitutes an unconstitutional change of government and is liable to appropriate sanctions by the Union: 1. Any putsch or coup d'etat against a democratically elected government. 2. Any intervention by mercenaries to overthrow a democratically elected government. 3. Any intervention by armed dissident groups or rebel movements to overthrow a democratically elected government. 4. Any refusal by an incumbent government to hand over power to the winning party or candidate after free, fair and regular elections. 5. Any amendment or revision of constitutions or legal instruments that undermines the principles of democratic alternation. ". Heyns and Killander (eds), Collection of key African Union human rights documents, (Pretoria, PULP, 2018) 7; 138.

²⁰⁴This article of the Protocol stipulates: 'Any unconstitutional change is prohibited, as well as, any undemocratic mode of accession or maintenance of power'.

²⁰⁵Article 45 of the ECOWAS Protocol on Democracy and Good Governance

In the event of suspension, the Protocol stipulates that ECOWAS will continue '[...] to monitor, encourage and support any effort made by the suspended Member State to return to normal democratic institutional life'.²⁰⁶ Added to this, is the sanctions regime provided for in the Supplementary Act A/SA. 13/02/12 of February 17, 2012, ranging from the travel ban and denial of visas, as well as the freezing of the assets of these perpetrators and their families.²⁰⁷

However, the question of the effectiveness of these sanctions is doubtful, given that those imposed on Mali were not enough to deter the Burkinabe and Guinean soldiers. Even threats to resort to military intervention to restore constitutional order there seem to be of no use. Besides, we note that these States are more attentive to the threats of sanctions brandished by the Western powers than those of ECOWAS.

Intolerance in the face of unconstitutional changes is only important if it embarrasses States, or if sanctions are feared and make it possible to protect against them. It is obvious, that the Community Institution must review its policy of sanctions against the perpetrators of the coups d'etat, but also, against the former Heads of State at the origin of the crisis. Because once deposed, these Leaders or Presidents, are no longer worried while they are at the origin of these unconstitutional changes. Hence, the persistent challenges to be faced in the sub-region where coups and other unconstitutional changes of government have almost become a fashion.²⁰⁸

²⁰⁶As above

²⁰⁷For example, by Decision A/DEC.2.01/2018 signed by the current President of ECOWAS, H.E.M. Faure Essozimna Gnassingbe, President of the Togolese Republic, and concerned with promoting the restoration of democratic governance and respect for the rule of law in Guinea Bissau, the West African leaders imposed sanctions on several Bissau-Guineans. Under the terms of this Decision, the Commission, as well as, the Peace and Security Council of the African Union, the International Organization of La Francophonie, the CPLP, the European Union, and the United Nations Organization are called upon to provide their support to ECOWAS for the application of the said sanctions.

https://www.facebook.com/Ecowas.Cedeao/posts/2039761822927763?locale2=ar_AR&paipv=0&eav=AfYGtWbuYGguO7xTo8WMdSdi3kJGZtmhDNau6Va16dYU1Ys0-t9z2JHWWd6ERAT7l6w&_rdr (accessed on 1 March, 2023)

²⁰⁸O NAREY,, 'Unconstitutional changes of government: fashionable or unfashionable', available on the blog of the International Association of Constitutional Law: blog-iacl-aidc.org/transformations/2022/6/28/les-changements-anticonstitutionnel-gouvernement-fashion-or-counter-fashion, June 2022. (accessed on 1 March, 2023)

3. Persistent Challenges

The effectiveness of the Community principles identified is hampered by the intrusion of the army into the political sphere,²⁰⁹ and the weakness of the institutions on which they must be based. Such institutions deserve to be strengthened.

3.1 The intrusion of the Army into the political sphere

The Army has long been the architect of unconstitutional changes carried out in almost all the African States.²¹⁰ This is why modern constitutions have, clearly, defined the role of the Army in a democratic rule of law.²¹¹ This common aspiration of States is reflected in the Protocol on Democracy and Good Governance, which insists on the neutrality of the Army and its 'republican'²¹² character. It, thus, marks an important stage in the political evolution of a sub-region characterised, for a long period, by the monopolization of political power by the Armed and Security Forces. From 1975 to this day, only Senegal and Cape Verde have not experienced military coups.²¹³

Despite the existence of internal and Community Legal Instruments, it is clear that the epidemic of coups seems to be gaining ground in West Africa. We are witnessing a renewed seizure of power by the Military with the apparent complicity of the population, because these situations,

²⁰⁹O Narey, (dir.), *Law, power and politics*, Proceedings of the Scientific Seminar of the Nigerien Association of Constitutional Law (ANDC) from October 20 to 22, 2022 in Niamey, Niger, L'harmattan, Senegal, 2022, 608 pages.

²¹⁰Fall and SALL, (above, (n17), p. 4.

²¹¹For example, article 66 of the Nigerien Constitution of November 25, 2010 stipulates: '

"The Nigerien Armed Forces (FAN) ensure the defense of the integrity of the national territory against any external aggression and participate, alongside the other forces, in the preservation of peace and security, in accordance with the laws and regulations in force. They participate in the work of economic and social development of the Nation and can exercise responsibilities corresponding to their skills and qualifications.

The revised Beninese Constitution of December 11, 1990, is even more explicit on several articles: 'Any member of the Armed Forces or Security Services who wishes to be a candidate for the office of President of the Republic must, first, resign from the Armed Forces or the Security Services. In this case, the person concerned may claim the benefit of the rights acquired in accordance with the statutes of his body' (article 64); 'Any attempt to overthrow the constitutional regime by the personnel of the Armed Forces or Public Security will be considered a forfeiture and a crime against the Nation and the State and will be punished in accordance with the law' (article 65); 'In the event of a coup d'etat, putsch, aggression by mercenaries or any coup de force, any member of a constitutional body has the right and the duty to use all means to restore constitutional legitimacy. , including the use of existing military or defense cooperation agreements. In these circumstances, for any Beninese, disobeying and organizing to defeat illegitimate authority constitute the most sacred of rights and the most imperative of duties' (article 66); 'The President of the Republic may not call on foreign Armed or Police Forces to intervene in an internal conflict except in the cases provided for in article 66' (article 67).

²¹²Article 19 of the ECOWAS Protocol on Democracy and Elections.

²¹³On the relationship between law, military power and politics, see A Cabanis, 'Constitution, military power and politics in Africa' O Narey, (dir.), *Law, Power and Politics*, above, (n30) 43-68; D Breillat, "Power and Politics by the Law", 121-140.

most often, result from breaches of the guiding principles of convergence and which have been poorly managed by Continental and Sub-Regional Institutions. We remember the non-consensual revision in Guinea, and the obstinate refusal of the president in power, at the time, to receive the ECOWAS delegation, acting under the legal instruments relating to the prevention of conflicts in the West African Community area. Thus, military coups intervene to put an end to the initial civilian coups.

Moreover, the disarray of civilians, and even soldiers, in the face of insecurity is a source of legitimisation of these coups. As ECOWAS is not sufficiently involved in the fight against terrorism, States plagued by this scourge are forced to turn to other foreign powers to create other organisations such as the G 5 Sahel.²¹⁴ Community citizens turn to ECOWAS and the States when terrorists sow panic and desolation among the poor civilian populations. When they feel that their rights are violated without them having any recourse or remedy, that they do not have the possibility of participating in the decisions that affect their lives, that their complaints continue to go unresolved, or that their basic needs are not being met by the State, a sense of injustice grows and in the worst cases, this can manifest itself in violence which, in turn, creates further insecurity and instability in the country, the breeding ground on which terrorism is born and thrives as experienced in the Sahel today. Hence, the need for ECOWAS to focus on the fight against poverty and the promotion of social dialogue, real factors of security and peace, in accordance with the provisions of its Protocol on Democracy and Elections.²¹⁵

It should, also, be noted that recent coups have taken place after the first term of democratically elected Heads of State or Presidents; which explains the weakness or soft underbelly of the institutions that need to be strengthened.

3.2 Internal Institutions to be strengthened

The Principles and Values embodied by ECOWAS can only be effective with strong, credible and balanced institutions.

²¹⁴Five (5) Countries of the Sahel, namely, Burkina Faso, Mali, Mauritania, Niger and Chad have created the G 5 Sahel, by Convention signed on December 19, 2014 in Nouakchott (Mauritania) in order to fight against terrorism and contribute to the implementation of security and development actions in the Member States.

²¹⁵Articles 25 and following of the ECOWAS Protocol on Democracy and Elections.

The Institutions most in demand are, among others, the Constitutional Courts²¹⁶ and Electoral Commissions,²¹⁷ dreaded bodies responsible for organising elections, settling electoral disputes and protecting citizens' rights and freedoms enshrined in Constitutions and Regional and International Legal Instruments.²¹⁸

Constitutional jurisdiction²¹⁹ is most often the last bulwark against the violation of the principles set out in the fundamental law and international legal instruments. As a competent court in electoral matters, and in reviewing the constitutionality of constitutional revision laws, it is also up to it to approve, on one hand, the final results and to decide, on the other, on the constitutionality of a revision. Indeed, the Constitutional Judge is the most solicited in the safeguard of democratic achievements. In his role as judge of electoral disputes, he must maintain neutrality and independence towards political parties and public authorities. Indeed, the Constitutional Judge must distance himself from politics and not hesitate to cancel the presidential election marred by manifest irregularities. He must, also, reject the manipulations, or the revision of the constitution relating to the extension of the presidential mandate.²²⁰ The Constitutional Courts must assume their functions of judge of the constitutionality of the laws of Regulatory Acts,²²¹ and of guarantor of the fundamental Human Rights and of public freedoms,²²² as well as, Regulator of the Institutions. As such, it is important that they be protected against the attacks of the political parties which proceed by maneuvers to have the members opposed to the project of revision, or maintenance in power, replaced or automatically retired.

²¹⁶See the important contributions of MA Mangu, 'The African constitutional courts: between duty and politics', in O Narey, (dir.), *Law, power and politics*, above (n30) pp. 455-476; JA Adeloui, , 'The judge, law and politics in Benin', 479-516; DE Emmanuel 'Constitutional justice at the test of politics', 517-524; SP Nyebe, 'Transitional justice in the building and consolidation of States in crisis or emerging from crisis', 209-249.

²¹⁷See in this case A Cabanis, , 'The independent administrative authorities in the constitutions of French-speaking Africa', in O Narey, (dir.), *The Constitution, Proceedings of the Scientific Seminar held in Niamey from October 24 to 26, 2018*, L'Harmattan-Senegal, (2018), 223-244.

²¹⁸The Constitutional Court of Benin, *Jurisprudence of the Constitutional Court: Fundamental Rights. Studies in honor of the 2nd and 3rd mandates chaired by Conceptia Liliane Denis OUINSOU, 1998-2003 and 2003-2008*, Cotonou, 2022, 469 pages.

²¹⁹On this subject in general, see L Favoreu, , W Mastor, , *The Constitutional Courts*, (2011), 153

²²⁰The Constitutional Court of Niger, for example, rejected the referendum wanted by former President Tandja Mamadou at the end of his constitutional mandate. See in this case judgment n°4/CC/ME of 12 June 2009 available at the address: www.cour-constitutionnelle-niger.org (accessed on 02/03/2023).

²²¹See article 3 paragraph 3 of the revised Beninese Constitution of December 11, 1990 which stipulates: 'Any law, any regulatory text and any administrative act contrary to these provisions are null and void. Consequently, every citizen has the right to appeal to the Constitutional Court against laws, texts and acts presumed to be unconstitutional'.

²²²For example, Article 114 of the Constitution of Benin stipulates: 'The Constitutional Court is the highest jurisdiction of the State in constitutional matters. It is judge of the constitutionality of the law and guarantees the fundamental Human Rights and public freedoms. It is the regulatory body for the functioning of institutions and the activity of public authorities'.

Due to their role as institutional checks, and balances,²²³ these jurisdictions must be strengthened by the ECOWAS authorities, in particular, through capacity building, the appropriation of community principles, as well as support in the electoral process.

They must, also, provide these jurisdictions with more means for them to have representation in each polling station in order to ensure the credibility of the polls. In addition, the ECOWAS Institutions could create a framework for dialogue between the various constitutional jurisdictions of the Community.

With regard to National Electoral Commissions, independent or not, they are at the heart of the holding of elections. This important role requires them to be independent and neutral, vis-à-vis, the Executive and the Legislature. This desired requirement is reflected through their composition where Opposition, Government, Civil Society and Administration are all represented. But they struggle to cope with the assigned missions because, most often, they lack the material means and sufficient qualified human resources. This is why there are countless Electoral incidents attributable to the poor functioning of Electoral Commissions, the dissensions that run through them and the inability to exercise powers that are too broad to be mastered, and too poorly defined to be effective. Based on this observation, ECOWAS must continue its efforts to support these Institutions, in particular, its expertise in the establishment of biometric files and mobilise enough Observers during the elections.

In addition, given that in the exercise of State power, political parties contribute to the expression of votes,²²⁴ ECOWAS must also take a look at non-institutional players, such as, political parties, civil society and the media, through training and awareness-raising on community principles and values.

Moreover, traditional approaches to the promotion of the Rule of Law and Democracy, tending to give a priority role to State Institutions must be stopped. It is essential to involve the citizens, especially the youth, so that they feel responsible and take ownership of the issues related to the Rule of Law, Democracy and Good Governance. Rightly so, since they are the primary beneficiaries of the progress made. Indeed, by targeting the citizens, ECOWAS will, necessarily, contribute to their civic education,

²²³O NAREY, (dir.), *Separation of Powers and Checks and Balances, Proceedings of the 1st Scientific Days of Constitutional Law*, Dakar, L'Harmattan Senegal, (2018,) 513

²²⁴See article 4 paragraph 3 of the Nigerien Constitution of November 25, 2010.

to the emergence of a 'new type of West African citizens', awareness of their role in safeguarding community principles. There must, therefore, be less involvement of the citizens to make them the lever on which institutions can rely in the event of a breakdown in Democracy or poor Governance in our States.

The strengthening and consolidation of Institutions, at the level of each of the ECOWAS Member States, must go hand in hand with an increased awareness of the citizens' role in the defense of these Institutions for greater democratic anchoring.

SUB-THEME 2

ECOWAS MECHANISM FOR CONFLICT PREVENTION, MANAGEMENT, RESOLUTION, PEACEKEEPING AND SECURITY

**ECOWAS MECHANISM FOR CONFLICT PREVENTION,
MANAGEMENT, RESOLUTION, PEACEKEEPING
AND SECURITY
BY
DR BRASCA IFEADI**

1. INTRODUCTION

Over the years, the Economic Community of West African States (ECOWAS) establishment, through its well-structured Commission and the Authority of its Heads of State and Government, has uniquely remained functionally legitimate, efficient and relevant arising from its robust inbuilt Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. Any serious attempt to interrogate these crucial spheres of the ECOWAS, would unarguably not achieve the ultimate aim without adequate understanding of the primary objectives which propelled the establishment of ECOWAS by its founding fathers. It is therefore imperative that this presentation would leverage on the foundational aims and objectives of the sub-regional body by thoroughly examining the thematic issues we are attempting to discuss in this paper.

Historically, the Heads of State and Government of West African countries established the ECOWAS on the 28th of May, 1975 in Lagos, Nigeria. The Treaty of Lagos was originally signed by Fifteen (15) Heads of State and Government of Benin, Burkina Faso, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Sierra Leone, Senegal and Togo, with its stated mission to promote socio - economic integration across the sub - region. Thereafter, Cape Verde joined the Union in 1977, while the only Arabic speaking member –Mauritania withdrew its membership in December, 2000, but in August 2017 signed a new associate-membership.

Considered in contemporary times as one of the pillars of the African Economic Community, ECOWAS was originally set up to foster the ideals of collective self-sufficiency for its Member States. As a trading union, it is also meant to create a single, but exceedingly large trading bloc through economic cooperation that revolves around, but is not limited to industry, transport, telecommunications, agriculture, commerce, monetary and financial issues, energy, natural resources, social, as well as cultural matters. Fundamentally, the aim of the Community is to significantly promote economic cooperation and integration, which would lead to the establishment of an Economic Union in West Africa. It is strategically expected that this will remarkably raise the living standards of its peoples; and also maintain and enhance economic stability, foster relations amongst Member States and contribute to the progress and development of the African Continent.

The objectives of ECOWAS, among other things, are deeply centred on the harmonisation and co-ordination of national policies and the promotion of

integration programmes, projects and activities, particularly on food, agriculture, natural resources, industry, transport, communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism and legal matters. It also aims at accomplishing the harmonisation and co-ordination of policies for the protection of the environment; the promotion of the establishment of joint production enterprises, the establishment of a common market through liberalisation of trade and abolition of customs duties or levied on imports and exports; and the abolition of non-tariff barriers in order to establish a free trade zone at the Community level; the adoption of a common external tariff and a common trade policy *vis-a-vis* third world countries.

In addition to the foregoing, ECOWAS also has many other objectives. Besides its statutory objectives, ECOWAS has some fundamental principles which are hinged on equality and inter-dependence of Member States, solidarity and collective self-reliance, inter-State cooperation, harmonisation of policies and integration of programmes, non-aggression between Member States; maintenance of regional peace, stability and security through the promotion and strengthening of good neighbourliness. It also has as part of its principles, the peaceful settlement of disputes among Member States, active cooperation between neighbouring countries and promotion of a peaceful environment as a pre-requisite for economic development, recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

As events unfolded in 1999, that is, twenty-four (24) years after the inception of ECOWAS, the Community found it expedient to expand the scope of its activities. This became necessary in view of some very unpleasant developments, capable of destroying the fundamental objectives of the ECOWAS establishment. In 1975, when ECOWAS was established, trans-border crimes, banditry, armed conflicts, kidnapping and other violent terrorist crimes that can threaten the peace and security of Member States were relatively low or quite insignificant. Two decades later, the scenario dramatically changed with some Member States experiencing severe insecurity which dangerously became serious threats to regional peace and security. This deadly situation since 1999, inadvertently led to the establishment of the ECOWAS Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

This paper presentation would, thus, critically examine and interrogate the entire contours of this very crucial Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security within the operational fabrics of ECOWAS member States since the inception of the Protocol about twenty-four (24) years ago.

2. Clarification and Definition of Terms and Concepts

The major terms and concepts which are utilised in this paper presentation that needs to be conceptually clarified and defined are as follows:

a. Crisis

Crisis has severally been defined as any type of intense danger and high - impact calamity, catastrophic event or occurrence that threatens the peaceful existence of any organisation, society or polity. It should also be noted that crises could be conceptually described as the pluralised perspective of crisis, which simply depicts a multiple or chain of Crisis scenarios.

b. Conflict

The term 'conflict' could be clarified from the perspective of a fight, war and violent struggle or disagreement between two disputing group of persons, parties, communities, or nation states.²²⁵ Aremu defined conflict from the perspective of a confrontational relationship between States or rival factions within a State; which throws up hostilities or tension manifested in severe subjective hostilities.²²⁶

Coser viewed conflict as a struggle over values and claims to scarce resources, power and territorial space, in which the aims of the conflicting parties are to injure and eliminate their rivals or opponents.²²⁷ Conflicts usually could thus, be bloody, dangerously damaging, violent or precariously recessive and may result in life threatening injuries, as well as monumental loss of lives and properties.

c. Conflict Prevention

This concept refers to a structural strategy deployed by any institution, governmental agency or nation state to fend off, ward off, forestall or thwart a seeming or emerging conflict or crisis from occurring. This essentially peace-oriented device is usually utilised to avert a looming intense danger or catastrophe, which is capable of causing massive life-threatening disaster on a people or nation state.

²²⁵Little Oxford English Dictionary & Thesaurus, (2008), 137.

²²⁶Aremu, J.O. (2010), 'Conflicts in Africa: Meaning, Causes, Impact and Solution', 4(4), Serial No -17, *An International Multi-Disciplinary Journal, Ethiopia*, 550.

²²⁷LA Coser, Conflict Theory – New World Encyclopedia (1998) www.newworldencyclopedia.org. (assessed 15 March, 2023).

d. Conflict Management

Conflict Management concretely depicts a curtailing strategy with which a conflict or crisis on- going deadly process could be effectively cut-short, reduced, decreased or curbed. This conflict curbing societal device is usually employed in order to save lives and properties of community citizens within the immediate confines of any given war-ravaged space

e. Dispute Resolution

This concept refers to deliberate or calculated efforts and strategies deployed to contain acrimony, hostilities or tension amongst people in a community or society with a view to aptly entrench profound cordiality, peaceful coexistence and trust, while eliminating further deaths, perilous rivalries and threats to life and properties.

f. Negotiation.

The term 'negotiation' is one of the three major thrusts of conflict resolution mechanism. It practically expresses the methodology of reaching agreement through careful discussion, debate, bargaining, parleying and constantly prioritising the use of all peaceful and harmonious means to resolve crises, conflicts and disputes, instead of resorting to the use of maximum force, deadly and acrimonious strategies to outwit one's or a nation's enemies or opponents in times of conflicts.

g. Peace

This term depicts a state of harmony and tranquility, devoid of any form of collective suspicion, rancour, crises, conflicts, war and acrimony in any given society. It is usually such a situation of absolute societal calmness that creates an enabling environment for growth, development and superlative progress in any nation State.

h. Peacekeeping.

This concept is directly associated with scenarios of intense civil war or blown - up conflicts within a State, sub-region or continent; during which the intensity, morbid and deadly texture of the war or conflict necessitates the intervention of neighbouring countries or fellow member nation States within a Union, to collectively maintain peace and public order with an intervention military troop or contingent.

i. Public Order.

The concept 'public order' refers to a state of proper working of the law and

peaceful regularity of all elements of public and societal life for the good of the people.²²⁸ It also refers to the collective peaceful existence of the citizens of a State with no threats of insecurity. In other words, public order reflects a situation in a community, where there are due arrangements, sequence or a restrained and undisturbed condition, which generally guides the conduct of affairs in a State.

j. Constitutional Order.

Similar to the foregoing concept, 'constitutional order' depicts a wide-ranging institutional mechanism or condition which systemically ensures that all laws and regulations that should govern the entire affairs of any given institution, organisation, country or nation State are strictly followed and obeyed exactly as enshrined in the Constitution.

This thoroughly enhances the prevention of all manner of disorderliness or a state of constitutional anarchy in any given society.

K. Security.

The term 'security' could be viewed from a multi-dimensional perspective. Thus, it could be interrogated from the varied purviews of internal security, national security, and human security, which are all relevant to the crucial elements and contents of this paper on ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. But from which ever dimension security would be analysed or looked at in this paper presentation, it essentially depicts the creation of a state of tranquility, peace, orderliness and safety of persons and property in a State.

It also indicates the absence of any form of threats to life, property, human rights and the socio-economic and political well-being of the masses in any given polity.

²²⁸New Webster's dictionary, (1995) 705 -807).

l. Insecurity.

Insecurity is a term which depicts all strategic ethics and societal norms or activities that are directly opposite the classical definitions of Security, orderliness and tranquility in any given society. Therefore, Insecurity refers to a societal scenario where disorderliness, crimes, criminal proclivities, crisis and conflicts are rife.

m. Political Instability.

This concept refers to a state of governmental or politically motivated condition of total disquiet, turmoil, crisis and conflicts in a State or polity.

n. Sanctions.

The term 'sanctions' would be analytically utilised in this paper presentation as a punitive, penalty and deterrent action against any ECOWAS member State for disobeying Community rules and regulations. It could also be strategically explained or viewed from a corrective, admonitionist, reprimandal and strong disapproval purview, especially as an institutional reaction or organisational response to coup d'états against a legitimately elected government within the ECOWAS establishment.

o. Migration.

This term migration could be defined as the movement of large number of people, birds or animals from one location to another.²²⁹ Over the years, individuals, families and mankind in general have usually been instigated by favourable or adverse circumstances, such as, quest for freedom, search for employment opportunities, greener pastures, better lives, business connectivity, tourism, crises and conflicts, war, famine, diseases, epidemics, and general survival, to intentionally or forcibly migrate from one location to another.

Thus, migration, inadvertently might be between and across two or several nation States. But for analytical purposes, migration would be utilised in this paper from the perspective of normal human mobility from one location to another; which could be illegally or irregularly accomplished; or regularly and legitimately executed.

3. Theoretical Framework of Analysis.

The captivating nexus between the theme of the Conference – 'ECOWAS' zero tolerance for unconstitutional change of government', and sub - theme two (2) upon which my paper presentation is rooted – 'ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security', earnestly makes the combined theoretical view points by 'State' and 'Marginalisation'

²²⁹Oxford Advanced Learners Dictionary on Correct English (2000, Sixth Edition) , 743

theorists most ideal for a fulfilling, fruitful and thorough framework of analysis of the thought provoking contents of this paper. For the avoidance of doubts, 'State' and 'marginalisation' theorists posited that when a disconnect exists between the 'State' - (Government) and the 'governed' - (Masses), there are bound to be violent crises and conflicts, which would breed total anarchy, insecurity and forced disruption of governmental structures in any adversely affected polity around the world community.

Thomas Hobbes in his vast expositions in his celebrated work, *The Leviathan*,²³⁰ John Locke's *Two Treaties of Government*,²³¹ Rousseau's, *Collected Works*,²³² and Hobbes/Locke/Montesquieu and Rousseau joint theoretical expositions,²³³ were amongst the most renowned classical protagonists of State or Government theories. It has been observed that despite the divergence in a few aspects of the intellectual thoughts of these early theorists, two significant denominators are fundamentally noticeable in their theories, which were predicted on the legitimacy of State and Government. The first proviso indicated that the State and Government must be hinged on the truism that Governance and Leadership must be based on the Total Consent of the Governed (masses).

The second denominator also posited that the State and its leaders (Government) must have the capability to provide the liberties, protection, security needs and general welfare for the governed (masses), to which these wonderful theorists strategically subsumed on the collective premise of the 'Social Contract'²³⁴. The State theory, is thus, entrenched in the conceptual purview of a society or collection of polities as a structured socio-economic and political phenomenon, in which every institution, tiers of government within a polity or collection of States like we have under the whims of the ECOWAS establishment, must meet certain strategic and existential prerequisites, such as, capacity for developing routinised interpersonal and institutional arrangements, defining relations to the external environment, fixing boundaries and guaranteeing a peaceful and secure environment for their citizens; and without unconstitutional changes in their governmental structures.

²³⁰T Hobbes, *The Leviathan* (1991).

²³¹J Locke, *Two Treaties of Government* (1988),

²³²JJ Rousseau's, *Rousseau Collected Works*, (1990).

²³³T Hobbes, Montesquieu, and J.J.Rousseau, *Joint Theoretical Expositions*, (2004).

²³⁴M.J Sodaro, *Comparative politics: a global introduction*, (2001), 121-127; EBU. Ifeadi, 'Crisis, Regime Legitimacy and Nigeria Foreign Image (1985-2010)', being a dissertation presented For the award of Doctorate Degree (Ph.D) in International Relations, at the Department of Political Science and Public Administration, University of Benin, Benin – City, January, (2013), at 262, 270 – 272 (on file with the author)

The profound nexus between the 'State' theory and 'Marginalisation' theory surfaces at unpleasant societal scenarios where the State or collection of States like we have under the umbrella of ECOWAS Commission and their leaders, painfully fail to meet the 'Social Contract' they fundamentally owe the governed (masses), which usually precipitates wild protestations, violence, crises, conflicts and violent or unconstitutional change of governments in any given nation State within the ECOWAS Community. There is no doubt that the theory of 'marginalisation', as propounded by Ake,²³⁵ is equally predicted on the premises that a sudden collective upsurge of the feeling of 'exit', like that of the unified 'voice' and 'loyalty' of a totally 'marginalised' group of people, are usually a product of the relations, feelings and perception of State Power that exist amongst the various groups or categories of people in a polity or collection of nation states.

In support of the truisms of the nexus between the 'State' and 'marginalisation' theories, Osaghae,²³⁶ theoretically posited that individuals and groups of people who are weak, oppressed, deprived, dominated, excluded, alienated, systemically discriminated against and unable to influence the course of State action, in short, the 'marginalised', are most likely to 'withdraw' or 'exit' into parallel conflict-ridden systems beyond the control of the State. This dis-integrative predicament becomes inevitable because it offers these terribly 'marginalised' groups alternative access to social reproduction, empowerment, self-worth, security and defence against the ineffectiveness of the State and its security apparatuses to protect and adequately provide for its impoverished peoples.

²³⁵C Ake *Political Economy of Nigeria*, (1985).

²³⁶EE Osaghae, 'Exiting from the existing State in Nigeria' in Bekke, E.B. Dodds, M and Khas, M.M. (ed) *Shifting African identity*, (2001), 25.

The foregoing arguments provided, considering the deep seated truisms from the 'State' and 'marginalisation' theories, lucidly explains the dangerous political outcomes of non- inclusive or pseudo democratic paradigms and the devastating impact of rampant deficits in State protective mechanisms and their inability to meet the welfare needs of the people; and their lack of capacity to conform with the expected established security standards of governance in any given State or collection of nation States within the ECOWAS sub –region. It should therefore be noted that these structural administrative, functional, socio- economic and political shortfalls, poor leadership, corruption and policy execution inconsistencies, which have inadvertently led to conflicts, massive terrorist activities, total insecurity, violent quests for exit or secession, several coup d'etats and brutal unconstitutional change of governments, which have become prevalent in most nation States within the ECOWAS sub - region,²³⁷ remarkably makes this paper presentation on ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, extremely timely and appropriate.

4. ECOWAS PEACE AND SECURITY ARCHITECTURE.

At the formation of the ECOWAS in 1975, the primacy of its aims and objectives were concretely hinged largely on economic collaboration and integration, which would be of general interest to Member States. So, even though non- aggression was part of its objectives, it was not until the Liberian, Sierra Leone and Guinea Bissau crises erupted which consequently exposed Member States to the great dangers that are usually associated with crises and conflicts of the magnitude that followed especially as they dangerously impacted on the security and safety of Community citizens, that issues of the veritable factors and great value of ECOWAS Peace and Security Architecture, although not entirely latent, became practically imperative. The societal disorder and disruptions that came with these conflicts which were majorly triggered by poor leadership and governance deficits, resulted in serious regional problems of bloody conflicts and heavy migration across land border frontiers.

²³⁷Ifeadi, 'Crisis, Regime Legitimacy and Nigeria Foreign Image' (n 10), 262, 270 – 272

Indeed, the intensity and complexities of conflicts in the 1990s particularly, in these three countries – Liberia (1989-97 and 1999-2003); Sierra Leone (1991-2002) and Guinea-Bissau (1998-99); called for urgent interventions to stop mass atrocities, killings, destruction of property, total collapse of State institutions and all societal infrastructure in these three countries. The nature of the severe violence that ensued had regional implications with massive flow of refugees across land border frontiers, which remarkably threatened the stability of the sub-region. The intervention of ECOWAS in Liberia and Sierra Leone immensely helped to stop the killings and wanton destruction of property worth trillions of dollars. Military intervention, particularly in Liberia, Sierra Leone and later in Côte d'Ivoire, was preceded by, accompanied or followed due diplomatic efforts and procedures which eventually led to the signing of Peace Agreements, such as, the Cotonou, Abuja and Accra Peace Agreements in the case of Liberia, and the Lomé Agreement in the case of Sierra Leone.

The socio-economic and political gains made following interventions in Liberia (1990) and Sierra Leone (1997) by ECOMOG, compelled West African leaders to look at more structured and effective ways to drive regional peacekeeping and peacemaking efforts. In this regard, the leaders of the regional body agreed to establish strategic structures and tactical mechanisms to facilitate a more effective and efficient means to intervene in future crises and conflicts. As a result, ECOWAS established a structured mechanism for conflict prevention, management, resolution, peacekeeping and security in 1999 which was meant to guide the sub-regional organisation in preventing, managing and resolving inter-State and intra-State conflicts and to equally maintain peace and stability within the sub-region.

The Mechanism had wide-ranging structures which included - the Council of Elders (Council of the Wise), the Mediation and Security Council, and the Defence and Security Commission. The main mandate of these special Organs of the Mechanism was to assiduously address Security issues. This Mechanism was further developed into the Supplementary Protocol on Democracy and Good Governance in 2001. The Protocol was designed to strengthen democracy in the sub- region, arising from the truism of the notion that the absence of true

democracies, good leadership and vibrant institutions were at the centre of crises and conflicts in the sub-region.

In absolute support to this notion, Meyer,²³⁸ in her thesis, posited that 'As the purpose of the Community was purely economic, there was no mentioning of Peace and Security issues in the Treaty of 1975'. She further noted that such issues were first taken up three years later, in 1978, in the Protocol on Non- Aggression. Consequently, the ECOWAS establishment in its strategic quest to underline or bring into sub-regional and global focus the awareness and importance of an atmosphere of peace and harmonious understanding amongst the member States for the achievement of their aimed goals, the Community collectively agreed to refrain from any form of threat, use of force or aggression against the territorial integrity, sovereignty and political independence of fellow Member States.²³⁹

Moreover, since the Heads of State and Government of ECOWAS were now fully aware of the great dangers the numerous crises and conflicts had dangerously created within the Member States of Liberia, Sierra Leone, Cote d'Ivoire, Guinea Bissau, Guinea and Mali, they felt it was a *sine qua non* to go beyond the economic objectives of the Community, strategically deeper into issues of peace and security and in a more concerted manner that would give Member States the leverage to directly intervene militarily or otherwise, in the security affairs of Member States that have debilitating conflict situations capable of unsettling any part of the sub-region. This situation obviously necessitated the urgent need for the Heads of State and Government of ECOWAS to adopt a more pragmatic approach, by first, creating the platform that could facilitate any contemplated intervention in any Member State in time of excruciating insecurity. Members States were also aware that intervention could be done through various means, that is either via military, subversive, economic or diplomatic methodologies. Preparatory to creating the platform, Member States, among other things, were quite mindful of the fact that good governance, the rule of law and sustainable growth and development, were unequivocally essential for peace and conflict prevention in the sub-region and even within the African continent as a whole.

²³⁸Meyer 'The ECOWAS Intervention in Liberia'. Unpublished PhD thesis, (2009)/

²³⁹Article 1, Protocol on Non-Aggression, 1978

They were also conscious of the fact that unnecessary proliferation of crises and conflicts, which adversely constitute threat scenarios to peace and security in the sub-region, would certainly continue to undermine efforts to improve the socio-economic and general living standards of the impoverished masses within the ECOWAS enclave. Thus, this led to the emergence of the consciousness for urgent development of effective policies that would alleviate the sufferings of the down trodden civil population amongst Community citizens, which constitute especially women and children.

Ultimately, the Heads of State and Government of Member States of ECOWAS gathered to articulate how best they could institutionalise peace and security through the creation of practice organs that would constitute both the think tank and operational facilitators towards the promotion of peace, conflict prevention and other related positive factors that could engender constitutional order, public order and societal tranquility. Indeed, it is this bold initiative on sub-regional collective security that led to the establishment of the Protocols on the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security in 1999. This superb initiative which in ECOWAS parlance is simply referred to as the Mechanism, lucidly underlines what ostensibly unearthed the Security Architecture of ECOWAS, as a sub-regional Organisation in search of collective peace and security.

Peace and security architecture here specifically refers to the various organs, processes and the operational modus operandi which were expertly formulated and put in place by the ECOWAS Community establishment to strategically tackle any form or existential threats to Peace and Security within the various domains and boundaries of Member States. In specific terms, the Protocol crystallised and brought into clearer focus the ECOWAS Peace and Security Architecture through the elaborate aims of the mechanism; and these include: the strategies and processes for the management, maintenance and resolution of internal, intra-State and inter-State crises and conflicts; and effective implementation of the relevant provisions of the Revised Treaty of ECOWAS. The Revised Treaty was signed in Cotonou on 23rd July, 1993 barely eighteen years after the original Treaty was signed on 28th May, 1975. Emerging Security dynamics within the ECOWAS Community had made it imperative to revise the ECOWAS Treaty in view of new worrisome developments which necessitated the need for updating the mandates of the Community.

The ECOWAS Peace and Security Architecture was further re-enforced through its Mechanism's regulations on the execution of the extant provisions of the Protocols on Non- Aggression, Mutual Assistance in Defence, Free Movement of Persons, the Right of Residence, Strengthening of Cooperation in the areas of Conflict Prevention, Early Warning Signals, Peacekeeping Operations, Control of Cross-border Crime, International Terrorism, Kidnapping and Banditry, Proliferation of Small Arms and Anti-Personnel Mines. It should also be noted that the ECOWAS peace and security architecture was additionally concretised via its numerous strict rules which are designed to maintain and consolidate peace, security and stability within the community; establishment of institutions and formulation of policies that would engender organisational ethics, ethos and coordination of humanitarian relief missions; and promotion of close cooperation between Member States in the areas of preventive diplomacy and peacekeeping mechanics.

They further stretched into the realms of constitution and deployment of a civilian and military force to maintain, manage or restore peace within the sub-region whenever it becomes imperative to do so and safeguarding the cultural heritage and territorial integrity of member states, amongst many other well-tailored strategic models that astutely made its peace and security architecture remarkably unique.

5.) ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security

The ECOWAS Treaty, which was first signed in 1975 with the central mandate of economic collaboration, and consequent upon the initial revision of the ECOWAS Treaty in 1993, eighteen years after, has dramatically transmuted into a wider sub-regional establishment with varied areas of mutual socio-economic and political interests. Indeed, the current operational scope of ECOWAS is way beyond the initial multilateral engagements, which like I earlier stated, are earnestly hinged on multiple spheres of socio- economic collaboration and integration of Member States. It is extremely heartwarming to note that in addition to the foregoing wonderful progress made, the advanced, astute, operationally complicated and indisputably positive Community Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security has robustly become the centre-piece of the Revised Treaty. This is inevitably so, given the prevalent morbid escalation of bloody crises and conflicts, widespread tension occasioned by banditry, Kidnapping, hostage taking, prolonged terrorist activities with ethno-religious extremist undertones and several other dangerous threats to peace and

security within the domain of most member States of ECOWAS.

Universally, CONFLICTS and its calming mechanisms which is the subject matter in this paper presentation, from historical times have continued to manifest within and outside the borders of nation states throughout the world community of which the ECOWAS enclave is a unique subset. Maoz,²⁴⁰ in a major study of 'Serious Inter-State Disputes' which in contemporary times is known as - CONFLICTS, identified 827 conflicts as having occurred between 1815 and 1976. According to him, out of this number, 210 occurred in the Nineteenth (19th) Century. He identified these conflicts as involving security threats, subtle display or outright use of military force with very severe outcomes and consequences.

Again, Holsti²⁴¹ posits that in contemporary times, interactions between States are numerous and diverse, which include - socio-economic interfaces, international security, tourism, technical cooperation and cultural exchanges to mention just a few. These inter- personal and inter-nation States' socio-economic interactions and virtually all such related relationships do lead to and most times contain characteristics of crises and conflicts. Explaining the characteristics of conflict, Holsti further²⁴² argued that crises and conflicts which usually lead to organised violence normally emerge from a particular combination of parties, individuals or nation States with incompatible positions over an issue; hostile attitudes and certain types of varied diplomatic and military actions. Illustrating this, he stated that any critical issue at stake could become a very serious subject matter in contention between two parties which may have to do with, or eventually turn into very crucial, serious or contesting positions and goals which both parties are assiduously attempting to accomplish.

Therefore, a 'Conflict Behaviour' both in terms of attitudes and actions, as it affects any country or collection of nation States in West Africa, is likely to result, emanate or erupt into unexpected crises and conflicts when Party 'A' unreservedly occupies a position that is incompatible with the wishes, ideas or interests of Party 'B' and vice versa. The critical condition, is thus, one of scarcity or total non-conformism. That is, where a move on an issue by one party is seen to be at the expense of the other party's position, which is often referred to as a zero-Sum

²⁴⁰Z Maoz, *Paths to conflict: international dispute initiation*, 1818-1976, (1982)

²⁴¹KJ Holsti, *International politics, a framework for analysis*, (1995), 330. Human Right Watch (2023), *Mali conflict and aftermath realities*. <https://www.org>default>files> (assessed March 15, 2023)

²⁴²As above

situation. This conflicting scenario also explains where one's gain is the loss of others'. Similarly, societal tension refers to a set of collective attitudes and pre-dispositions, such as, distrust, suspicion, massive anxiety, worry, suspense or uncertainty, which the populace and policy makers hold firmly towards or against other parties. To Mitchell,²⁴³ tensions do not by themselves cause conflicts, but only pre-disposes parties to employ or manifest Conflict behaviour, at scenarios where they seek to achieve incompatible objectives.

Shaw²⁴⁴ went further to say that armed conflicts exist wherever there is a direct or inadvertent resort to use of armed force between States; or scenarios of protracted armed violence between governmental authorities, calculated armed rebellion and organised armed groups, or where outright war exists between such groups within a given polity. Some international relations' experts argued that some of these causes of conflicts still massively exist in modern times, which are related to societal problems and quagmires, such as, quest for state creation, ethno-religious differences, endemic feelings of marginalisation, secession threats, resource control, bad governance, leadership ineptitude, poor followership societal challenges, crises of regime legitimacy, leadership changes and governmental overthrow through outright constitutional disorder.

The ECOWAS establishment, ostensibly aware that these dangerous causes of conflicts rather than abate in present day political happenings, were indeed on the upswing. So, in drawing up the strategic template of the Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, it was strategically captured vividly in the Preamble, where the Protocol stated its solemn concern about the proliferation of conflicts which have continued to constitute huge threats to peace and security in the West African sub-region and within the African continent as a whole. The Heads of State and Government of ECOWAS also observed that these wide-spread security threats would continue to undermine efforts to improve the living standards and conditions of the terribly impoverished peoples within the sub-region. They equally observed that these damaging conflicts would inadvertently continue to influence the growing appetite for bad governance structures, unconstitutional change of government through military interventions via coup d'états or illegitimate elongation of rulership terms by unscrupulous seat-tight Presidents within the ECOWAS Community and all through the African Continent.

²⁴³CR Mitchell, *The structure of international conflict*, (1981), Chapter (1).

²⁴⁴MN Shaw, *International law*, (1997), 723 & 816.

Therefore, in order to thoroughly address and tackle the entire contours of the emerging quagmires of peace and security within the ECOWAS Community, the broad objectives of the Mechanism on Conflict Prevention, Management, Resolution, Peacekeeping and Security were lucidly spelt out in Article 3 of the Protocol as follows:

- a) To prevent, manage and resolve internal and inter-State conflicts under the conditions provided in paragraph 46 of the Framework of the Mechanism ratified as per Decision A/DEC.11/10/98 of 31st October, 1998;
- b) To implement the relevant provisions of article 58 of the Revised Treaty;
- c) To implement the relevant provisions of the Protocols on Non-Aggression, Mutual Assistance in Defence, Free Movement of Persons, the Right of Residence and Establishment;
- d) To strengthen co-operation in the areas of conflict prevention, early-warning, peacekeeping operations, the control of cross-border crimes, international terrorism and proliferation of small arms and anti-personnel mines;
- e) To maintain and consolidate peace, security and stability within the community;
- f) To establish institutions and formulate policies that would allow for the organisation and coordination of humanitarian relief missions;
- g) To promote close co-operation between member States in the areas of preventive diplomacy and Peacekeeping;
- h) To constitute and deploy a civilian and military force to maintain or restore peace within the sub-region, whenever the need arises;
- i) To set up an appropriate framework for the rational and equitable management of natural resources shared by neighbouring Member States

which may be causes of frequent inter-State conflicts;

- j) To protect the environment and take steps to rescue the degraded environment to its natural State;
- k) To safeguard the cultural heritage of Member States;
- l) To formulate and implement policies on anti-corruption, money-laundering and illegal circulation of small arms.

Therefore, arising from the strict instructional dictates of Article 1 of the ECOWAS Protocol of 1999, ECOWAS established a Mechanism for collective security and peace which became the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. It is important to state here that amongst the Fundamental Principles of the Mechanism is the promotion and consolidation of democratic government, as well as, democratic institutions in each Member State. It equally established as part of the Organs of the Mechanism, the ECOWAS Ceasefire Monitoring Group (ECOMOG). This is a structured multi-purpose Civilian and Military stand by module in each member States ready for immediate deployment as an Intervention Force in any member State in serious conflict.²⁴⁵ It is noteworthy to mention herein that ECOWAS successfully deployed ECOMOG forces in Member States in conflicts, such as, Liberia, Sierra Leone, Cote d'Ivoire, Guinea Bissau, Guinea and Mali.

Furthermore, in order to adequately firm-up and rejig the commanding authority of the Mechanism on Conflict Prevention, Management, Resolution, Peacekeeping and Security, ECOWAS adopted the Protocol on Democracy and Good Governance, which would serve as a Supplementary Instrument to the Mechanism. Thus, section (1) of the Protocol spelt out the Constitutional Conveyance Principles of ECOWAS, amongst which are that: every accession to power must be made through Free, Fair and Transparent Elections; Zero Tolerance for Power obtained or maintained by Unconstitutional Means; Popular Participation in Decision Making, Strict adherence to democratic principles, and

²⁴⁵ECOWAS Court of Justice Concept Note, 2023.3 international conference.

decentralisation of power at all levels of government; the armed forces must be apolitical, and must be under the command of a legally constituted political authority; and no serving member of the armed forces may seek to run for elective political office. the protocol also has extensive provisions on rule of law, human rights and good governance; elections; the role of the armed forces, the police and the security forces in a democracy; and the modalities for implementation and sanctions.²⁴⁶

In addition, Article 4 of the 1999 Protocol broadly specified the Institutions of the Mechanism. It therein also clearly assigned functions to each of the Institutions, all adequately geared towards conflict prevention, management, resolution, peacekeeping operations and security within the confines of ECOWAS Community space. It must be noted that these collective or interdependent functions and responsibilities of each of these Institutions, strategically constitute the place and position of ECOWAS on all sub- continental issues at any point in time in its honourable but complicated attempt to promote and maintain peace and security within the sub-region.

The three (3) major functional Institutions of the Mechanism are - The Authority; The Mediation and Security Council; The Executive Secretariat; and, any other Institution as may be established by the Authority. It should equally be stated that each of these Institutions have their respectively assigned roles or functions, which are statutorily emplaced to make up and regulate the whole Mechanism's operational system, which over the years have become truly systemic. Moreover, each Institution is functionally a sub-system that essentially relies on the contributions and participation of each other for the maximum achievement of the goals and objectives of the Mechanism, which are directly focused towards the superb actualisation of sub-regional peace, security and the general socio-cultural, economic and political interests of ECOWAS Member States.

²⁴⁶As above

Indeed, conflict prevention, management, resolution, peacekeeping engagements and security are notably at the front burner of ECOWAS Commission's mandate within the sub- region; and it is noteworthy to state that the community substantially derived its mandate and legitimacy in the shaping and formation of its conflict prevention, management, resolution, several peacekeeping operations and security policies and practices from various related regional and international authentic framework documents. These crucial legitimate documents, apart from ECOWAS foundation documents, include those of the African Union (AU), United Nations Organisation (UNO), New Partnership on African Development, the Universal Declaration of Human Rights, as well as, the African Charter on Human and People's Rights and the Civil Society.

These classified, dependent and globally recognised documents have no doubts helped the ECOWAS establishment in adopting valid and practicable Protocols over the years. For record purposes, these include – Protocols on Mutual Assistance in Defense (1981); Free Movement of Persons, the Right of Residence and Establishment (1979); the Protocol on Conflict Prevention, Management, Resolution, Peace-keeping and Security of 10th December (1999) hereafter referred to as the Mechanism; the Supplementary Protocol on Democracy and Good Governance (2001) and (December, 2002), respectively; and many others.

6.) Dispute Resolution under the Mechanism: Non-Involvement of the ECOWAS Court of Justice

Dispute or Conflict resolution within, between or among Member States under the Mechanism without the involvement of the ECOWAS Court of Justice, largely resides within the domain of the ECOWAS Council of Elders. This is in line with the provisions of Article 20 of the 1999 Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peace- Keeping and Security. According to Article 20:

the Executive Secretary shall compile annually, a list of eminent personalities who, on behalf of ECOWAS, can use their good offices and experience to play the role of mediators, conciliators and facilitators. The list shall comprise eminent persons from various segments of society, including women, political, traditional and religious leaders. The list shall be approved by the Mediation and Security Council at the level of the Heads of State and Government. These personalities shall be requested by the Executive Secretary or the Mediation and Security Council, whenever the need arises to deal with a given conflict situation.

Whenever the circumstances require, the Executive Secretary shall assemble eminent personalities from the approved list who shall now constitute the Council of Elders. The composition and mandate of the council of Elders shall be defined by the Executive Secretary on the basis of the missions to be carried out. Members of the Council of Elders shall be neutral, impartial and objective in carrying out their mission.

It is interesting to note that high-Level panels are significant diplomatic and conflict resolutive instruments. Just as the Africa Union has the Panel of the Wise, that is how the ECOWAS established the Council of Elders, which is now known as Council of the Wise. It is required to fulfill an equally important diplomatic and mediation role in West Africa. Indeed, the Council of the Wise is one of the concrete pillars of the ECOWAS Peace and Security Architecture.

Specifically speaking, Article 20 of the Protocol for the Mechanism assigned Mediatory, Conciliatory and Facilitation roles to the Council of Elders. It is therefore largely within this context that we could examine the performance of the Council so far with respect to Dispute Resolution. From operational perspective, there would be the need to understand what Mediation, Conciliation and Facilitation mean. According to Moore,²⁴⁷ mediation is a classified and structured pattern of Intervention in a negotiation process or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the parties in conflict to voluntarily reach a mutually acceptable settlement of issues in dispute.

Mediation could also be described as an informal non-adversarial process whereby a neutral third person who is the mediator, assists parties to a dispute to resolve by agreement some or all of the differences between them. In a mediation process, a decision-making authority remains with the parties, but the mediator has no authority to render a judgment on the issues at stake or in dispute. The role of the mediator is to encourage and assist the parties to reach their own mutually acceptable settlement by facilitating communication, helping to clarify issues and interests of both parties; identifying what additional information should be collected or exchanged; fostering joint problem-solving mechanics; exploring

²⁴⁷CW Moore, *The mediation process: strategies for conflict management*, (1996), 18.

settlement alternatives; and other similar means of settlement. The procedures for mediation are extremely flexible and may be tailored to fit the needs of the parties in a particular dispute.

Explaining mediation further, Shaw²⁴⁸ reaffirmed the fact that it involves the use of a third party whether an individual, group of persons, a State or group of States or an international organisation to encourage the contending parties to come to a mutually accepted settlement. Unlike the techniques of arbitration and adjudication, the mediation process aims at persuading the parties to a dispute to reach satisfactory terms for the termination of their dispute by themselves. To Shaw,²⁴⁹ mediation is like good offices which technically speaking, are also involved where a third party attempts to influence the opposing sides to enter into negotiation.

However, he posits that mediation implies the active participation in the negotiating process by the third party itself but agrees that the dividing line between mediation and good offices is often difficult to maintain as they tend to merge into one another, depending upon the circumstances. He concluded that a Mediator has an active and vital function to perform in seeking to subtly cajole the disputing parties into accepting what are often his own proposals. It is the responsibility of the mediator to reconcile the different claims and improve the conflict-ridden atmosphere pervading the discussions.

Shaw also argued that Conciliation in a dispute usually involves a third party who carefully investigates the basis of the dispute immediately after which he will submit a report that would embody suggestions for a settlement. As such, it involves and requires elements of a very diligent inquiry and mediation. He emphasised that the processes of conciliation were authentically derived from treaties provided for Permanent Inquiry Commissions. It should be noted that Conciliation reports are only proposals and do not constitute binding decisions. They are thus, different from arbitration awards.

²⁴⁸(n 15)

²⁴⁹As above.

Facilitation is commonly described as the use of a neutral third party to help multi-party groups accomplish the content of their work by providing procedural expertise and leadership. According to Fleischer,²⁵⁰ the emphasis on 'Process' is probably the most defining difference in Mediation and Facilitation. In many ways, facilitation and mediation are similar, but in the most elementary way, they are drastically different. Facilitation is primarily used for pre-conflict or pre-crystallized conflict situations. Fleischer, likened facilitators to holistic physicians who naturally have to be involved before any conflict becomes crystallised, to help prevent or avoid the conflict and make people work collaboratively and peacefully toward achieving their common goal. This, however, does not mean that there are no potentials for conflicts to occur; or that pockets of Conflicts may not have already erupted. In spite of this shortfall, facilitation can be effectively used in conflict situations, and therefore could rightly be described within the realm of a conflict resolatory continuum. An important characteristic of facilitation is its robust use as a preventive measure. Facilitators oversee the organisation and progress of meetings to alleviate tension, as much as, possible so that people can get past their individual agendas and get on with the group work that needs to be done during situations of dispute. Facilitation is indeed a transformative experience, both for the facilitator and the facilitated.

According to Spangler,²⁵¹ Facilitation is a term that means different things to different people. In the context of the United States (USA) Alternative Dispute Resolution (ADR), facilitation (or group facilitation) is generally considered to be a process in which a neutral person helps a group to work together more effectively without rancour or disputes. Facilitators may work with small groups within an organisation, or with representatives of different organisations who are working together in a collaborative or consensus peace building process.

²⁵⁰JM Fleisher, A Paper on 'Conflict Resolution, Preventing Conflict Through Facilitation' (1999), (on file with the author)

²⁵¹B Spangler Article on Facilitation, (2003) www.researchgate.net (assessed on 15 March, 2023)

As Mediators, Conciliators and facilitators, the activities of the ECOWAS Council of Elders (Council of the Wise), specifically from the perspective of dispute resolution under the ECOWAS Protocol of the Mechanism, over the years, have become fundamentally relevant in this paper presentation.

In 2001 ECOWAS adopted the Protocol on Democracy and Good Governance in order to address some of the political squabbles, skirmishes and governance failures, violent change of legitimately elected governments, over prolonged and sit-tight leaders and *coups d'état* that triggered off conflicts in the sub-region. Amongst the numerous robust therapeutic political initiatives, the Protocol of the Mechanism established were first, the guidelines for the organisation of credible elections. Second, are calls on member states to respect democratic principles and their constitutions. Third, is the initiative to massively reject unconstitutional changes of government.

The numerous military intervention activities of ECOWAS during conflicts in the sub- region, were thus, totally backed by the Mechanism and Protocol on Good Governance in line with the provisions of the Protocol on Peace and Security. The ECOWAS Council of the Wise (formerly known as the Council of Elders) was firmly established under the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. Evidently, since the late 1980s and 1990s till date, many ECOWAS Member States have painfully experienced a huge dose of excruciating crises and conflicts, which have led to the death of thousands of innocent Community Citizens and loss of property worth trillions of dollars. Amongst the Member States that have massively suffered from this debilitating series of conflicts are Liberia, Sierra Leone, Cote d'Ivoire, Guinea Bissau, Guinea, Mali, Gambia and Nigeria. In most of these Member States, the physical intensity of these ravaging crises and conflicts inadvertently necessitated direct military intervention operations by the ECOMOG.

Beginning with the prolonged Liberian civil war between 1989-2003, the ECOWAS establishment rather unpreparedly grappled with the plethora of deadly conflicts which massively drained the sub-regional collective energy and resources that would have graciously engendered its economic growth, development and efforts at sub-regional integration.²⁵²

²⁵²TZ Suifon, ECOWAS sub-regional peacekeeping: learning through experience, in the framework of the capacity building programme for conflict prevention and good governance for ECOWAS and civil society organisation in west africa. wanep was commissioned to conduct an assessment of ECOWAS 'conflict prevention mechanism, both capacity and training Needs, wanep.org 30th August, 2020 (assessed 15 March, 2023).

It would not be wrong for one to categorically posit that in Liberia it was the extra despotic and autocratic leadership style of President Sergeant Samuel Kanyon Doe that became one of the major factors that led to the emergence of the Liberian Civil War. While according to Suifon²⁵³ and Aboagye,²⁵⁴

the tap-root of the Liberian deadly crisis lay deep in the power struggle between the Americo-Liberians who had monopolised the political power machinery and the Africo-Liberians who aspired for political control and attempted to tilt the balance of power to their favour and advantage.

Meanwhile, another potential channel of Conflict in the Liberian political landscape was Charles Taylor, the rebel leader of the National Patriotic Front of Liberia (NPFL), who in May 1990 had rejected the plan of having a free and fair elections in which President Doe was to be exempted. Charles Taylor was bluntly intransigent and demanded the outright resignation of President Sergeant Doe, in spite of the massive pressure by the Inter-Faith Mediation Committee (IFMC).²⁵⁵ At this point, it was glaringly clear that the dice for an all-out conflict has been cast down the Liberian brittle landscape. The Liberian general socio-political predicament, thus, threw up an arduous challenge that ECOWAS leaders resolved to tackle head long. They immediately stepped in and began a Mediation process and on 9th May, 1990 ECOWAS set up a Five- Member Consultative Group on the Liberian emerging Conflict. They also appointed a Standing Mediation Committee (SMC), which was chaired by The Gambia under the exalted whims of Sir Dauda k. Jawara; and with an Eight (8) faceted mandate to maintain peace and security in Liberia and within the sub-region (ECOWAS Official Journal: 1990).

With the intransigence, non-conformist and no consensus on the immediate cessation of hostilities and formation of an interim government headed by Amos Sawyerr, posturing of Charles Taylor; and the stance by the NPFL spokesman Tom Woewiyu that they would neither accept a cease-fire nor any form of ECOMOG Peacekeeping Force which the NPFL saw as an Invasion Force. The ECOWAS establishment found itself in an embarrassing tight corner. They suddenly found

²⁵³As above.

²⁵⁴FB Aboagye, *ECOMOG: a sub-regional experience in conflict resolution, management and peacekeeping in Liberia*, (1999) 19-39, 57- 58, 61.

²⁵⁵Aboagye, 1999:57-58.

out that in spite of sub-regional good intentions, huge fiscal input and human selfless sacrifices, ECOMOG mediation adventure was going to be an exceedingly tough, arduous and costly experience in their first ever sub-regional conflict resolution, management and peacekeeping experiment.

To make matters worse at the height of the Liberian political conflict was the momentary tactical confusion ECOWAS leadership via its ECOMOG Commanders found its self whether its security forces (Buffalo Soldiers) should fight its way into Liberia as a Peace Enforcement strategy to enforce comprehensive cease-fire considering the mayhem on ground and the extreme hostility of the factions, especially the Charles Taylor's led NPFL and Prince Yormie Johnson's led Independent National Patriotic Front of Liberia (INPFL) the splitter faction of NPFL, who deliberately targeted both Armed Forces of Liberia (AFL) and ECOMOG Forces, as 'Alliances' changed colours at will.

The situation became compounded for the ECOWAS sub-regional peace and security mediation contingent with the decision of the United Nations Security Council and the United States of America not to recognise ECOWAS initiative to move its forces through ground routes into Liberia. They argued that the conflict was entirely a Liberia's domestic dilemma.²⁵⁶

Therefore, despite the formidable military efforts from a leader in the calibre of General Ibrahim Babangida of Nigeria, the gallantry of Lt. General Arnold Quainoo of Ghana and Major General Joshua Dogonyaro of Nigeria who at different times commanded the sub-regional Forces, and most importantly the bravery and super intrepidity of the ECOMOG Forces, confusion and anarchy characterised the ECOMOG intervention adventure in Liberia. As they battled assiduously to redeem its image and legitimacy as a veritable fighting Force, arising from the awful and embarrassing capture and brutal assassination of President Sergeant Samuel Kanyon Doe on 9th September, 1990 at the ECOMOG Headquarters in Monrovia, Liberia.

²⁵⁶ Aboagye, 1999:61

No doubts, the ECOWAS establishment experiment in the Liberian Conflict inadvertently turned into a very dangerous and arduous lesson learning experience especially with ECOMOG's challenging choices of managing a conflicting mission of 'peace enforcement' in the face of complete recalcitrant proclivity from Charles Taylor who will go down in history as an individual who took the whole West African sub-region hostage through his pinky-panky attitudinal style, unnecessary hard line conduct and non-respect of diplomatic agreements he signed. Indeed,²⁵⁷ the ECOMOG militarised Intervention in Liberia, which spanned between 1989- 2003, ended with multiple diplomatic stalemates and piece meal achievements in the face of numerous human and material tragedies.

The situation became compounded for the ECOWAS sub-regional peace and security mediation contingent with the decision of the United Nations Security Council and the United States of America not to recognise ECOWAS initiative to move its forces through ground routes into Liberia. They argued that the conflict was entirely a Liberia's domestic dilemma.²⁵⁸

The Sierra Leone Conflict presented yet another bloody ECOWAS had to painfully contain with between 1990-2001. It was a multiple armed conflict that had a structured nexus with the Liberian political turmoil. This conceptual assertion arose from the fact that while the Liberian crisis and conflicts raged, the leader of the National Patriotic Front of Liberia (NPFL), Charles Taylor had vowed to deal mercilessly with Sierra Leone for allowing ECOMOG Forces to launch their military operations from bases in Sierra Leone.

As it were, Foday Sankoh a low cadre ex-army Corporal who led the Revolutionary United Front (RUF), mobilised and launched an assault on Sierra Leone. Following the threats from Charles Taylor, Foday Sankoh of RUF launched this attack right from NPLF territory. Suifon¹⁷⁷ revealed that Foday Sankoh unleashed his brutal and senseless war in such a callous manner that knew no tactical difference between Civilians and Combatants. Moreover, the modus operandi of his invasion was so fearsome to the extent that by 1992 the Revolutionary United Front (RUF) had gathered widespread popularity throughout the entire Sierra Leonean landscape.

²⁵⁷Suifon, n 23 above.

²⁵⁸As above

According to Alie A.D. Joe²⁵⁹ and Suifon²⁶⁰ narratives, Foday Sankoh and his RUF had won the awe and admiration of the legion of disaffected Sierra Leonean young elements who had read Colonel Gaddafi's revolutionary Green Book which totally galvanised their interests against a sitting President they considered unjust and corrupt. This led to the overthrow of President Joseph S. Momoh of the All Peoples Congress (APC) and the enthronement of a National Provisional Ruling Council (NPRC) led by Captain Valentine Strasser on 29th April, 1992. Following peace initiatives by ECOWAS elections were held on 29th March, 1996 which brought Ahmed Tejan Kabbah of the Sierra Leone People's Party (SLPP) to power. Thereafter, events moved very quickly with stalemates over disagreements on the implementation of the Abidjan Accord between the SLPP Kabbah government and RUF military junta, which led to Ahmed Tejan Kabbah's overthrow on 25th May, 1997. This coup d'état was carried out by a collection of young military officers which was led by Major Johnny Paul Koroma and thereafter formed an Armed Forces Revolutionary Council (AFRC). Surprisingly, President Robert Mugabe of Zimbabwe who was the African Union (AU) Chairman at that time rated the new regime as legitimate which to him would restore the integrity of the Sierra Leonean leadership.

At this juncture, ECOMOG's physical military intervention become imperative, arising from several failed peace initiatives. It was not surprising that with the superlative military involvement of a large contingent of the Nigerian Army amongst the ECOMOG Forces, successfully led to the restoration of the democratically elected government of President Ahmed Tejan Kabbah.²⁶¹ This massive success, in spite of the catastrophic invasion of Freetown by RUF and AFRC rebels on 6th January, 1999, culminated in the Lome Peace Agreement which comprehensively sealed all documents and structures that put a final full-stop to the horrendous bloodbath in Sierra Leone.

²⁵⁹ADJ Alie, "Background to the Conflict (1961 - 1991): what went wrong and why?" in Anatole Ayissi and Robin – Edward Poulton, *Bound to Cooperate: Conflict, Peace and People in Sierra Leone* (2000), p.31.

²⁶⁰Suifon, n 23.

²⁶¹Kargbo, A (2000), "The Long Road to Peace: 1991-1997" in Anatole and Robin – Edward, *Bound to cooperate*, pp.38 & 44

With the onset of violence in Côte d'Ivoire in 2002, following the attempted coup d'état, which was initially thought to be a mutiny within the Ivorian Armed Forces and multiple crises and conflicts that spread to several cities including its capital Abidjan, the ECOWAS establishment was better prepared to intervene than it had been in previous conflicts in the sub-region considering the huge intervention experiences it had gathered in the past. The result of the rebellion and conflicts that ensued was the creation of an awful picture of a country divided into the Rebel - held North and the Government - controlled South.

ECOWAS immediate reaction to the crisis was heavily premised on the fact that the coup d'état attempt violated the ECOWAS Protocol on Democracy and Good Governance, and the AU Principles against Unconstitutional Changes of democratically elected Government.

Also wary of the fact that the conflict could spread to other countries in the sub-region, the ECOWAS Executive Secretary General, Mohammed Ibn Chambas publicly condemned the rebels. Furthermore, a group of West African leaders from Ghana, Guinea-Bissau, Mali, Niger, Nigeria and Togo formed a Contact Group to proffer practicable solutions to end the crisis. The group was formed during an emergency meeting of ECOWAS leaders which was held in Accra, Ghana, on 29th September, 2002. This led to the signing of what became known as the Accra (I) Agreement.²⁶² The group immediately called on the rebels to embrace peace, renounce violence and end the conflict. The group also took the initiative and responsibility to initiate contacts between the rebels and the Ivorian Government, as well as, the development of a framework for resolving the Crisis. It is important to State that the Lome Ceasefire Agreement that followed was initiated on 24th October, 2002 under the auspices of the ECOWAS Contact Group, which gave the Togolese President, Gnassingbé Eyadéma, the mandate to lead negotiations that was aimed at resolving the political differences between the Cote d'Ivoire government and the MPCl rebels.

Consequently, the warring parties declared that they were committed to the ceasefire agreement, which was signed in Bouake, Côte d'Ivoire. They also promised to end human rights preserve the country's Constitutional Order, Public Order and Territorial Integrity. ECOWAS leadership tenaciously swung abuses and to respect Ivorian Institutions and maintain Constitutional Order. However, the implementation of the Lome Agreement and others at this point in time, stalled, when the MPCl insisted that the Constitution should be amended, and further called on President Gbagbo to resign;

²⁶²Gberie and Addo, 2004.

while Gbagbo expectedly insisted that the rebels disarm to preserve the country's Constitutional Order, Public Order and Territorial Integrity. ECOWAS leadership tenaciously swung into action and organised other meetings in Kara, Togo, as well as, in Abidjan, Cote d'Ivoire and in Dakar, Senegal to convince the warring parties to recommit themselves to the Lome Ceasefire Agreement. But sadly, the MPCl and the Ivorian Government remained adamant. The signing of the Lome Agreement coincided with the submission of proposals by the ECOWAS Defence and Security Commission to the Mediation and Security Council to deploy ECOMOG Forces, which was now redubbed ECOMICI Forces, in Côte d'Ivoire.

As an immediate follow-up mechanism, approximately 1,400 troops under the auspices of the ECOWAS Mission in Côte d'Ivoire (ECOMICI) were deployed and given a tough mandate to monitor the cessation of hostilities; assist in all pragmatic processes that would lead to the return of normal administrative services; guarantee the safety of humanitarian workers and observers; and support the implementation of the Lome Agreement. Sadly, the Lome Agreement²⁶³ was not successfully implemented because of marked differences in the demands from and expectations of President Gbagbo's camp and the MPCl rebel group. Just like the Accra Agreement, the diplomatic and persuasive agreements reached, at one time or the other, only succeeded in halting the conflict in the very short term and the crisis would later resume.

With the resumption of conflicts in Liberia, the ECOWAS establishment embarked on another peacemaking and military intervention. The most significant outcome of ECOWAS mediation process in resolving the conflicts in Cote d'Ivoire could be authentically linked to the Accord which was held in Accra, Ghana and the subsequent signing of the comprehensive peace agreement in 2003. The agreement was signed between the Government of Liberia, LURD, MODEL and political parties. The success of the 2003 Peace Agreement could therefore be attributed to the unity of purpose of the ECOWAS leadership spectrum, most of whom were now earnestly committed to lasting peace, and to the inclusion of Civil Society Organisations in the Negotiations, Peace Building Process and their eventual inclusion in the Transitional Government.

²⁶³Musah, 2011

It should also be noted that the formidable and combined efforts of ECOWAS via its ECOMICI Intervention Forces, the French Mediatory role that led to the Linas-Marcoussis Peace Agreement in January, 2003 and a strong UN Peacekeeping Force, also made it possible for the concretes and ethos of sustainable Peace, Security, Constitutional and Public Order to become permanently entrenched in Côte d'Ivoire.

Similarly, the several Agreements they reached helped to facilitate the formation of a Government of National Unity, which legitimately led the country until general elections were conducted in October, 2005. Equally crucial was the role of the African Union (AU) through Thabo Mbeki, the former President of South Africa, which resulted in Pretoria (1) and (2) Agreements. Again, in 2005 Blaise Campaore as lead Mediator and as Chairman of ECOWAS brokered a Peace Agreement which is known as the Ouagadougou Peace Accord on March, 2007. This Accord provided a power sharing arrangement in which the leader of the rebellion - Guillaume Soro became the Prime Minister alongside the astute administrative whims of the sitting President - Laurent Gbagbo.

The political impasse and bickering in Guinea Bissau spanned between 1997 -1999. But it actually degenerated into a crisis when President Joao Bernardo Vieira ordered the arrest of General Ansumane Mane who was a very Senior Army officer in the military of Guinea Bissau. General Ansumane Mane was accused of staging an attempted coup d'état and supplying light arms to a rebel separatist group in the Cassamance divide of Southern Senegal.²⁶⁴ He vehemently denied the charges of gun-running. But sadly, this accusation thereafter dangerously transformed into a major crisis as the accused General's recalcitrant, rebellious and refractory response inadvertently edged the fragile nation State of Guinea Bissau closer to a full-blown war. As events later unfolded, General Mane was later

²⁶⁴ A Adebajo, 'Current developments in Guinea-Bissau', Paper Presented at the Joint IPA/ECOWAS Task Force Meeting on Operationalising the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Dakar, Senegal, 12th – 13th August (2002).

exonerated of all the charges after passing through a rigorous investigation process. But in spite of his being cleared of the charges, the dice for a full-scale war had been cast. As his profile, sympathisers and group of admirers massively increased, his capacity to go disdainfully against the Armed Forces of Guinea Bissau rose to an unimaginable apogee. The situation became even worse as many loyal soldiers defected from the government camp and joined him to the extent that he successfully held up a large part (three quarter) of Guinea Bissau total land space for eleven (11) months. With massive tension and fighting pervading the little nation States' space, it took a full military intervention of over 2,400 ECOMOG Forces to quell the instability, resulting in total human and material catastrophe in Guinea Bissau. According to a report by the International Peace Academy,²⁶⁵ a Peace Accord was signed on 2nd November, 1998 which paved way for the establishment of a broad-based Government in December, 1998. They also reported that the United Nations Organisation (UNO) eventually joined ECOWAS in the peace process and establishment of a Peace Support Office and a Trust Fund in Guinea Bissau in March 1999 considering the country's state of abject poverty and established financial liquidity crisis.

International Peace Academy,²⁶⁶ also reported that the ECOWAS establishment equally deployed about 712 Peacekeepers in Guinea Bissau in March, ¹⁹⁹⁹; while also in November the same year an authentic Presidential election catapulted Mr. Kumba Yala into power. The story was painfully different for General Ansumane Mane as he was killed in November, 2000 when he unilaterally declared himself head of the Armed Forces and spuriously revoked military promotions by incumbent President Mr. Kumba Yala of Guinea Bissau.

²⁶⁵International peace academy & ecowas operationalising the ecowas mechanism for conflict prevention, management, resolution, peacekeeping and security, rapporteurs: Dorina Bekoe and Aida Mengistu, Dakar, Senegal, August, (2002), p. 10.

²⁶⁶ As above.

The Republic of Guinea was among the nation States within the ECOWAS enclave that experienced severe crises and conflicts which subsequently required the military intervention by ECOMOG Forces. In spite of their gaining political independence since 1958, the country's two foundation leaders President Ahmed Sekou Toure and General Lansana Conte separately had administrative structures that were totally in the negative. Both were notorious for their political repression and mismanagement of the country's economy.²⁶⁷ It was also observed that both leaders painfully led a country, which in spite of her abundant natural resources, such as, Gold, Diamond, Bauxite and Iron Ore, remained one of the poorest nation States within the world community.

Even more pathetic were the decadent socio-economic and political structures on ground, which indicated that their electioneering paradigms since Guinean first poll in 1998 have been characterised by severe apathy, electoral manipulation and intimidation of opposition elements, fraud, extraordinary high degree of youth unemployment arising from poorly manipulated series of privatisation schemes and extreme high crime rate.

Other societal maladies that rocked the Guinean socio-economic and political landscape included - high ratio of corruption, nepotism, ethnically biased and general societal ineptitude that massively plagued the Guinean entire legislative and judicial structures.²⁶⁸ It became obvious that a typical fragile nation State with the foregoing societal inadequacies and decadence, was incredibly and pitifully sitting on a keg of gun powder waiting to explode into a full-blown conflict.

²⁶⁷TM Saw, 'Current developments in Guinea', A summary of the political situation in Guinea is a paper presented at the Joint IPA/ECOWAS task force meeting on operationalising the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Dakar, Senegal, 12th – 13th August, (2002)

²⁶⁸International Peace Academy, n 41 above.

Guinea also suffered from massive spillovers of refugees as a result of the long-drawn crises, conflicts and civil wars in their neighbouring countries, such as, Liberia, Sierra Leone and Cote d'Ivoire. The refugees spectacle gradually became a source of conflict when the Guinean governmental authorities began to complain that rebels and other criminal elements from Liberia and Sierra Leone were stealthily and surreptitiously infiltrating the refugee camps that were located within their territorial frontiers fomenting trouble. This awful development in September, 2001, threw up incidents of inter-State conflicts that inadvertently led to deteriorating relations especially between Guinea and Liberia.

The despotic and sit-tight leadership proclivity of General Lansana Conte, who incredibly came to power through a coup d'état in 1984 did not help matters. Moreover, the absence of political checks and balances; and General Lansana Conte's political sense of impunity during his conduct of a referendum in 2001 which led to the extension of Presidential term from five (5) years to seven (7) years; and the scrapping of the limit of two (2) five (5) year terms, and his elimination of the President's age limit of Seventy (70), finally signposted the dawn of an emerging era of doom, conflicts and political catastrophe for Guinea. As events were, the deteriorating health of President Lansana Conte; the multiple quagmires of his over prolonged regime especially since 2003 with the series of crises that surrounded issues of further elongation of term and succession; the weak governmental institutions and acute socio-economic difficulties facing the terribly impoverished Guinean masses; the general strike and unprecedented demonstrations and full-blown turmoil which were violently quelled by the Conakry (Guinean) authorities, precisely a year after the death of President Lansana Conte and the inglorious takeover by the military Junta in December, 2008; all, provided enough historical context upon which the multiple crises and conflicts in Guinea evolved, that earnestly made ECOMOG military intervention and numerous mediation actions taken by ECOWAS between January, 2007 to December, 2009 in Guinea extremely imperative and sublime.

The texture of conflicts in Mali had a wide, varied and complicated outlook. This is largely because it cut across multi ethno-religious and inter-State divides and purview. This complex, mixed and squabbles ridden state of national affairs is far from what was expected of a country whose Constitution lucidly classified it as a Secular State; and also, with a legally enshrined regulation that all political parties with any form of religious orientation that are based on a particular religious foundation should be outrightly prohibited by law.²⁶⁹

Similarly, the increasing crises prone domestic environment is shocking, considering the fact that when Mali gained National Independence from France in 1960, the country's new governmental authority had to vehemently assert its authority on a large territorial space, which included the vast desert region and terrain where the present day Tuaregs peacefully held sway over the years.²⁷⁰ It is therefore shocking that Mali which was once a sub-regional democratic leader and cradle of sub-saharan civilisation, has become an epicenter of Conflicts. It is also surprising that contemporary international relations analysts now posit that the conflicts in Mali systemically has followed the recent trend of political unrest and instability in the West African sub-region and Africa in general.

In the same vein, other analysts have argued that Mali, like the rest of the Central Sahel region, since 2012 has been increasingly characterised by high class volatility immense subjugation and intimidation, protracted crises, conflicts and insecurity, perilous invasion by politically motivated armed groups, including ethnic based movements, militia, jihadist groups, transnational criminals, as well as, large-scale population displacements, climate shocks, rapidly worsening poverty and hunger crisis by nearly half of Malian population and many are without access to education and employment, in spite of the country's huge reserves of Gold and other mineral resources.²⁷¹

Mali has also witnessed severe human rights abuses, criminal killings and assassinations by armed Islamist groups, abuses by State security forces, violation of children's rights, women and girls' rights, increased communal bloody violence, zero accountability for these criminal abuses and total deterioration of human security which have drastically spiked up socio- economic and political crises and an unimaginable level to which governmental officials,

²⁶⁹Transformation Index (2022), Mali Country Report, BTI

²⁷⁰Clingendael Insitute, Internet <https://www.clingendael.org/pub> (accessed on 15 March, 2023)

²⁷¹Advocacy Brief 'Hunger crisis in mali, 21st November'; and what to know about the Crisis in Mali since 12th August, 2020. Relief Web –<https://reliefweb.int/report/hunger>.

Islamist and jihadist groups have deepened their degree of impunity against their down trodden masses since 2021 till date.²⁷² The grievous impact of these crises and conflicts is that the extremely low prospects for the survival of young people who are deceived by the attractive offers by armed groups to join their ranks, distrust between the Northern and Central population and the State, and the atrocities that are openly committed by the Malian security Forces are crucial catalysts for the current widespread crises.

To make matters worse, Mali experienced two military coups d'état in 2020 and 2021 and both disastrous political incidents were dastardly orchestrated by the Malian military. After the coup d'état in 2021, the Malian government and the French forces within the Malian domestic space had a fall out which instigated the Malian authority to officially demand the total withdrawal of French troops.²⁷³ With the massive escalation of the Malian political impasse, in spite of the huge ECOWAS organised military international support mission sent to assist the government of Mali against Islamist Rebels in the Northern Mali conflict, valid reports revealed that as at early 2012, Tuaregs Islamist rebels had seized key towns and locations in Northern Mali, sparking and increasing the tempo and intensity of Mali's political and security crisis to a higher apogee till date.²⁷⁴ These Islamist and Jihadist invaders in addition to the above wanton destruction, also engaged in massive demolition of Mali's collection of enviable historical sculptures, artifacts and museums which have been part of the bases upon which their old time civilisation structures were predicted.

The ECOMOG Forces that made up the International support mission and who were to back up the UN Peacekeeping mission in Mali (MINUSMA) according to Human Rights Watch were drawn from Ghana, Gambia, Guinea, Nigeria and Sierra Leone; while the home troops from Mali later joined (Human Rights Watch). Furthermore, News and Press Release from the Communique of the ECOWAS Mediation Mission to Mali (2021), publicly declared that in order to adequately firm-up the intervention, mediation and peacekeeping efforts of ECOWAS Heads of State and Government, on 19th June, 2021 held a Summit in Accra, Ghana during which they decided to send a High-Level Mission to Mali, to be led by His Excellency Goodluck Ebele Jonathan, former President of the Federal Republic of Nigeria. He thus, served as a Special Envoy and Mediator to Mali between 5th to 7th September, 2021.

²⁷²World report, *Mali human rights report watch* (2022), <https://www.hrw.org>>world- report

²⁷³Mali war Wikipedia (accessed 15 March, 2023)

²⁷⁴Mali crisis news, 'Mali crisis news hits ten (10) years marks–DW, 30th March; theAfricanledinternational supportmissiontoMali, (2022), Wikipedia–<http://en.m.wikipedia.org>>wiki.

The ECOWAS Mission's diplomatic visit was a huge success, during which they paid courtesy call on the President of the Transition Government, Colonel Assimi Goita. They also held a working session with the Prime Minister of the Transition, Mr. Choguel Maiga. They held Consultations with members of the Local Monitoring Committee and members of the Diplomatic Corps accredited to Mali. The Mission further congratulated the Government of Mali for the relative calm they observed in the country and took special note of the lifting of the restriction measures which were imposed on the former President of the Transition - His Excellency Bah N'daw and the former Prime Minister - Mr. Moctar Ouane. They also appreciated the renewed vigour of the Transition authorities towards respecting all agreed deadline of the Transition before the International Community. The Mission further reiterated the necessity of respecting the date which has already been announced for the elections in order to ensure credibility of the electioneering process. Finally, the Mission called on the Multilateral and bilateral partners to support the Transition process, especially the preparatory phase for the elections.

Finally, following credible admonitions from Human Rights Watch, it is crucial to categorically state that despite the 2015 Peace Accord which purportedly signaled the end of Mali's 2012 - 2013 bloody armed conflicts, arising from very respectable diplomatic mediation and military intervention by ECOWAS and its ECOMOG gallant Forces, signatories have failed to implement many of its key strategic peace provisions, notably the disarmament of thousands of Combatants. The Mediation and Intervention efforts by ECOWAS in the political conflict in The Gambia, in my calculation and evaluatory mechanics, seems to be the most direct and more successfully implemented in all intervention and conflict resolatory experience by the ECOWAS establishment within the West African sub-region.

The Gambia political conflict spanned between 2016-2017; but it actually came into fore in 2016. It was apparently thrown up by the unfortunate innate political sit-tight proclivity of most leaders within the African political space. President Yahya Jammeh had apparently been in office as President from 1994 to January, 2017 which made him the second longest sitting President of The Gambia after succeeding former President Dawda Jawara who ruled the country since its independence in 1965.²⁷⁵

As political events unfolded, President Yahya Jammeh conducted what turned out to be a legitimate democratic election that culminated to his defeat on 1st December, 2016. He originally accepted the results and conceded defeat after it was officially announced by the Gambian electoral authority, which was globally acclaimed as exemplary and President Jammeh uniquely applauded.

²⁷⁵IT Terwnse, I.T, OS Adesina, GS Puldu, G.S., A Abdul, 'The role of ECOWAS on peace and conflict resolution in Nigeria and Gambia', (2018) 12(2) *International Journal of Management & Social Sciences*, pp. 55 61. doi:<http://dx.doi.org/10.2013/jmss>. V12, n3. p1 (assessed 15 March, 2023).

But as a result of a dubious political rethink, he all of a sudden declared he no longer accepted the result and outcome of the valid elections of 1st December, 2016 which he personally organised. The Gambian down trodden masses out of their collective quest for a change in the political dynamics of their country came out en mass to vote for the new President-elect Mr. Adama Barrow who prior to the elections was the Opposition leader.

Arising from the political turmoil that ensued, the ECOWAS establishment quickly stepped in to assist The Gambia in its emerging conflict which if not properly handled would certainly have consumed lives of numerous innocent Gambians. In an excellent display of ECOWAS brotherhood and dynamism, leaders of some Member States which included - Nigeria, Ghana, Senegal, Liberia, Guinea and Sierra Leone united to solve the political conflict in The Gambia. Following strategic decisions by these ECOWAS leaders His Excellency Adama Barrow tentatively moved into exile in Senegal where he remained and was eventually sworn - in as Gambia's legitimate leader and President at the Gambian Embassy in Dakar, Senegal under the military surveillance and coverage of the ECOWAS Armed Forces (ECOMOG). Former President Yahya Jammeh thereafter agreed and stepped down as President of The Gambia under the mediatory tutelage of ECOWAS amiable leaders. The new leader - President Adama Barrow safely returned to Banjul, Gambia; while the former President, Yahya Jammeh expectedly went on exile in faraway Equatorial Guinea.

Current reports have indicated that the Gambian Government has officially indicated their determination to prosecute their ex-ruler Yahya Jammey for massive financial misappropriation while in office. But the sad news is that Equatorial Guinea does not have extradition Treaty with The Gambia.²⁷⁶ This unappetising development provides yet another escape route for one of Africa's inglorious leaders, who painfully led their terribly impoverished peoples and nation State, in the most corrupt, impetuous and dishonourable purview.²⁷⁷

Finally, and next on line in my analyses of ECOWAS dispute resolution efforts under the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, is the Federal Republic of Nigeria. Ironically, super populous, geographically vast, and geopolitically massive as the Nigerian State is, it has the most complicated texture of crises and conflicts; but with the minutest internal input within the realms of conflict mediation and intervention by the ECOWAS establishment.

Prior to the establishment of the Economic Community of West African States (ECOWAS) in 1975, Nigeria has had its morbid share of a Civil War, which

²⁷⁶Courts News Current Information about the Location where former President Yahya Jammey of The Gambia lives in exile, (2002), 25th May

²⁷⁷As above.

occurred between 1967-1970. Since then, Nigeria's internal conflicts have been limited to its usual numerous domestic crises, communal squabbles that are boundaries' related, ethno-religious crises, political and electioneering hinged conflicts, which in nearly all scenarios are deeply associated with our open-ended North - South dichotomous socio-economic and political dangerous differences. Most international relations, political scientists and economic analysts have looked at the Nigerian conflicts mostly from the economic abyss, total impoverishment and violent political electioneering conflicts Nigeria have shamefully been pushed into by its past and present leaders. But amongst these varieties of deeply domesticated perennial conflicts, political electioneering deadly disturbances stand out as most dominant.

Originally, in line with Terwase's postulations²⁷⁸, it was envisaged that the strategy of zoning political offices, including the position of Mr. President would provide a permanent solution to the contagious conflict of ascendancy between politicians in the North and Southern divides of the country, which the deadly and overheated political atmosphere as we have just witnessed during the 25th February, 2023 elections in Nigeria have proved fatally wrong. In addition to the above political challenges, is the decadent electoral procedure itself in Nigeria, which is usually overwhelmed with high quantum of corruption, vote buying, massive under-aged voting, political intimidation and harassment, ballot box snatching, voting sheets manipulation, massive rigging and political related killings and assassinations. These ugly and shameful incidences have thrown the Nigerian State into unimaginable degree of Political tension in its ongoing 2023 electoral processes.

However, in recent years beginning from the twilight of 2009 and up till date, exceedingly devastating violent conflicts through the evil machinations of hardened and bloodthirsty religious fundamentalists have taken center stage in the entire Nigerian domestic space. The awful and sorry texture of religious fundamentalism began with the Boko Haram Jihadists around the North Eastern and Lake Chad divides of the country, which encompassed Borno, Yobe, Taraba and Adamawa States. The brutish state of crises and conflicts in Nigeria become worse with the arrival of the Islamic State of West Africa Province (ISWAP) to join in the myriad of devastating attacks and bombardments by the Boko Haram insurgents. These are terrorist groups with established links with other far more dangerous terrorist extremists, such as, ISIS and Al-Qaeda.²⁷⁹

²⁷⁸EBU Ifeadi, 'Free Movement Of Persons, Goods and Services as an Important Factor In Regional Economic Integration', a Paper Presented at the International Conference Hosted by the ECOWAS Court of Justice, at the Republic of Cape Verde, 9th - 12th May, (2022), 40,

²⁷⁹Terwase, The Role of ECOWAS on Peace and Conflict Resolution in Nigeria and Gambia, RA/ Institute of Research Advances, (IRA) – International Journal of Management & Social Sciences (ISSN 2455 - 2267), 12(2), pp. 55- 61. doi:<http://dx.doi.org/10.2013/jmss>. V12, n3. p1, 61. doi:<http://dx.doi.org/10.2013/jmss>. V12, n3. p1.

Other devastating aspects of Nigeria's conflicts and massive Crime waves presently include: unimaginable mayhem caused by Terrorists, Bandits, Kidnappers, Hostage taking and Abductions, Fulani Herdsmen atrocities against Native Famers, Armed Robbery attacks, Cattle Rustling, Killings by Unknown Gun men and Ethno-religious massacre of faithfuls in Churches and Mosques; which have made the earlier Niger Delta Militants' escapades a child's play. The sad story of Nigeria's current status of Conflicts is that it has spread throughout all the geopolitical zones of the country with that of the North Western divide escalating to a very morbid proportion.

When the foregoing devastating situation is juxtaposed with the down turn economic crisis associated with the current scarcity of new currency notes induced conflicts, your guess shall be as good as mine, as to how excruciating and catastrophic Nigeria's Conflicts have risen today. Terwase and his colleagues in their report,²⁸⁰ indicated that Boko Haram which originally started its attacks in Nigeria, later expanded its criminal assaults to other countries, such as, Chad, Niger and Cameroon. And since Niger is a bonafide member of the ECOWAS Community, it adopted the Political Declaration and Common Position against Terrorism in 2013.

In all of these massive crises and conflicts the Nigerian State have faced, the ECOWAS establishment are yet to see the need for the engagement of its ECOMOG Intervention Forces to officially undertake on any direct military intervention against the invading Boko Haram and ISWAP Jihadists, even though Nigeria unequivocally remains a giant in the Security Architecture of the ECOWAS Community. The only major exception is the ECOWAS quiet adoption of a counter terrorism strategy and Implementation Plan, which understandably is to help the regional group in countering all forms of terrorist activities in the West African sub-region; and the Multilateral and Bilateral Joint Task Force Operations by Nigeria, Niger and Chad against the Boko Haram and ISWAP terrorists within the North Eastern frontiers of the Nigerian State.

²⁸⁰Terwase, I.T, Adesina, O.S Puldu, G.S., Abdul, A. (2018), The Role of ECOWAS on Peace and Conflict Resolution in Nigeria and Gambia, RA/ Institute of Research Advances, (IRA) – International Journal of Management & Social Sciences (ISSN 2455 - 2267), 12(2), pp. 55- 61. doi:<http://dx.doi.org/10.2013/jmss>. V12, n3. p1

7.) Sanctions Regime under the Mechanism

A critical perusal of the Protocols of the Mechanism has unearthed the truism that under the Mechanism, a total of 58 Articles lucidly spelt out the various components and areas that relate to the Establishment, Principles and Objectives of the Mechanism. Also included amongst these 56 Articles are the Institutions, Functions, Conflict Management, Funding and Co- operation with other Organisations that operationally relate to the Mechanism. But interestingly, none of these Articles clearly provided for a sanctions regime under the Mechanism. On the contrary, the contents only elaborately sought for channels of cooperation amongst Member States of the ECOWAS Community through voluntary committal as participating Member States, for as long as, the Head of State or Government in any particular instance, has signed the Protocol in line with Article 57 seeking the Ratification of the Protocol in accordance with the Constitutional procedures of each Member State.

Again, Article 56 of the Protocol also made provision for voluntary withdrawal of any Member State, if for whatever reason, the State finds it necessary to do so. Moreover, provisions of Article 56 on “Withdrawal”, expressly stated that – any Member State that wishes to withdraw from this Protocol shall give a one year written notice to the Executive Secretary who shall inform Member States thereof. At the end of this period of one year, if such notice is not withdrawn, such a Member State shall cease to be a Party to the Protocol. During the period of one year referred to, in the preceding paragraph, such a Member State shall nevertheless continue to observe the provisions of this Protocol and discharge its obligations there-under.

It is evident that Member States of ECOWAS who are signatories to the Protocol in spite of their internal challenges on Insecurity, Poverty, Small Arms Proliferation and others, have always showed profound interest in the collective aspirations of the sub-regional body through Good Governance, Peace and Security in Member States. The Former Executive Secretary of ECOWAS, Mohammed Chambas in his paper titled “Operationalising the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security”, which was presented in New York on 29th April, 2002 noted that – 'ECOWAS has adopted a two-pronged approach to its duty of consolidating stability and security in our region: a call for adherence to the principles enunciated in the Protocol on Democracy and Good Governance as a means of averting conflicts, as well as, establishing strategies that can be called upon to prevent or manage conflicts depending on the situation at

hand'. Mohammed Chambas further noted that ECOWAS strategies are not unique, nor do they provide all the answers needed to ensure sustainable peace in the region. What is certain according to him, is the fact that member States in the West African sub-region are earnestly committed to the implementation of ECOWAS initiatives, by providing a peaceful, secure and stable environment that will be conducive for the implementation of the Community's economic programme and its ultimate developmental objectives.

However, even though the 1999 Protocol on the Mechanism did not provide for a clear-cut sanctions regime against erring Member States, there have been numerous concrete instances of sanctions being imposed on Member States that truly deserves it for their wrong doing. For instance, a trade embargo was meted out against the Republic of Mali for its prolonged return to democratic rule. The Malian Military had staged a coup d'état and a counter-coup d'état respectively in 2020 and 2021. The coup plotters, in prompt response, promised to return the country to democratic rule. Ironically, in February 2022 Mali's Interim Lawmakers officially approved a Plan allowing the Military Government to Rule for up to Five (5) years, citing security concerns. In response, ECOWAS at the 4th Extraordinary Session of its Authority of Heads of State and Government, which was held in Accra, Ghana on 9th January, 2022, to review the political situation in Mali imposed a trade embargo on the Military Government of Mali. In addition, ECOWAS Member States closed their borders with the Republic of Mali. The sub-regional Bloc (ECOWAS) also declared the potential length of the transition period as absolutely unacceptable.

In addition to the foregoing measures, the ECOWAS sanctions also included – an urgent recall of ECOWAS Member States' Ambassadors accredited to the Republic of Mali, a closure of land and air borders; a suspension of all commercial and financial transactions except for food products, pharmaceutical products, medical supplies and equipment, as well as, structural materials required for the control of COVID-19, petroleum products and electricity, freezing of Malian assets in ECOWAS Central Banks and the suspension of all financial transactions.

Similarly, the ECOWAS establishment in 2022 imposed strong Sanctions against Guinea in full defence of democracy as the transition government was not making tangible progress towards establishing a transition timeline and organising elections for the purpose of legitimately moving Guinea towards valid democratic rule. It is important to note that the country unnecessarily witnessed a military coup d'état in 2021. This strategic initiative through the imposing of stiff sanctions and punitive measures by ECOWAS received a boost and support from the United

States Government via an official Statement on 27th September, 2022. Evidently, the United States' support of ECOWAS sanctions was designed to encourage the Transition Government to move Guinea quickly towards a Constitutional, Civilian-led Democracy through a Transparent and Legitimate Consultative Process.²⁸¹

Furthermore, on 28th January, 2022 Burkina Faso was outrightly suspended from ECOWAS following a military coup d'état.²⁰¹ It is obvious from the foregoing sanctions, suspensions, restrictions and punitive measures on erring Member States over the years, that extant by-laws of the ECOWAS establishment do exist in reality and could be effectively enforced where and when necessary, even though they may not have been directly enshrined amongst the 56 Articles of the Protocol on the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. The sanctions regime under the mechanism and the commanding whims of the ECOWAS establishment has become extremely crucial and imperative to enable it continue to serve as a structural deterrent Instrument against Unconstitutional Change of Government by a few unscrupulous and ignominious governmental leaders within the West African sub-regional political domain.

8.) Desirability of the Community Intervening to Restore Constitutional Order

It is historically true that at the formation of the ECOWAS and the signing of its Treaty in 1975, about nine (9) of its foundation Member States were under the leadership aprons of military juntas. Leading the pack amongst these countries, which were led by the military at that time was the Federal Republic of Nigeria. Incidentally, Nigeria under the same military was at the threshold of its plan to return the country to democratic governance which was eventually actualised in October, 1979.

With this welcoming development, Member States of ECOWAS were earnestly desirous and determined to work towards enthroning democratic rule and ethics in the whole West African sub-region. This assertion was evident in the Community's interest and desirability in the promotion and consolidation of a democratic system of governance in each Member State as envisaged by the Declaration of Political Principles adopted in Abuja on 6th July, 1991.

²⁸¹ www.state.gov (accessed 15 March, 2023)

²⁸² en.m.wikipedia.org (accessed 15 March, 2023).

Therefore, the 1999 ECOWAS Protocol in Article 45 made 'Restoration of Political Authority' a highpoint and further stated that at situations where the authority of government is absent or has been seriously eroded, ECOWAS shall support all genuine processes that would engender the restoration of political authority in any Member State. Such support may include the preparation, organisation, monitoring and management of the electoral process in any nation State within the Community that falls within this category; and this would be politically accomplished with the co-operation of relevant regional and international organisations. Thus, the restoration of political authority would be undertaken at the same time as the restoration of constitutional order and public order; as well as, the development of respect for human rights, enhancement of the rule of law and the judiciary.

Interestingly, the Community has relatively worked towards promoting democracy in the region by being practically involved in activities that would ensure sustainability of the rule, desires and opinions of the majority via democratic institutions in member States. Evidences of this inclusive action by the ECOWAS establishment abound in its management of the Liberian conflict and many other cases.

It is no news that sequel to the resurgence of hostilities in Liberia, the ECOWAS Commission adopted mediation and other strategic initiatives as a practicable mechanism in resolving the Liberia crisis. Indeed, the mediation process eventually led to the restoration of Peace and Security in the country, through the Accra Comprehensive Peace Agreement. Moreover, the final stage of the implementation of the peace agreement for Liberia unfolded with the holding of general elections on 11th October, 2005, which was quickly followed by the presidential run-off election on 8th November, 2005. The ECOWAS Observation Mission and the team of ECOWAS Special Mediators, which was led by Nigeria's last military Head of State - General Abdulsalami Abubakar, observed the elections which further gave credibility to the Liberian Peace process. Similarly, ECOWAS was deeply concerned about the situation in The Gambia following the attempted coup d'état on 22nd March, 2006 by the Army Chief of Staff, Colonel Endures Cham. The ECOWAS authorities diligently mediated in the crisis and confidence in the security situation was automatically restored.

In addition, the unique role ECOWAS leaders played during the Gambian conflict between 2016-2017 will never be forgotten in a hurry. It would be recalled that former President Yahya Jammeh of Gambia after conceding defeat and accepting

the result of the elections, made a dubious rethink and declared he no longer accepted the result and outcome of the Presidential elections in December, 2016. With the strategic mediation and guidance from the ECOWAS leadership, the winner of the Presidential election Mr. Adama Barrow, tentatively moved into exile in Senegal where he remained until he was sworn in on 15th January, 2017 as the authentic President of the Republic of The Gambia under the surveillance and coverage of the ECOMOG Forces which were drawn from Nigeria, Ghana, Senegal, Liberia, Sierra Leone and Gambia. Sincerely, without the mediatory and diplomatic excellence and determination of ECOWAS leadership, constitutional order would not have been remarkably restored in The Gambia. ECOWAS also earlier played a huge Mediatory role during the Cote d'Ivoire crisis which led to the resolution of the impasse between President Laurent Gbagbo and Guillaume Soro, the leader of the Force Nouvelles, who became the Prime Minister. This subsequently led to the signing of a Peace Agreement in Ouagadougou, Burkina Faso on 4th March, 2007, under the auspices of President Blaise Compaore who was also the Chairman of ECOWAS at that time.

The Mechanism was also effectively applied by ECOWAS to uniquely restore Constitutional and Public Order during the Guinean Conflicts, which began in January, 2007 as a result of the existing very weak democratic institutions, serious economic and social difficulties facing the masses, general strike actions and unprecedented demonstrations. The multiple Crises were eventually successfully resolved with the diplomatic maneuvering of the complicated socio-economic and political situation at that material time in Guinea, with their careful and subtle support of Lansana Conte as the President. The resolution of the conflict was as a result of an ECOWAS mediation mission which was led by the former President of the Federal Republic of Nigeria, General Ibrahim Badamasi Babangida and Dr. Mohammed Ibn Chambas, who was the President of ECOWAS Commission.

The ECOWAS Community also usually utilises its sanctions regime as a strategic method to checkmate likely or established breachers of Constitutional Order. Several of such instances which have already been broadly discussed in an earlier chapter of this paper presentation, would be briefly discussed below, essentially for clarity purposes. It was sad to observe that in a bizarre fashion in February, 2022, Mali's Interim lawmakers approved a scheme that would allow the Military Government to Rule for five (5) years citing security concerns; in spite of an extant sub-regional sanction which was imposed on the military junta for their calculated delays in the electoral process. Even though the Army dominated legislature as a deterrent measure declared that the country's Interim President cannot stand for

any future democratic election, as part of the same Bill, the ECOWAS Community in a tough response imposed a trade embargo and closed its borders with Mali. The ECOWAS Bloc further called the potential length of the Junta's Transition period as Unacceptable.

Also, in 2022, the ECOWAS establishment similarly imposed Punitive Sanctions against Guinea over the slow pace in returning the country to democratic rule. This was largely because the Guinean transition government did not make appreciable progress towards establishing a transition timeline for the country's elections following the Junta's coup d'etat in 2021. It is on record that this positive action by ECOWAS received tremendous applause from the United States' Government on 27th September, 2022 which further boasted the integrity and efforts of the Transition Government to move Guinea quickly towards the establishment of a constitutional civilian led democracy through a transparent and consultative process.²⁸³ Similarly, for subverting the will of the down trodden peoples of Burkina Faso, the military government of the country on 28th January, 2022 was suspended by ECOWAS.²⁸⁴ This further reminded all Member States of the zero tolerance of the sub-regional body for Unconstitutional Change of Government and its determination to restore Constitutional Order.

In the same spirit of promoting democratic echoes and the desirability of ECOWAS efforts at restoring Constitutional Order in Nigeria and the West African sub-region in general, on 6th December, 2022, the President of ECOWAS Commission Dr. Omar Alieu Touray, received members of the West African Elders Forum who were proactively on a Pre-Election Assessment Mission to Nigeria ahead of the forthcoming February, 2023 General Elections. The Elders Forum was formed by former West African sub-regional leaders to establish a Mechanism which is earnestly targeted at preventing electoral abuses and disruptions, as well as, perfectly resolving all species of election related conflicts that would subvert Constitutional Order within the West African sub-regional space.

9.) How Insecurity and Political Instability Trigger Migration

Any real discourse on how insecurity and political instability trigger migration would primarily elicit a lucid understanding of what migration generally means in the contexts of physical relocation from one geographical space to another either internally within a sovereign territory or across two or more different sovereign nation States.

²⁸³ www.state.gov (accessed 15 March, 2023)

²⁸⁴ (en.m.wikipedia.org). (accessed 15 March, 2023)

The United Nations International Organisation for Migration (IOM), noted that since the earliest times, human beings of diverse nationalities have been on the move. Migration from whichever perspective it is interrogated has indeed been a natural part of humanity. Some people move in search of work; greener pastures; or economic opportunities; to join their families abroad; or for educational advancement (to study). Others move in order to desperately flee from danger, crises and conflicts of different magnitude; to escape from persecution; banditry; kidnapping; abduction; terrorism; ethno-religious killings; political related assassinations; human trafficking and child labour; or from severe human rights abuses and violations. Still, others move in urgent response to the adverse effects of climate change; natural disasters; famine; and other adverse environmental factors.

In contemporary times, people more than ever before live in countries other than the one in which they were born. According to the IOM World Migration Report 2020, as at June, 2019 the number of international migrants was estimated to be almost 272 million globally, which is 51 million more than in 2010. Nearly two thirds of this figure was labour migrants. International migrants comprised 3.5 percent of the global population in 2019. This compared to 2.8 percent in 2000 and 2.3 percent in 1980. Moreover, many individuals migrate regularly or irregularly out of choice, while many others migrate out of necessity. According to United Nations High Commission for Refugee (UNHCR), the number of global forcibly displaced people worldwide was 79.5 million at the end of 2019. Of these, 26 million were refugees (20.4 million refugees under UNHCR's mandate, 5.6 million Palestine refugees under UNRWA's mandate). 45.7 million people were internally displaced, 4.2 million were asylum seekers, and 3.6 million were Venezuelans displaced abroad.

Some authorities agree that describing migration, especially internal migration, is a controversial activity since at one end of the spectrum, migration is explained as the movement of people over some distance, or at least from one 'migration defining area' to another, and from one 'usual place of residence' to another. At the other end of the spectrum the description of migration discards the requirements that migration must involve a change of residence and a move across some distance. Migration can also be permanent, temporary or seasonal and it happens for a range of reasons. These can be economic, social, political or environmental. It is also globally known that diverse Push and Pull factors, which have elaborately been discussed and outlined above earnestly drive migration throughout the world community. Ideally also, migration impacts on both the place left behind and the place where migrants eventually settle. The impact of migration can equally be both positive and negative. However, in the context of this paper presentation, it is imperative to ascertain how insecurity and political instability

can trigger migration and vice versa particularly within the ECOWAS Member States. Agreed that not all migration activities, permanent, temporal or seasonal, are voluntary in nature; but a lot more of human migration activities are caused by certain adverse factors that are actually life threatening as a result of acute state of insecurity and political instability. It therefore becomes crucial for us to look in the direction of those adverse migration occurrences that are a function of involuntary or forceful circumstances.

In his book, *The Face of Poverty in Nigeria*, Usman,²⁸⁵ in describing those he categorised as — 'Dispossessed Citizens', earnestly contends that a large segment of our West African sub-regional societies consists of less privileged elements who are found often in urban slums are akin to the most pitiable faces of poverty stricken Nigerians and Africans in contemporary times around the globe. They have weak access to good and quality public goods (infrastructure) and services, and they have limited voice in public policy making. This growing urban army of unemployed are often restless and agitated and consist of the uneducated migrants who go from the rural areas in search of better life. From this simple submission, it is ostensibly clear that poverty-induced sense or feelings of deep seated human insecurity and collective societal insecurity in the rural areas, usually prompted or triggered off their forced or uncontrolled migration appetite to move to urban centres for better lives or greener pastures. Ona Ekhomu,²⁸⁶ in discussing —'Boko Haram: Security Considerations and the Rise of Insurgency', noted that a key indicator of emerging conflicts with governmental authorities is the huge internal migration of Northern Muslim Youths to Angwar Doki area in Maiduguri and other Boko Haram and ISWAP occupied communities in the North Eastern divide of Nigeria. It is openly known that young Northern Muslims were quitting their menial jobs and moving to the North East to join the Boko Haram and ISWAP religious fundamentalists, yet no critical alarm bells or early warning signs are sounded to the political elite or government authorities for possible proactive strategies to be deployed to stem the dangerous tide. Indeed, the Northern Muslim Youths and many other Youths in other parts of Nigeria, such as, the North West especially the Zamfara area, are all in a state of socio-economic and political instability occasioned by emerging widespread terrorist insurgency, banditry, Kidnapping, hostage taking, ethno-religious and political related killings, assassinations and general insecurity, are all currently in a forced and desperate mode to migrate from their usual places of residence to join Boko Haram and ISWAP Jihadists for survival, preparatory for what would eventually become a full scale terrorism; or to undertake large scale migration abroad in their desperate search for greener pastures and better lives.

²⁸⁵BY Usman, *The face of poverty in Nigeria* (2022)

²⁸⁶Ekhomu, O. (2020), *Boko Haram: Security Considerations and The Rise of Insurgency*, CRC Press, New York.

Similarly, in a recent study which was carried out in six (6) West African countries with a view to examining the motivations or the trigger factors for migration at the individual level using national representative surveys and focus group data, Matthew Kirwin and Jessica Anderson,²⁸⁷ submitted that in Nigeria for example, which accounts for about a quarter of the population of all Africans on irregular migration through the Central Mediterranean routes, when juxtaposed on individual perceptions of Nigeria's democracy failures, the state of national insecurity and political instability, glaringly indicate the strong desire for most Nigerian Youths to migrate abroad arising from their collective lack of trust in the integrity and capability of Nigeria's local security institutions. Evidences of such irregular migrations which are caused by some Pull and Push factors and their resultant effects are reported often in the media. For instance, the PRIVATE EYE Magazine published by the Crime Reporters Association of Nigeria in its November, 2022 edition reported that between 2016 and February, 2022 about 17,414 irregular migrant Nigerians have so far been assisted back home from Libya by the government due to extreme harsh conditions in the North African country. According to the report, many of these migrant returnees interviewed, disclosed that they were tempted to leave Nigeria due to the increasing level of insecurity and the worsening state of the economy in the face of high level corruption and political instability.

Moreover, Mali became an independent country on 20th June, 1960. Since then, Mali has gradually built up its democratic institutions for about 20 years. However, the country has displayed characteristics of State fragility that eventually led to a Military coup d'état in 2012 and a rebellion in Northern Mali that erupted the same year. Although the societal environment seems to be calming down but acute insecurity and political tensions persisted in the years that followed till date. This again, culminated in two military coups d'état in 2020 and 2021.

Following multiple threats, insecurity and continued political instability, valid reports and data from the United Nations High Commission for Refugees (UNHCR), have indicated that over 13,164 people fled from Mali in 2021 following the political instability; and have all applied for asylum in other peaceful climes around the world. Additional data indicated that the most common destination countries for these migrants have been nearby countries, such as, Mauritania, Spain, Italy and France.

²⁸⁷Kirwin, M. & Anderson, J. (2018), "Identifying the Factors Driving West African Migration", Econpapers, Oregon University School of Business.

Similarly, following these military coups d'état, another U.N. Refugee Agency again reported that thousands of people in Northern Mali have continued to flee from their homes till date because of insecurity and political instability to the extent that more than 2,000 Malians had reportedly fled to Burkina Faso and Mauritania within five days shortly after the Coup d'etats. As a matter of fact, the Northern divide of the country had become more dangerous due to the proliferation of armed groups in that terribly dangerous Sahel terrain.

Also, in her study of the challenges of internal displacement in West Africa, Jessica Wyndham, noted that West Africa has been heavily affected by displacements. Internal conflicts based on ethno-religious tensions and rivalries; political instability; disputes over the control of natural resources; natural disasters; poverty; food and human insecurity; and the imperatives of development; have all resulted in significant population displacement both within and between countries. She posited that no accurate data is available, but it is clear, millions have been displaced, particularly as a result of prolonged civil wars and the ensuing regional instability over the years as a result of the outbreak of civil war in Liberia in 1989 and 14 years of intermittent conflicts which triggered or prompted most Liberians to flee their homes.

Past valid reports also indicated that during the Togolese Political turmoil in 2005, thousands of innocent people of ECOWAS pedigree were displaced and rendered homeless which prompted many of them to desperately migrate in search of better conditions of living. As a matter of fact, a special report by International Peace Academy and ECOWAS,²⁸⁸ indicated that Guinea suffered large spill-over effects of the civil wars in neighbouring countries, such as, Liberia and Sierra Leone, during which Guinea welcomed about 500,000 refugees from both countries, from whom it was later realised that some of them were rebels who began to foment trouble in several refugee camps in Guinea.

Tesfaye and Astghik²⁸⁹ agreed with the above postulation by the International Peace Academy and ECOWAS, in their analysis and argument on immigration and political stability where they categorically posited that, immigration may at some scenarios adversely affect Political Stability if conflicts become endemic amongst heterogeneous groups of people living in close proximity due to impromptu circumstances of migration. In addition, eleven (11) years of Civil War in Sierra Leone led to a third of the population being internally

²⁸⁸(2002:10)

²⁸⁹Tesfaye, A. G. & Astghik, M. (2013), Immigration and Political Stability, Discipline of Economics, University of Canberra, ACT 2601, Australia, Research School of Economics, Australia, National University, ACT, 0200, Australia, Corresponding author; August, pp.1 & 2.
Email address: astghik.mavisakalyan@anu.edu.au.

displaced at the height of their conflicts. Spill-over effects of these conflicts in neighbouring Guinea-Bissau equally caused mass displacements in Guinea. Reports also later sadly indicated that about 1.2 million people were earlier displaced in Côte d'Ivoire by the end of November 2005. Similarly, rebellion in the southern Casamance Province of Senegal also led to major human displacements; while ethno-religious massacres of faithfuls; resource control related crises and conflicts; Fulani herdsmen ruthless attacks against farmers; insurgency, banditry, abduction, Kidnapping and intensive terrorist attacks by Boko Haram and ISWAP Jihadists in Nigeria have painfully led to massive displacement of millions of innocent ECOWAS Community Citizens within the Nigerian State and in other member States, whose immediate response were to painfully migrate to other climes in search of safety, peace, greener pastures and security in the face of excruciating state of insecurity and political instability.

10.) RECOMMENDATIONS AND THE WAY FORWARD

Numerous salient thematic issues were vigorously interrogated in this paper presentation, which had to do with the ECOWAS establishment and its well-articulated and redefined Protocols on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security; as well as, the Community's wonderful sanctions regime which are all strategically fashioned in such an astute way that would enable them to be systemically applied during the myriad of Conflicts in Liberia, Sierra Leone, Cote d'Ivoire, Guinea, Guinea Bissau, Gambia, Mali and even Nigeria. They were equally designed in such a way that would enable ECOWAS authorities to enforce the ECOWAS unique principles of zero tolerance for unconstitutional change of government and against illegitimate overthrow of popular regimes through outright constitutional disorder; as well as, when any ECOWAS Member State is faced with crises arising from high crime waves, severe ethno-religious extremist attacks, severe hostilities, insecurity and political instability, which usually trigger massive migration of stranded Community citizens from one location to another.

A typical example is the Nigerian situation where insurgency in the North East and North Western divides of the country have resulted in very high level of migration and displacements. The escapades of Boko Haram and ISWAP elements in alignment with their more dangerous foreign collaborators and terrorist extremists, such as, ISIS and Al-Qaeda have seriously dislocated the fabrics of most socio-economic and political activities in both the north and eastern zones. Current realities have revealed that these conflicts in the northern part of Nigeria have led to huge destructive spillovers and negative effects which have painfully cascaded down to other geo-political zones of the country.

What the foregoing narrative directly means is that the brutal texture of insurgency in Nigeria has inadvertently given birth to large scale dimensions of other varieties of criminal activities, such as, armed banditry, kidnapping escapades for ransom, Fulani Herdsmen attacks on local farmers which regrettably have spread beyond the northern parts of the country to all corners of the Nigerian State where many people have been displaced by these violent bloodthirsty herdsmen.

In Mali and in most other West African States in conflict, political rivalry, leadership tussle and sectional agitations have continued to threaten the relative peace of the citizenry, coupled with high degree of poverty and humongous corruption in public places. All these constitute factors that inevitably create room for irregular migration that invariably result in some challenges to the host communities or countries. Those who could afford to migrate to other parts of West African States or beyond do so involuntarily in an attempt to escape being killed in the ensuing conflicts. Therefore, this paper presentation would earnestly proffer the following recommendations as a veritable pathway forward.

First, all ECOWAS Member States should primarily and uncompromisingly be committed to the establishment of solid democratic ideals, re-enforcement of Protocols agreed upon, and Promotion of Rule of Law as specified by the various International Declarations such as the Protocol on Non-Aggression (1978), the Universal Declaration of Human Rights, the African Charter on People's Rights and Democracy, and the Protocol on Good Governance (2001); which ECOWAS Member States are all signatories to. Second, authentic periodic elections should be organised according to extant Constitutional Laws of member States in a free and fair manner without the political parties circumventing the rules or electoral guidelines, since available evidences in some cases have shown otherwise, such as, the Nigerian recent extremely shameful experience on 25th February, 2023. Events during the election revealed that vote buying, attempt to manipulate or tinker with the electoral processes and outright falsification of original electoral results, both now and in the past have led to electoral violence, which ultimately resulted to societal insecurity and instability in the political space with its aftermath of violent Conflicts and Irregular Migration for fear of victimisation or being killed in the process.

As a matter of fact, electioneering malpractices have become extremely disdainful in Nigeria where in the 2023 Presidential elections criminal distortion of electoral results were alleged to have been orchestrated and executed with the connivance of

some Presidential Candidates and incumbent State Governors. The Independent National Electoral Commission (INEC) was seriously criticized for violating the new electoral law by failing to upload results before collation with the use of its Bimodal Voters Accreditation System (BIVAS) machines direct from the Polling Units. INEC also failed to thoroughly investigate grievous allegations of multiple manipulations and distortions of original election results before officially announcing the RESULTS and WINNERS of the highly controversial elections. This very disgraceful political status which has been ascribed on Nigeria's 2023 Presidential elections was openly attested to by Official Foreign Electoral Observers who declared and announced through a Press Conference in Abuja shortly after the elections that the just concluded Presidential election was a sham and far from being credible. It is therefore further recommended that in future, Foreign Election Observers, especially those from the ECOWAS Commission should be outrightly Frank in their assessment and pronouncements on Electoral Proceedings in order to make erring and corrupt Community member States' leaders to put a permanent stop to their heavy malpractices and WIN AT ALL COST SYNDROME like they just witnessed in the 25th February, 2023 Presidential elections in Nigeria.

Third, the use of mediation, conciliation and arbitration in settling disputes in ECOWAS countries like Sierra Leone, Liberia, Togo, Cote d'Ivoire, Guinea Bissau, Senegal, Mali and Gambia has rightly been considered as a good measure. Some specialists in Strategic Studies, such as Livinus Okere have noted that these methods were successfully used to restore peace in the afore-mentioned countries and should be encouraged because the decision was reached and consented by the parties in conflict themselves which makes enforcement of such inclusively derived agreement easier. There is also the suggestion that the current use of the Council of Elders on an ad-hoc basis for peaceful resolution of conflicts is not sufficient enough. Arising from this little limitation, it is further recommended that the ECOWAS establishment as a matter of urgency should institute a Commission of Mediation, Conciliation and Arbitration as it will serve as a reminder to disputants that there is still the last opportunity to resolve their differences amicably. Those to be appointed as mediators should have good track records in terms of high level work experience, integrity and character. They should also be endowed with negotiating skills and be able to bring about peace and reconciliations that can be employed in potential intra-State and inter-State conflict situations.

Fourth, it has also been observed by Linus Malu²⁹⁰ that despite recording relative success in bringing peace to Liberia, Sierra Leone and other Member States at different times, ECOWAS is yet to address the root causes of crises and conflicts in West Africa, which can be traced to the poor socio-economic conditions of Member States and the impoverished living conditions and standards of their Community Citizens. Records have proved that ECOWAS Member States are amongst the poorest in the world, with a population of about 414 million people (2022 estimates) and an average per capita income of US\$1000. The poor state of the economy of countries in West Africa creates decadent conditions that could trigger bloody political instability. As a result, the region is amongst the world's most unstable, which accounts for many of the coups d'état in Africa particularly between 1960-1990 and in recent years amongst the ECOWAS member States. Fifth, another factor at the root of political conflicts within the ECOWAS Community is unstable political system which is characterized by endemic problems of bad political leadership and decadent governance structures. Others include, unduly prolonged sit-tight leadership tenures of political leaders, inept and corrupt leadership; which should all be urgently addressed by ECOWAS through re-engineering of its Protocols on Democracy, Good Governance and Leadership.

Sixth, the quagmire of Poor Followership Societal Structure remains a major weakening index for the growth and development of the economy of ECOWAS member States. Another awful perspective of decadent Followership culture occurs when voters allow themselves to be shamefully bought over by corrupt and dishonourable leaders. Sadly, the enfranchised public in our West African sub-region recklessly forget that when voters are bought over, their collective destiny and integrity are unfortunately sold out. They also forget that if they compromise their votes, they would have shamefully concessioned the future of their generations yet unborn.²⁹¹ It is therefore recommended that this ugly political continuum must stop.

²⁹⁰L Malu, (2003), 'Collective Peace-Keeping in West Africa', Published in Peace and Conflict Monitor

²⁹¹Ifeadi, E. B. U. (2022), "Free Movement Of Persons, Goods and Services as an Important Factor In Regional Economic Integration", a Paper Presented at the International Conference Hosted by the ECOWAS Court of Justice, at the Republic of Cape Verde, 9th - 12th May, p.40.

Seventh, and purely on strategic grounds, this paper recommends that a well-structured intelligence gathering and intelligence driven outfit should be urgently established cutting edge technology, it would be effectively utilised as a solid preventive model for unearthing future occurrences of bloody conflicts and wars in West Africa before they blossom into full-scale conflicts or wars.

Eighth, concerted efforts should be made by governments of nation States under the whims of the ECOWAS establishment to as a matter of policy to vehemently discourage their teeming youths from allowing themselves to become dangerously radicalised by Terrorists, Separatist Militias within countries in conflicts, Bandits, Kidnappers and Ethno-religious fundamentalists, who would end up making them weapons of mass destruction of their innocent peoples of diverse faiths and nationalities within the West African sub-region.²⁹²

Ninth, for any conflict prevention and resolution method to have positive impact and meaningful in West Africa, ECOWAS leaders should strive to address the very poor economic conditions of their Citizens, by endeavouring to meet the 'social contract' they fundamentally sealed with their terribly impoverished peoples; improve on the high illiteracy level in the sub-region; maintain strict control of light arms proliferation; and general promotion of responsible democratic ethics. ECOWAS Protocol is no doubt laudable but the Community should do more to provide a better mechanism for Peace Building. This becomes highly imperative taking into consideration the re-occurring conflicts in the sub-region and likely re- emergence of fighting and counter *coups d'état* in any part of West Africa. This cautionary admonition is essentially strategic because success in peacekeeping alone cannot guarantee peace since peacekeeping is not an end in itself but should be part of a comprehensive peacemaking and peace-building mechanism or programme. This is in line with the remark of the United Nations former Secretary General, Late Kofi Annan, that 'reliance on coercion alone is insufficient because coercion will erode over time, while desirable peace and lasting solution requires not only stopping the violence but also taking the next step'. It therefore becomes highly crucial that the ECOWAS Community should not see success in peacekeeping as a guarantee to peace.

²⁹²As above, 50

Tenth, as a solid pathway moving forward, this paper herein re-emphasizes the all importance strategic fact that ECOWAS Member States should at all times adhere strictly to the Protocol on Democracy and Good Governance because the rule of majority in line with the Rule of Law is a sine qua non to political stability, which every nation State needs for tranquility, peace and progress of the entire system. ECOWAS should, thus, upscale its commitment in ensuring that every member State is democratically governed and attempts to substitute democracy with military dictatorship, such as, what is presently playing out in Mali should be thoroughly resisted. Agreed sanctions against erring Member States should be collectively enforced and no member State should act as an unscrupulous index of recalcitrancy by exempting itself from the general decisions of the within the ECOMOG Intervention Military Force. This will enhance the Early Warning Mechanism of ECOWAS. If carefully instituted with cutting edge technology, it would be effectively utilised as a solid preventive model for unearthing future occurrences of bloody conflicts and wars in West Africa before they blossom into full-scale conflicts or wars.

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11.) Conclusion

This paper presentation has carefully examined the ECOWAS Peace and Security architecture; Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security; Dispute Resolution under the Mechanism; as well as, the effective utilisation of a stiff and sacrosanct Sanctions Regime under the Mechanism even in the reality of a Non- involvement paradigm of the ECOWAS Court of Justice; Desirability of the Community Intervening to restore Constitutional Order; and finally, on how Insecurity and Political Instability trigger migration within the ECOWAS sub-region and the World Community in general. We could conclude by reiterating the fact that ECOWAS has accomplished a lot of development and attained more relevance within the African Continent and at the global stage, sequel to its adoption of the 1999 Protocol which redefined and repositioned it to play more role beyond its original socio-economic integration centered aims and objectives.

Besides the original intentions of promoting the economic interest of its Member States, ECOWAS as an institution over the years has made concerted efforts towards promoting Peace and Security in the sub-region through strategic military Peacekeeping Interventions, Mediation, Conciliation and Arbitration. It has also restored Sanity in some troubled Member States and where necessary, had bared its strict admonitionist fangs by dishing out tough sanctions to recalcitrant regimes and sit-tight leaders of Member States in order to effectively restore Constitutional Order. Though, it has not effectively checkmated the root causes of the crises and conflicts in most member States, which primarily centre on decadent leadership and governance system, poor followership structures, large scale poverty and massive corruption in governmental circles and Public domain, which largely account for Insecurity and Political Instability leading to forced irregular migration. But most encouraging is the truism that the ECOWAS establishment is not unmindful of the huge tasks before it and the need for improvement in its concerted struggle to remain the undisputed beacon of hope and optimism to its terribly impoverished peoples.

What needs to be done is for Member States to earnestly upscale their commitment towards promoting the overall objectives upon which ECOWAS Founding Fathers established the Community; and thus, adhere resolutely to the terms and ethos of the 1999 Protocol and other strategic Protocols and Resolutions taken in the greater interests of the ECOWAS down trodden Community Citizens.

**ZERO TOLERANCE FOR UNCONSTITUTIONAL CHANGE OF
GOVERNMENT IN ECOWAS**

BY

DR. TONY LUKA ELUMELU

AG. DIRECTOR PRIVATE SECTOR ECOWAS COMMISSION

Introduction

Prior to the establishment of The Economic Community of West African States (ECOWAS), the region known as West Africa was made up of a conglomeration of States that had risen from several colonial administrations that had essentially established the borders of the 15 States – Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal, and Togo – residing there. Before colonialism, the region was home to a number of mighty Empires and centuries-long kingdoms, among them Ghana, Mali Songhai, Wolof, Oyo, Benin, and Kanem Bornu. The diversity of the region's cultures, languages, and ecosystems offers opportunities and problems for the integration process. It has always been acknowledged that the desire to work together politically and economically is a positive step toward fostering co-prosperity in the region.

The first attempt at integration in this area began in 1945. The establishment of the CFA Franc united the region's francophone nations under a common currency. Subsequently, in 1964, President William Tubman of Liberia suggested an economic union for West Africa, and this led to an agreement that was signed in 1965 by the four Republics of Cote d'Ivoire, Guinea, Liberia, and Sierra Leone.

However, a proposal for a union of West African Nations did not appear until 1972. In support of the merger idea, the Togolese President Gnassingbe Eyadema and the Nigerian leader, Gen Yakubu Gowon, visited the area that year. We are grateful for the drafts that resulted from their work. This served as the cornerstone for the 1975 Lagos Treaty, which gave rise to the ECOWAS. ECOWAS's general objectives include 'inter-state collaboration', 'regional peace, stability, and security', as well as the 'development and consolidation of a democratic system', in addition to promoting economic growth in the region. It is a regional trading bloc that was founded on May 28, 1975. The group, which has its main office in Abuja, Nigeria, aims to fairly represent its Members through a Commission.

Since the 1990, Benin National Sovereign Conference, West Africa has assumed the African leadership position in developing the dynamics and tools for democratisation, and ECOWAS has played a very active role in the process, developing and operationalising the normative framework for democratic sustenance. The African Union (AU) used the ECOWAS Additional Protocol on Democracy and Good Governance as the basis for its own Charter. West Africa is currently seeing a sharp decline in its democratic structure. Guinea Bissau faced its second coup d'état in two years on April 12, 2012. This was a part of a wave of

coups and unlawful government changes that shook West Africa in August 2008, December 2008, March 2009, and Niger in 2010. The coup that occurred in Mali in March 2012 shocked the world community because the country had been a model of democracy in the region for two decades.

ECOWAS promptly denounced each of these coups and unlawful changes of administration and issued penalties (except in the case of Mauritania, which had pulled out of ECOWAS in December 2000). Undemocratic changes of administration appear to be the rule rather than the exception in West Africa, notwithstanding penalties by ECOWAS. The effectiveness of ECOWAS in handling these complications is called into question by these events. Because of the many detrimental effects it could have on regional peace and stability, it is crucial to analyze this new problem.

1. ECOWAS' Peace and Security Structure

The region of West Africa is a focal point for both traditional and contemporary armed warfare. This encompasses armed extremism, organised crime, piracy, unrest brought on by social injustice, disputes over land use, and violence associated with elections. Many of these security issues cannot be remedied by only taking national action. Regional actions are necessary, and ECOWAS should coordinate them. The success of ECOWAS in maintaining peace and security depends on a variety of circumstances. These include the regionalisation of domestic civil wars and how this motivates regional leaders to take action; the political viability of the States and their willingness to contribute to the challenging and costly activities of maintaining regional peace and security; organisational mandate and in clarifying the mandate for peacekeeping deployments, in particular, when appropriate; the damaging role of peace 'spoilers', such as the exploitation of conflict economies; and how they affect the efficiency of the regional organisation. We have chosen to concentrate on four crucial elements that could help us understand how effective ECOWAS is.

2. Quality of Leadership of Regional Organisation

Leadership of the regional organisation and lead nations, in particular, the dominant State, Nigeria, is key to the effectiveness of ECOWAS in peace and security. General Yakubu Gowon's leadership of Nigeria in the 1970s was crucial to the establishment of ECOWAS. Similarly, General Ibrahim Babangida's instrumental leadership led to the creation of ECOMOG. In the 1990s, it was the political leadership of key West African leaders, in particular, the then Nigerian military leader, General Babangida, that made it possible for ECOWAS to intervene in regional peace, conflict and security issues. As a military dictator, with preponderant military resources and might, financial capacity and political

influence, General Babangida effectively directed the creation of ECOMOG, citing the imperative of Nigeria's foreign and security policy, as the justification for the establishment of the regional peacekeeping and intervention force. The rest of the ECOWAS Member States were simply requested to support the 'regional initiative' and those reluctant to do so, mainly Francophone States, were cajoled and 'bribed' with preferential oil shipments to convince them to join the regional military adventure.

How does leadership of ECOWAS in peace and security translate on the ground in practical terms? Between 1990 and 2003, ECOWAS had two proactive Executive Secretaries in the persons of Dr. Abass Bundu and Dr. Mohamed Ibn Chambers. The quality of their leadership made it possible to translate the political commitments of the Heads of States and Government of ECOWAS into practical military and operational peacekeeping and peace support operations deployment, including the effort to mediate political settlement of the civil wars in West Africa. Both Executive Secretaries have been involved in the civil war peace resolution efforts that led to the management and political settlement of the wars in Liberia, Sierra Leone and Côte d'Ivoire. It is perhaps at the military level of ECOMOG peacekeeping and conflict management that the quality of leadership is more important.

Between 1990 and 1998, ECOWAS appointed nine ECOWAS Field Commanders, all with varying degrees of effectiveness in the implementation of the ECOWAS peace and security mandate in each of the war-torn Member States. After the debacle of September 1990, whereby the *de facto* President of Liberia, Samuel Doe, was captured under the watchful eyes of ECOMOG and killed by the Independent National Patriotic Front of Liberia (INPFL), Lt. Gen. Quainoo (Ghanaian) was replaced by Maj. Gen. Dongoyaro (Nigerian), who rapidly developed a reputation as a no-nonsense military peace enforcer in Liberia. Despite the fact that ECOMOG's initial peacekeeping deployment was given a Chapter VI mandate, Gen. Dongoyaro was often prepared, based on the military imperatives on the ground, and without the approval of his political masters, to expand the mandate of ECOMOG to peace enforcement, in a desperate bid to bring some level of stability and order to the war-ravaged Member State. Similarly, and at the height of the bloody civil war in Sierra Leone, Maj. Gen. Victor Malu was deployed between December 1996, and January 1998, to lead the peace enforcement operations of ECOMOG in Sierra Leone. It is generally acknowledged in Sierra Leone that the quality of his military leadership of ECOMOG during this period forced the RUF to the negotiating table and the

reinstatement of the government of President Tijan Kabbah. However, academics are divided as to whether the agency is more important than structure in the effectiveness of not only foreign policy but also regional organisations in responding to peace and security issues.

2.1 External Pivotal States / Foreign Powers and the UN in ECOWAS Peace and Security

External actors, and in particular, external pivotal States and the UN are of vital importance in understanding the effectiveness of ECOWAS in peace and security. External support is central to the effectiveness of the ECOWAS-led peace and security initiatives. The US support in Liberia, Britain in Sierra Leone, the influence of the Community of Portuguese Language Countries (CPLP) in Guinea Bissau, and France in Côte d'Ivoire, as well as the involvement of the United Nations (UN) and other key Donor Agencies and Intergovernmental Institutions such as the European Union (EU), the AU, and the Commonwealth were crucial in negotiating the civil war peace settlements, supporting ECOWAS political and diplomatic activities, ECOMOG's peacekeeping and peace enforcement operations, and post-war peacebuilding and reconstruction in West Africa.

However, the conflict of interest of extra-regional actors and the Western Governments involved in the management of civil wars in the region created obstacles for troop deployment, reinforcement and logistical support for ECOMOG peacekeeping operations. Despite this, the general consensus at the level of the international community is that there is a need to support and capacitate the Africa-led approaches to managing and resolving conflicts on the continent. The prevailing view is that the challenges posed by contemporary globalisation, the war on terrorism and the regionalisation of domestic civil wars mean that wars and armed conflicts in Africa inevitably affect other parts of the world in diverse ways, hence it is in the interest of the West or the international community to support African approaches to African problems in peace and security.

2.2 Nigeria's Hegemonic Leadership in ECOWAS Peace and Security

Nigeria's leadership of ECOWAS and ECOMOG is crucial to the effectiveness of the regional organisation in peace and security. As the sub-regional hegemon, it was instrumental in the formation of ECOWAS and in the 1990s provided the politico-financial and military leadership to develop a regional collective peace and security system in the form of ECOMOG. Nigeria's preponderance in the sub-region in terms of size, population, military, economic and political resources has inextricably linked the country's national security to regional security.

2.3 Geo-Politics and the Challenges of Common Foreign and Security Policies

A major determinant for effectiveness of any regional organisation is the nature of geo-politics and the extent to which West African States have developed common foreign and security policies, and in particular 'dependable expectation of peaceful change'.²⁹⁴ Historically, ECOWAS integration has been plagued by the geo-politics of Anglophone, Francophone and Lusophone divides. In addition, the internal, external and conflict/co-operation (amity-enmity) logics of regional integration have constantly played themselves out in the ECOWAS peace and security responses in the sub-region.

These historic colonial divisions coupled with the pursuit of strategic self-interests have often prevented the development and implementation of common values. In some cases, however, ECOWAS has co-operated on the basis of common values. The conflict management interventions in Liberia, Sierra Leone, Guinea Bissau and Cote d'Ivoire are a demonstrable track record of the development of common foreign and security policy. The main problem is the fact that the record of ECOWAS common foreign and security policies is based on ad hoc crisis management intervention responses dictated by the politics of 'do something now'.

3. ECOWAS Conflict Prevention Framework (ECPF)

The ECOWAS has demonstrated over the years that it is capable of carrying out successful peacemaking, conflict prevention, and resolution efforts. A number of prospective conflict prevention organisations have also been established by the institution to support its mission, including the Early Warning System, the Mediation and Security Council, the Offices of the Special Representative, the Council of the Wise, and Special Mediators.

It is the duty of ECOWAS Member States to secure lasting peace and security by putting in place policies that go beyond violence management as the region realigns itself to prevent the recurrence of violent conflicts. To put it another way, within the larger framework of peace and security, military intervention should only constitute a part, and ideally a last choice. Now, the focus should be on prevention and peacebuilding, including promoting a culture of democracy, sustainable development, and a regional strategy for humanitarian crisis prevention and readiness. This necessitates a review of the connections between internal causes of violence and ECOWAS tools, such as its early warning and

²⁹⁴KW Deutsch, SA Burrell and RA. Kann, *Political community and the North Atlantic area*. (1957) 6

A solution to this new problem is the ECOWAS Conflict Prevention Framework. The ECPF is made up of fourteen parts that include a range of efforts aimed at enhancing human security and include both operational and structural conflict prevention measures as well as peacebuilding components. They are: (a) Early Warning; (b) Preventive Diplomacy; (c) Democracy and Political Governance; (d) Human Rights and the Rule of Law; (e) Media; (f) Natural Resource Governance; (g) Cross-Border Initiatives; (h) Security Governance; (i) Practical Disarmament; (j) Women, Peace and Security; (k) Youth Empowerment; (l) ECOWAS Standby Force; (m) Humanitarian Assistance; and (n) Peace Education

3.1 Dispute Resolution: Non Involvement ECOWAS Court of Justice

Article 15(1) of the 1993 Revised ECOWAS Treaty established the ECOWAS Community Court of Justice (ECCJ). The ECCJ is charged with resolving disputes that may be referred to it in accordance with the provisions of Article 56 of the ECOWAS Revised Treaty of 1993, as well as disputes between States and the Institutions of the Community. Its primary responsibility is to ensure the observance of law and justice in the interpretation and application of the Treaty and the Protocols and Conventions annexed thereto.

The ECCJ has undergone various phases of development and evolution since its founding. The ECCJ has evolved from having a very limited initial original jurisdiction to one that offers a more flexible and accommodating legislative framework for jurisdiction and access to the Court. In addition to better jurisdiction and access, the ECCJ's judgements can now be implemented or executed according to a well-defined process.

It is evident from a careful comparison of the ECCJ's 'competence' under the Protocol of 1991 and the Court's jurisdiction under the Supplementary Protocol of 2005, that the ECCJ, after the year 2005 has more enhanced jurisdiction, including the interpretation and application of the ECOWAS Treaty, Conventions, and Protocols, as well as examining the legality of regulations and other rules, as well as examining Member States' failure to comply with them. The ECCJ has evolved from an international court with a very limited initial original jurisdiction into one that has a more flexible and accommodating legislative framework for jurisdiction and access to the Court. To honor their duties under the Treaty, the method for carrying out the judgments of the ECCJ has also been clearly spelled out, in addition to better jurisdiction and access. It is unmistakable that the ECCJ now has more authority than it did at its establishment under the Supplemental Protocol. However, the new Article 9, which deals with the jurisdiction of the ECCJ, raises a few important problems that will be covered in the paragraphs that follow. First, one would have thought that Member States would be more eager to honour

their obligations voluntarily given the additional authority granted to the ECCJ to consider the failure by Member States to uphold their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS. Experience has proved that this is not the case because States frequently break the law or do not fulfill their commitments with no sign of remorse. It is simple to infer that the primary reason the majority of Member States do not uphold their duties, notwithstanding the ECCJ's jurisdictional reach, is that the ECCJ lacks the necessary authority to sanction indiscreet Member States. Second, because it has been stated that the ECCJ shall have the authority to decide on any non-contractual liability of the Community, the question of whether the Court will also have the authority to decide on any contractual liability of the Community needs to be taken into account. With all due respect, the justification for giving the ECCJ the authority to decide expressly on 'any non-contractual liability of the Community' is questionable. A related point that has to be answered is what happens to the Community's contractual liability when it arises if the ECCJ can rule on this 'non-contractual liability of the Community' *strictu sensu*. Should the ECCJ handle the Community's non-contractual liability while the Community's contractual liability is brought before a Member State's national court? Or does the Community not expect legal issues or liability resulting from business relationships? In fact, how can one tell which problems to bring before the ECCJ by differentiating between a contractual and non-contractual duty of the Community? Additionally, in cases of contractual obligation, should the Community be invoked in front of national courts? With all due respect, it is asserted that the justification for granting the ECCJ authority to decide, particularly with regard to 'non-contractual' liability of the Community, is murky.

Thirdly, when the Supplementary Protocol states that the ECCJ has the authority to serve as an arbitrator for the purposes of Article 16 of the Treaty pending the creation of the Arbitration Tribunal, the character of an arbitrator who is also a Court is likely to be contested. One cannot help but wonder how the ECCJ, as it is currently constituted, can act as both an arbitrator and a court - possibly in the same case - given the attendant challenges that trail in practice, court-connected Alternative Dispute Resolution (ADR) proceedings in Nigeria and other Member States, especially in the multi-door court houses. What happens if the arbitration is unsuccessful and must be contested in court? Can the arbitrator's court ultimately make a decision? If the arbitral award is being contested, function as a judge in its own case? If the ECCJ had an arbitration department apart from the Court, one that could be self-accounting and whose award the Court could independently evaluate, it might be seen as a lesser evil. But, to be on the safe side, the Community

Arbitration Tribunal should be established right away, as only this Tribunal is qualified to act as an arbitrator for the Community.

The ECCJ now has jurisdiction over any item provided for 'in an agreement where the parties provide that the Court shall settle disputes arising from the agreement'.²⁹⁵ This appears to be an effort to increase individual engagement in the process of West Africa's economic integration. I respectfully submit that this clause is undefined. One of the most straightforward interpretations of the new Article 9(6) of the Supplementary Protocol is that any group of individuals, regardless of whether they are from any of the Member States, may come to a written agreement on any matter and designate the ECCJ as the Court to resolve any disputes.

The fact that any group of people from anywhere in the world can reach the ECCJ as long as they choose the ECCJ as the Court of adjudication and on any topic at all is a clear example of a Treaty provision. Hence, there are no limitations with regard to the clause or article in question. While this innovation is beneficial for a citizens-of-the-Community approach to the economic integration of the West African sub-region, it is, with all due respect, aberrant that any group of people, who may not even be citizens of the Community, can bring issues in their agreement that have no bearing on matters of integrating the sub-region.

3.2 Desirability of the Community Intervening to Restore Order

With the assistance of the UN and AU, ECOWAS has demonstrated over the past ten years, its willingness to employ various strategies to help West African States regain some measure of democracy. For instance, through facilitating the Conakry Accord, employing sanctions, and monitoring elections, ECOWAS made a significant contribution to the restoration of some degree of political stability, following the coups in Mali in 2012 and Guinea Bissau in 2015. ECOWAS had a more active and direct involvement in Mali's domestic affairs during the coup there in August of 2022, imposing stronger sanctions than in Guinea Bissau and even employing military pressure to eventually bring back some form of democracy.

ECOWAS collaborated with the UN to improve Guinea Bissau's democracy and arbitrate negotiations between Guinea Bissau and other ECOWAS States through the Conakry Accord in an effort to regain some political stability. The Conakry Agreement was put into effect in Guinea-Bissau on October 14, 2016, and as a result, a Stability Pact that ensured an inclusive government with proportional

²⁹⁵See the new article 9(6) of the Court's Protocol.

representation in the National Assembly (parliament), accountability and transparency in institutions, and constitutional reform was inevitably created. ECOWAS additionally oversaw the development and execution of the Stability Pact and served as a mediator during negotiations leading to the Conakry Accord involving representatives from Guinea Bissau, the ECOWAS Commission, the UN, the AU, Senegal, Sierra Leone, and Angola. Moreover, the UN and ECOWAS both offered constitutional specialists. The ECOWAS helped the UN and AU by aiding Guinea Bissau's democratic and national security institutions to strengthen their accountability, efficiency, and stability, claims the UN Integrated Peacebuilding Office in Guinea-Bissau (UNIOGBIS). The UN Security Council also commended ECOWAS for its initiative to form a presidential mission for Guinea Bissau that included the leaders of Guinea, Senegal, and Sierra Leone. On June 4, 2016, in Dakar, Senegal, the Authority of Heads of State of ECOWAS met with the government of Guinea-Bissau to conclude this presidential mission. Discussions between ECOWAS and government representatives from Guinea-Bissau who were involved in the impending political crisis took place during this meeting.

4. How Insecurity and Political Instability Triggers Migration

Conflict, war, disputes over land and property, breaches of human rights, epidemics or disease outbreaks, natural catastrophes, climate change, and food shortages all contribute to migration in West Africa. It is estimated that 80% of all migrants originating from West Africa lives in another country in West Africa. More people than ever before are living outside of their nation of birth nowadays. The International Organisation for Migration (IOM) Global Migration Report 2020 estimates that there were about 272 million migrants worldwide as of June 2019, an increase of 51 million from 2010. Labour migrants made up over two thirds. 3.5% of the world's population was made up of immigrants in 2019. This is in contrast to 2.8% in 2000 and 2.3% in 1980. Migrants profile are changing and becoming more diversified. More women and youth migration will continue to be a defining element for ECOWAS. The Economic, security and humanitarian factors have played a huge role in triggering migration.

At the end of 2019, 79.5 million people were forcibly displaced globally, according to the United Nations High Commissioner for Refugees (UNHCR). 26 million of them (including 20.4 million under the UNHCR's mandate and 5.6 million under UNRWA's for Palestine) were refugees. There were 45.7 million internal migrants, 4.2 million asylum seekers, and 3.6 million Venezuelans who had to flee their country.

The dilemma of migration and development is also closely tied to the problem of political unrest in West Africa. The large flight of both highly trained and poorly educated populations from West Africa is significantly influenced by the dire political and economic conditions there. They include issues such as civil wars, inadequate governance, and deplorable economic situations).²⁹⁶ Several people are relocating as refugees or a variety of different refugees. They are fleeing from civil wars and repressive governments that support foreign special interests, especially in nations with abundant natural resources. The eventual result is forced and willful migration, with the north as the final destination. Nonetheless, it appears that the more surface-level components of migration are being addressed at the policy level. Countries in the north adopt strategies to control migration in ways that are counterproductive)²⁹⁷ rather than addressing the core causes of less advantageous kinds of migration, such as forced migration and so forth.

Because of this, migration is viewed negatively by recipient nations, who then react inappropriately owing to a lack of sensitive understanding. Addressing these difficulties and the outlined security threats earlier calls for a thorough comprehension of the issues after they have been located.

Regardless of the difficulties involved, migration is a human issue. Any attempt at a solution necessitates a thorough comprehension of the problems and difficulties related to migrant travelers, whether they are regular or irregular. Indeed, the first step in tackling the dual problems of migration and security is the ability to recognize and comprehend migrant travelers, both legal and illegal. The second is the capacity to deliver workable answers within a regional framework.²⁹⁸

It is recommended that migration should be considered as critical element in the development agenda of the region and that Governments should be encouraged to budget adequately for migration. Also, Intra regional trade should be encouraged and all impediments to mobility of goods be removed.

²⁹⁶(Mohamoud, 2005:20

²⁹⁷A Adepoju, *Institutional cooperation between the diasporas and homeland governments, the case of Nigeria. project report to African diaspora policy group*, (2009) 51

²⁹⁸A L Elumelu. *40 years of ECOWAS (1975 - 2015)*. A publication of National Institute for Legislative Studies (2015) 258-276.

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**THE ECOWAS MECHANISM FOR CONFLICT PREVENTION,
MANAGEMENT, RESOLUTION, PEACEKEEPING AND SECURITY**
BY
PROFESSOR KOSSI MAWULI AGOKLA
INTERNATIONAL CONSULTANT, SECURITY SECTOR REFORMS (SSR)

Introduction

One will only be stating the truth and the obvious if one should state that in contemporary times, peace and security in the Economic Community of West African States (ECOWAS) space, and therefore of the ECOWAS Member States, have come under threats. Among these threats, one can point to terrorism and unconstitutional change in government. These two elements thus singled out, namely, terrorism and unconstitutional change of regime, do constitute from time to time, the two parts of a pair of recurring crises, in the West African sub-region.

Since its establishment by the 28 May 1975 Treaty of Lagos, Nigeria, the ECOWAS has spared no effort in strengthening the basis in its march towards free movement of persons, and in consolidating the landmark gains to that end, for its current²⁹⁹ fifteen (15) Member States. Towards realising that objective, a legal framework of reference, in the form of a specific text, was drafted under the name: 'ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security',³⁰⁰ ('the Mechanism'). The Mechanism in question, however well drafted it may be, has not been without a pragmatic call to attention, of certain problems, which we intend to discuss in the following lines of our presentation, adopting the following format:

1. The peace and security architecture of ECOWAS;
2. The ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security;
3. Settling disputes through the Mechanism; the non-involvement of the Court;
4. The regime of sanctions under the Mechanism;
5. The opportunity of ECOWAS for intervention and for restoration of institutional order; and
6. How insecurity and political instability spark off migration.

1. The Peace and Security Architecture of ECOWAS

From its establishment in 1975, and in addition to its central objective of promoting the main target of a collective self-sufficiency for its Member States, ECOWAS has relied unquestionably on the noblest of these ideals and vision, for its Member States. These ideals and vision may be summarised below as:

- Non-aggression;
- Peaceful settlement of disputes;

²⁹⁹Originally 16 in number, the Member States of ECOWAS are now 15, upon the withdrawal of Mauritania in 2000, and becoming a Member State of the Arab Maghreb Union (AMU) since then.

³⁰⁰See the Protocol on the Mechanism. Just for a reminder, the Mechanism was adopted by the Heads of State and Government of ECOWAS at their meeting in Abuja, Nigeria, on 31 October 1998, via Decision A/DEC. 11/10/98. The Protocol on the Decision was signed at Lome, Togo, on 10 December 1999.

- Good neighbourly relations;
- Respect for human rights; and
- Consolidation of a democratic system of government, etc.

The foregoing pointers, essentially, have resolutely propelled ECOWAS in the direction of a Community governed according to the principles of democracy, rule of law and good governance. The most optimistic proponents of these targets have even nursed the great hopes of attaining an 'ECOWAS of Peoples', by the year 2050, in the search for greater peace and prosperity for all.

However, the road travelled so far by ECOWAS, from establishment, has indeed been a bumpy one, and ECOWAS has had to go through a number of regrettable conditions and challenging experiences which call for questioning, just like one may be compelled to do for the other regional bodies on the Continent of Africa. Among these challenges, one may cite:

- Cross-border crime;
- Illicit circulation of small arms and light weapons (SALW);
- Money laundering;³⁰¹
- Drug trafficking;
- Human trafficking;
- Massive population displacements;
- Instability of major national institutions mainly due to coups d'état;
- Human insecurity in all its forms: famine, unemployment, disease, floods, extreme vulnerability of refugees and displaced persons, etc; and
- Violent extremism and terrorism²²¹ etc.

³⁰¹In 2000, ECOWAS set up an institution responsible for the capacity building of Member States in the prevention and fight against money laundering and the financing of terrorism at the Community level: 'Intergovernmental Action Group against Money Laundering in West Africa West' (GIABA).

These have ended up constituting themselves into serious challenges, to which the ECOWAS Community has turned its full attention, and tackled nevertheless, in their upstream stage, via the ECOWARN³⁰² system. These efforts, however, could not prevent the problems from worsening. Despite the special attention devoted by ECOWAS, to certain challenges such as unconstitutional changes of government, these challenges have not ceased to plague the West African sub-regional organisation,³⁰³ principally in the form of coups d'état. This therefore called for stepping up the steps which had already been taken, by way of adopting a more robust approach, through a structural mechanism borne out of a number of legal instruments, among which are:

- The Treaty of 28 May 1975 establishing the Economic Community West African States (ECOWAS);
- The Treaty of 24 July 1993 revising the Treaty of 28 May 1975 referred to above; The Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security;³⁰⁴
- Protocol A/SP1/12/01 on Democracy and Good Governance³⁰⁵ Supplementary to the Protocol relating to the Mechanism for the Prevention, Management, Conflict Resolution, Peacekeeping and Security; and
- The ECOWAS Convention on Small Arms and Light Weapons, etc. signed at Abuja, Nigeria, on June 14 2006 etc.

³⁰²For a long time identified mainly within the Sahel region in the 'commune' (locality) known as Liptako-Gourma in Burkina Faso; and in Mali; and in Niger, terrorism had begun, since 2022, to gain ground on the coastal areas of countries such as Togo and Benin, in the southern parts of these two Member States, adjoining Burkina Faso. With the Grand-Bassam attack, Côte d'Ivoire had already had a taste of this social menace in March 1996.

³⁰³'ECOWARN' is the ECOWAS Early Warning System, an information collection system consisting of about a hundred indicators applied by officers assigned in each of the Member States. The system operates at three levels as follows: (1) Information gathering = Government and civil society; (2) Quality control of information = Heads of office; (3) Development of early warning products = Country analysts.

³⁰⁴Principally in West Africa and East Africa

³⁰⁵As a reminder, the Mechanism was adopted by the ECOWAS Heads of State and Government at their meeting in Abuja, Nigeria, on 31 October 1998, via Decision A/DEC.11/10/98. The related Protocol was signed in Lome, Togo on 10 December 1999.

³⁰⁶This Protocol was adopted by the Authority of Heads of State and Government in Dakar, Senegal, on 21 December 2001

2. The Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security

The ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security will be studied in two ways: emphasis will first be placed on the Protocol relating to the Mechanism *per se*; and secondly, our attention will switch to the Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism referred to above.

2.1 The Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security

Of the various texts stated above, constituting the ECOWAS legal architecture of peace and security, special mention must be made of the Mechanism for the Prevention, Management, Settlement of Conflicts, Maintenance of Peace and Security.

In total, 13 chapters form the broad framework of the Mechanism, in 58 articles. In substance, the objectives of the October 1998 Mechanism are contained in Article 3, notably:

- Prevention, management and settlement of internal and inter-State conflicts, in accordance with paragraph 46 of the framework of the Mechanism as endorsed by Decision DEC.10/11/98 of 31 October 1998;
- Maintenance and consolidation of peace, security and stability within the Community;
- Promotion of close co-operation between Member States in the areas of preventive diplomacy and peacekeeping; and
- Constitution and deployment of a civil and military force to maintain or restore peace in the sub-region, if need be.

The Authority of Heads of State and Government is the highest authority for decision-making under the Mechanism, supported by the Mediation and Security Council and by the Executive Secretariat.³⁰⁷

³⁰⁷The Executive Secretariat was transformed into a Commission of 9 members during the 30th Ordinary Session of the Community in Abuja, Nigeria, on 14 June 2006. The Commission, which serves as the Executive of the Community, became functional in January 2007. The idea of this transformation was mooted at the Summit of the Heads of State and Government held in January 2006 at Niamey, Niger. The Commission now comprises a President, appointed by the Authority of Heads of State and Government, for a period of 4 years, not renewable, and a Vice-President, and 13 Commissioners. cf. <https://ecowas.int/governance-structure/?lang=eng> (accessed 11 April, 2023)

As regards the practical implementation of the Mechanism, it is specifically provided for by Article 25, which makes reference to situations of aggression or armed conflict in one or more Member States. In terms of conflict management, standby forces have been constituted, with the Member States providing ECOMOG³⁰⁸ with adequately equipped units of defence and security forces.

ECOMOG remains the operational security apparatus of the Mechanism whose mandate and mission are respectively spelt out under Articles 29 and 31. In terms of sub-regional security, it is indeed catered for by the Mechanism. To that end, ECOWAS operates a system of close collaboration among the security forces of the Member States: emphasis is thus placed on the fight against criminals through mutual assistance in criminal cases and through extradition. (Chapter X, Article 46 and related provisions).

Chapter XI of the Mechanism addresses the international cooperation aspect of its implementation. To that end, ECOWAS is called upon to co-operate fully with the African Union Mechanism for the Prevention, Management and Settlement of Conflicts. With the UN, co-operation is focused on the process of implementation of Chapters VII and VIII, with respect to military interventions decided in relation to the ECOWAS Mechanism.

To make any further in-depth analysis would require that we take a closer look at Protocol A/SP1/12/01 on Democracy and Good Governance, Supplementary to the Mechanism, signed in Dakar, Senegal, on 21 December 2001.

³⁰⁸ECOMOG (Economic Community of West African States Cease-Fire Monitoring Group, is not only, as its name suggests, an ECOWAS ceasefire monitoring brigade. Indeed, ECOMOG carries out preventive deployments, in addition to humanitarian or other interventions aimed at maintaining peace, and disarmament of illegal armed groups. Its establishment in 1990 was as a result of the civil war in Liberia. ECOMOG was also put into operation during the civil wars in Sierra Leone (1991-2002) and Guinea-Bissau (1998-1999). In the aftermath of the post-election crisis of 2010-2011 in Côte d'Ivoire, plans were made to deploy ECOMOG to that Member

2.2 Protocol A/SP1/12/01 on Democracy and Good Governance, Supplementary to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security

As aptly recalled by Article 46 of the 21 December 2001 Protocol A/SP1/12/01 on Democracy and Good Governance, Protocol A/SP1/12/01 is an integral part of the 10 December 1999 Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security; the former completes the latter in the areas of democracy and good governance. Still in considering instruments, the Protocol on Democracy and Good Governance has links with many other legal tools, including the Decision of July 1999 made by the former Organisation of African Unity (OAU), a decision considered as an OAU response to the unconstitutional changes in government in Africa.³⁰⁹

The Protocol is divided into 3 chapters and 50 articles. Straightaway, Article ¹ sets out the principles of constitutional convergence, notably, that:

Every form of accession to power must be made through free, fair and transparent elections, according to Article 1(b). It is further prescribed that the preparation and conduct of elections and the announcement of results shall be done in a transparent manner (Article 6); and that no substantial modification shall be made to the electoral laws in the last 6 months before elections, except with the consent of a majority of the political actors (Article 2). The elections in question shall be done in a transparent manner (Article 6). Still, regarding elections, and at the request of any Member State, ECOWAS may provide assistance in the conduct of any election (Article 12 and related provisions).³¹⁰

State. Eventually, ECOWAS decided to turn ECOMOG into a permanent institution in 1999, with its currently assigned mission.

³⁰⁹It is also noted that the Protocol makes reference to the OAU Solemn Declaration, in its preamble to the Declaration of the defunct OAU, on Security, Stability, Development and Co-operation in Africa adopted in Abuja on 8 and 9 May 2000 and Decision AHG. DEC 142 (XXV) on the framework for OAU's reaction to unconstitutional change of government, adopted in Algiers in July 1999. In this latter context, one cannot but mention the AU's anti-coup intervention in the Comoros in March 2008. At that time, 1,000 Tanzanian and Sudanese soldiers under AU mandate intervened to counter the coup against the government of Colonel Mohamed Bacar, then at the head of Anjouan, one of the 3 islands of the Union of the Comoros. See <https://fr.allafrica.com/stories/200803270954.htm> (accessed 11 April, 2023)

³¹⁰ECOWAS aid and assistance missions during elections have often been criticised in many Member States where they have been deployed: they are accused, among other things, of lack of adequate logistic resources, the fact that such electoral missions are not conceived with the intention to make them function on a long-term basis, and to adequately cover all regional electoral operations, particularly just before the election period, etc. Enough of complaints to justify several suspicious situations which may often facilitate fraudulent electoral acts alleged to have been committed by the incumbent Government – arguments sometimes advanced by opposition parties here and there within the Member States of the Community.

The Protocol also provides for the prohibition of unconstitutional changes of government, and zero tolerance for power obtained or maintained by unconstitutional means. Other prescriptions include: Ensuring, as a clearly provided condition, that the army shall assume a non-partisan status, and always remain subject and loyal to the regularly established political authority. Each Member State shall guarantee for its citizens the rights contained in the African Charter of Human and Peoples' Rights and adhere to the provision that Member States shall establish independent national institutions to promote and protect human rights. (Article 35). In addition, the non-partisan character of the army, coupled with its political neutrality, is laid down as fundamental principles of democracy (Article 19). Member States agree that good governance is essential for the prevention of conflicts, the preservation of political stability, peace and the strengthening of democracy (Article 32). Finally, a system of sanctions is provided for under Article 45. The subject-matter of sanctions will be dealt with in depth in Part IV below.

In our final comments on the Protocol on Democracy and Good Governance, we will have to point out its noble objective, namely promotion of the rule of law for all the Member States of the Community. In that sense, it is akin to a hugely significant instrumental process for the 'demilitarisation' of the political powers within the Community. It cannot be over-emphasised that such demilitarisation is very much desired, for the consolidation of democracy and good governance. All the more so because the militarisation of the political powers has become the means for bringing about the unconstitutional changes in government.

Nowadays, what is essential, and which suits our modern political societies, is the effectiveness of the observance of the rule of law – the lifeblood for the practice of uninterrupted democracy and good governance – which, in turn, requires the subordination of the army to the legitimately instituted civilian authority. Straightaway, it shall become illegitimate for the military regimes formed from unconstitutional changes in power, to remain in power. Massaër Diallo reminded us in October, 2007 that as at the time the 2001 Protocol was seeing the light of day, out of the 15 ECOWAS Heads of State who were then in office,³¹¹ 7 had a military background: they had converted to a civilian status either before entering politics, or after participating in political power.

³¹¹See M Diallo, "Le protocole additionnel de 2001 de la CEDEAO : place et rôle dans la promotion de la démocratie et la gouvernance en Afrique de l'ouest" . (The 2001 ECOWAS Supplementary Protocol: Status and Role in Promoting Democracy and Governance in West Africa). Dakar. October 2007. <https://www.oecd.org/fcsao/publications/39466688.pdf> (accessed 11 April, 2023)

Ultimately, if ECOMOG appears to be the lever for setting the Mechanism into motion, Protocol A/SP1/12/01 is no less similar to being the constitutional appendage of the Mechanism,³¹² according to experts. In view of the recent political events in West Africa, it is to be feared whether such constitutional nature as is assigned to the 2001 Protocol may still have any bright future before its total incorporation by the various stakeholders on the political scene of West Africa. Indeed, if up to date, Cape Verde and Senegal remain the only two Member States which have not experienced coups in the ECOWAS space. Mali and the Burkina Faso, on the other hand, have broken all the records, in terms of unconstitutional change of government. Since the political independence of Burkina Faso and Mali, from 1960 up to today, the two Member States have respectively experienced eight and five military coups d'état. Seen from a much more peculiar angle, Mali has had to experience two coups in less than a year (in August 2020 and in May 2021), while Burkina Faso has faced two coups in eight months (between January and September 2022).

3. Settling Disputes through the Mechanism: The Non-Involvement of the Community Court of Justice, ECOWAS

Originally conceived, within the 1975 ECOWAS Treaty, as the Community Court of Justice, the Court of Justice of ECOWAS (the Court of Justice), was established under the provisions of Articles 6(1) (e) and 15 of the 1993 Revised Treaty of ECOWAS. The Court is composed of five independent judges appointed, for a term of four non-renewable years, by the Authority of Heads of State and Government, upon the recommendation of the Community Judicial Council. The administrative functions of the Court are carried out by a Chief Registrar assisted by other professionals.³¹³

The organisation and functioning of the Court of Justice as well as the procedure before it is drawn from Protocol A/P1/7/91 of 1991, which confers on the Community Court of Justice the status of the legal organ of ECOWAS,

³¹²This position is particularly held by Ismaïla Madior Fall and Alioune Sall, Full Professors (Agrége) of Law, Faculty of Law and Political Science, Cheikh Anta Diop University, Dakar, Senegal.
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjn78n> (accessed 11 April, 2023) [g49v8AhU6TKQEHC9A4QQFnoECCQQAQ&url=https%3A%2F%2Fjaga.afrique.gestion.net%2Ffr%2Fjagaatelier%2Fjagaatelier-_docs.html&usg=AOvVaw0L3abgX0nFmKDeupsNgPT7](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjn78n)

³¹³See <https://ecowas.int/structure-de-gouvernance/?lang=en> (accessed 11 April, 2023)

entrusted with the mandate for resolving conflicts relating to the interpretation of the Treaty, and the Community protocols and conventions. Protocol A/P1/7/91 has been amended by Supplementary Protocols A/SP.1/01/05³¹⁴ and A/SP1/06/6 of 2005 and 2006 respectively.

Fundamentally, the jurisdiction of the Court of Justice covers the following areas: interpretation and application of Community texts; issuing legal advisory opinion on matters relating to interpretation of the Treaty; and adjudication on disputes of various categories.³¹⁵ Indeed, the Court of Justice has delivered several judgments in different areas of its jurisdiction, occasioning decisions made against several Member States in cases which are more or less related to electoral matters.³¹⁶ From this, it could be said that most of the disputes ECOWAS has been involved in have had to do with problems of governance and democracy, and therefore, having a lot to do with threats to peace and security.

If, within the meaning of the above-mentioned Protocol A/P1/7/91, the mandate of the Court of Justice is to handle conflicts arising from the interpretation of the major Community legal texts, the fact still remains that the Court equally directs its attention towards settling disputes within of the Community. A case in point is the settling of electoral disputes between candidates and their respective Member States.

³¹⁴By Protocol A/SP.1/01/05 signed in Accra, Ghana, on 19 January 2005, the Heads of State and Government of ECOWAS amended the Preamble, and Articles 1, 2, 9, 22 and 30 of Protocol A/P1/7/91 relating to the Community Court of Justice, and Article 4(1) of the English version.

³¹⁵For more information, see <https://clubceadeao.com/la-cour-de-justice-de-la-cedeao> (accessed 11 April, 2023)

³¹⁶One may cite, among other things that the Court of Justice has had to dismiss the application of a candidate of the *Parti Démocratique Sénégalais* (PDS) (Senegalese Democratic Party) in the presidential elections of 24 February 2019 in Senegal; the candidacy of Karim Wade for the 2019 presidential elections of Senegal was rejected. Karim Wade challenged the constitutionality of the July 2018 amendment of the Electoral Code of Senegal. Again, after the disputed presidential elections, the Court of Justice ruled against the arrest, arbitrary detention and violation of the freedom of expression of Agbeyome Kodjo, an Opposition candidate in the April 2020 presidential election in Togo.

It will not be pointless to state that the Court of Justice has had to render several judgments outside its electoral sphere of operation.²³⁶ It is true that Member States would not like to see accusing fingers being pointed at them in the decisions of the Court; that situation constitutes, under international law, an affront to the accused States. The decisions made by the Court of Justice in their case law do frequently feature defaulting Member States, something very much disliked by the Member States.

Practically speaking, the implications of the principle of separation of powers at the international level would mean that the ECOWAS Court of Justice has no coercive powers to enforce its judgments: the enforcement of the conclusions arising from the decisions of the Court of Justice is left to the discretion of the Member States, as obtains all over the world.

One can only continue to hope that in the light of the progress so far made in democracy and good governance, the Court of Justice would have a greater foothold in the area of settling disputes under the Mechanism. Pending such a time, it is the sovereignty of the Member States which continues to hold sway.

4. The Regime of Sanctions under the Mechanism

Protocol A/SP.1/12/01 on Democracy and Good Governance, as cited above, takes up the matter of sanctions under its Chapter II, and more specifically, under Article 45. The sanctions regime in question presents at least two characteristics: it comes in a twin form, first as a regime of sanctions, and secondly as a graduated regime of sanctions.

A Twin Regime of Sanctions: the dual nature of this regime of sanctions, as provided for in paragraph 1 of Article 45, arises from the fact that: on the one hand, it points to cases where democracy is abruptly brought to an end by any means whatsoever,

³¹⁷In this particular case, the Court ruled against The Gambia, by asking it pay damages in the sum of USD 200,000 to the former Chief Justice of the Supreme Court, for his illegal dismissal and imprisonment. Similarly, the Court ordered the Liberian government to pay \$18 million in compensation to the widow of the late President Samuel Doe, just as, among others, the Court asked the Republic of Senegal to compensate two of its nationals arbitrarily arrested and detained in 2017. See <http://www.courtecawas.org/fr/la-cour> (accessed 11 April, 2023)

and this refers to unconstitutional change of government, in the broad sense of the term, such as military coups *per se*, and again, to tampering with the constitutional provisions of the State. The latter is very often aimed at removing the lid put in place to limit the Heads of State to two terms in office.

Such tampering with the constitution is seen in the form of two new 'vicious cycles': the exercise of an illegitimate tenure of political power, and the maintenance of a stranglehold on an instituted political system at the highest level. On the other hand, it refers to situations of massive violation of human rights in a Member State. The Member States are often confronted, unfortunately, with such situations during instances of problematic electoral processes.

³¹⁸The 3rd consecutive mandate, instead of two generally in force, often arises from amendments to the national constitutional provisions, which nevertheless had sought to prohibit such amendments of post neo-constitutionalism of African national conferences in the 1990-1991 era. The prohibition of 3rd terms for the Heads of State, or rather, 'the limitation of the tenure of Heads of State to two terms', is cast in stone in many African constitutions, and may be couched as 'No one can serve for more than two terms'. In reality, the lid has been removed more and more frequently these days through the force and the hammering of 'civilian coup-plotters', and this often takes the new form of a customary continued stay in power. We may recall the validation in 2012 of the 3rd candidacy of former Senegalese President, Abdoulaye Wade, by the Constitutional Council of Senegal, resulting in violence. President Macky Sall, who emerged victorious from the ensuing presidential election, is fuelling, nowadays, the discussion on a 3rd term in office in Senegal. As far as this subject-matter is concerned, we observe that among the Member States of ECOWAS, where limits to the term of office are not respected, just like elsewhere on the African continent, such disregard for the strict observance of the maximum number of terms a President may serve, provides a recipe for conflicts on the African political scene, with these conflicts threatening the survival of democracy and good governance in Africa. In addition to this is the trend of drafting a new national constitution.

³¹⁹This has been the case, in one way or another, in Guinea Conakry, Côte d'Ivoire, Togo, etc. According to experts, and since 2015, there have been at least thirty African countries that have gone through or somehow practised this 3rd term system. See TV5MONDE-News. ('Democracy: Why is the presidential "third term" corrupting African politics?') <https://information.tv5monde.com/afrique/democratie-pourquoi-le-troisieme-manadt-presidentiel-gangrene-la-vie-politique-africaine-471766> (accessed 11 April, 2023)

Among others, one may cite the cases of violations of human rights during presidential elections in 2005 in Togo,³²⁰ in 2012 in Senegal,³²¹ etc. The widespread post-electoral crisis of 2010-2011 in Côte d'Ivoire ideally illustrates the scale of human rights violations envisaged for sanction: during the five months of violence which followed the presidential election of November 2010, close to three thousand people were killed and more than one hundred and fifty women raped.³²² Besides, by the massacre of 28 September³²³ in Guinea, one can cite a case of serious human rights violations outside of any case concerning the electoral process.

A Graduated Regime of Sanctions: the above-mentioned Protocol sets out three kinds of sanctions, and it does this in a graded order of severity, in consonance with

³²⁰Cf. FIDH: ('One year after the deadly violence of April 2005, impunity still persists on a wide scale'.) <https://www.fidh.org/fr/regions/afrique/togo/Un-an-après-les-violences>. (accessed 11 April, 2023)

³²¹In Senegal, deadly human rights violations were observed in the course of the conduct of the presidential elections of November 2012, of less magnitude when compared with the other countries mentioned, and when put in the same categories as the cases observed in Togo and Côte d'Ivoire.

³²²For more information, see, in particular: <https://ici.radio.canada.ca/nouvelle/550569/senegal-violences-manifestations-morts>. (accessed 11 April, 2023)

³²³See H Yebouet: ('Côte d'Ivoire in the aftermath of post-electoral crisis: in-between ending the political crisis and living with persisting security challenges'). <https://www.cairn.info/revue-securite-et-strategie-2011-3-page-22.htm>(accessed 11 April, 2023)

a demonstration by the Opposition in Guinea on 28 September 2009 in a stadium at Conakry. This demonstration was quelled in the deadliest manner by the Armed Forces and security officers of Guinea, under the regime of Moussa Dadis Camara, who came to power by a coup in December 2008. The violence, documented as constituting crimes against humanity, according to an international commission of inquiry, caused some 157 deaths and more than 109 women raped. The trial proceedings of the massacre began in Conakry on 28 September 2022. These events from the combination of unconstitutional change in government the violation of human rights. For more information, see https://fr.wikipedia.org/wiki/Massacres_du_28_septembre_2009 (accessed 11 April, 2023)

the provisions of article 45(2), thus:

1. Refusal to support candidates presented by the Member State concerned for elective posts in international organisations;
2. Refusal to organise ECOWAS meetings in the Member State concerned; and
3. Suspension of the Member State concerned from all ECOWAS decision-making bodies. During the period of suspension, the Member State concerned shall still be under obligation to pay its dues for the period in question.

The power to apply the regime of graduated sanctions lies in the hands of the Authority of Heads of State and Government (Article 45, paragraph 2), upon the recommendation of the Mediation and Security Council (Article 45, paragraph 4), any time a Member State commits a breach of democracy or massive violations of human rights. It was in accordance with those provisions that the following Member States were once sanctioned, one after the other: Mali, following the coups of August 2020 and May 2021; Guinea, following the September 2021 coup; and Burkina Faso, as a result of the January 2022 coup, followed by a second coup in September 2022.³²⁴

In specific terms, the sanctions applied were as follows: the recall of the Member States' ambassadors; the closure of the land and air borders with the Member States; and an embargo on financial and commercial transactions with the Member States, except for basic necessities.

It shall be appropriate to state that the above penalties are relaxed where progress is made by the defaulting Member State, notably in restoring a civilian regime. It must also be stated that in the case of the suspension of a Member State,

³²⁴Before this set of countries which have had sanctions imposed on them, others, such as Côte d'Ivoire and Guinea Bissau, had experienced the sanctions regime of ECOWAS. For Côte d'Ivoire (post-electoral crisis of 2010-2011), economic and financial restrictions were the order of the day as the Army Chiefs of Staff came out with one voice in January 2011 in favour of an armed intervention through ECOMOG. With regard to Guinea Bissau, the extraordinary Summit of Heads of State and Government, held in Abidjan, Côte d'Ivoire, on 26 April 2012, condemned the coup of 12 April 2012 and demanded the immediate restoration of constitutional order, with recourse to diplomatic, economic and financial sanctions, without ruling out prosecution before the International Criminal Court (ICC). For more information, see the following link: <https://www.presidence.ci/communique-final-du-sommet-extraordinaire-des-chefs-detat-et-de-gouvernement-de-la-cedeao/> (accessed 11 April, 2023)

ECOWAS continues to monitor the situation, towards a return to normal constitutional national life, which is the intended target.³²⁵

Finally, it is regrettable that only one article out of a total of fifty, is devoted to the regime of sanctions, in the context of the high propensity of the Member States to resort to unconstitutional change of regime within the ECOWAS space. Moreover, in the opinion of certain experts, the sanctions in question, which are economic, diplomatic or even political in nature, are not of the most deterrent nature against coup plotters. Judging by the persistence of coups in West Africa, the coup makers seem to perpetuate their 'original sin'.³²⁶ Fortunately, the Summit of Heads of State and Government held in Abuja, Nigeria, on 5 December 2022, decided to form a regional force of intervention against terrorism and unconstitutional change of regime in the West African sub-region.³²⁷

5. The Opportunity for ECOWAS to Intervene to Restore Institutional Order

The idea of ECOWAS having to intervene to restore institutional order within the Community space is not a recent one. In the course of 2012-2013, the idea was already being seriously put into shape under the French acronym MISMA, and under a previous acronym MICEMA. It was an African Union mission initially led by ECOWAS and authorised on 20 December, 2012,

previous acronym MICEMA. It was an African Union mission initially led by ECOWAS and authorised on 20 December, 2012, by UN Security Council Resolution 2085 under Chapter VII of the UN Charter. With an initial 12-month deployment, authorised by Resolution 2085, MISMA had a twin mandate: firstly, to enhance the capacity of the Malian army, in conjunction with other international partners; and secondly, to assist the Malian authorities to regain control of the north and reduce the terrorist threat.

³²⁵Paragraph 3 of article 45 states specifically that during the period of suspension, 'ECOWAS shall continue to monitor, encourage and support the efforts being made by the suspended Member State to return to normalcy and constitutional order'. The implementation of the said paragraph 3 in the event of the coup d'état in Mali on 22 March 2012, enabled the immediate lifting of sanctions against Mali by the Heads of State and Government, as from 7 April 2012, during the ECOWAS Summit held on that date in Abidjan, Côte d'Ivoire.

³²⁶See A. Ayissi, 'Illusoire interdiction des coups d'état' ('Illusory ban on coups d'état'), (2000) 1 *Le Monde diplomatique*, May-June, 32-34.

³²⁷For more details, see <https://www.agenceecofin.com/politique/0512-103519-la-cedeao-durcit-le-ton-contre-le-mali-et-decide-de-creer-une-force-anti-terroriste-et-anti-putsch>

For the implementation of the mandate, the UN asked Member States of AU and ECOWAS to provide the contingents and the necessary means and resources, which, unquestionably, the African countries did not sufficiently have. Meanwhile, other developments cropped up: the coming into existence of the United Nations Office in Mali (BUNUMA) in 2012; French operations in 2013 under the name Serval; in 2014, named Barkhane, etc. As time went on, the procrastination of the AU and ECOWAS as well as the change of concept of harmonised operations (CONOPS), among others, ended up killing off and burying MISMA. This was how *Mission Multidimensionnelle Intégrée des Nations Unies pour la Stabilisation au Mali* (MINUSMA) (in English - UN Multidimensional Integrated Mission in Mali) and African Union Mission for Mali and the Sahel (MISAHHEL) came into being respectively on 1 July 2013 and 1 August 2013, *ipso facto* permanently putting away the noble idea of a fundamentally anti-terrorist Community force.³²⁸

Much more recently, ECOWAS has not ceased to make active use of every opportunity towards implementing the establishment of a mechanism for intervening to restore Community constitutional order, each time Community law and order appear to be tampered with. The intended mechanism is envisaged both as an operational anti-terrorist apparatus and an anti-coup apparatus, a brainchild of the 62nd Session of the Authority of Heads of State and Government held in the Guinea-Bissau capital on 4 December 2022.³²⁹ The two angles to this mechanism are analysed below:-

The Anti-Terrorist Apparatus: the mandate for such a device, in the opinion of His Excellency, Omar Alieu Touray, the new President of the ECOWAS Commission,³³⁰ is urgently, to contain the waves of unconstitutional change of democratically elected governments in West Africa. This formed the rationale behind the Army Chiefs of Staff of the ECOWAS Member States gathering in the Guinea-Bissau capital on 19 December, 2022, to consider the following two options:

³²⁸About the history of MISMA operations and the African Union Mission for Mali and the Sahel (MISAHHEL), see <https://www.au-misahel.org/histoire-de-l-operation-misma>

³²⁹See <https://www.agenceecofin.com/politique/0512-103519-la-cedeao-durcit-le-ton-contre-le-mali-et-decide-de-creer-une-force-antiterroriste-et-anti-coup> (accessed April 7, 2023).

³³⁰He replaces the Ivorian Jean Claude Kassi Brou, appointed Governor of BCEAO (the all-French-speaking 'Central Bank of West Africa States'), on 4 June 2022.

- The Option of a Striking Force: this option envisages a regional counter-terrorist force with an offensive mission to search destroy enemy targets, to protect civilian populations, and to secure critical infrastructure. Briefly put, it is meant to be a force for neutralising terrorist groups. According to some experts, this force, which is similar, in traumatic terms, to the Serval and Barkhane operations in Mali, might not be welcome everywhere in the Member States of the Community, especially because it is likely to turn counter-productive for the Member States, both in terms of time and operational cost;
- The Option of a Support and Assistance Mission: the less ambitious of the two, its task would consist of providing information, as well as logistical, aerial, and any other support for the anti-terrorist force.
- The Anti-Coup Apparatus: some reluctance has been observed on the part of the Army Chiefs of Staff, concerning this option, in the sense that, these top ranking officials of the Armed Forces of the Members States of ECOWAS are of the opinion that the job of the members of such anti-coup system, in restoring the normal constitutional order, will prove to be complex and difficult, especially if the countrymen and women and (or) part of the Armed Forces openly and fully support the coup d'état in question.³³¹

In summary, the strong political will surrounding such a force, be it 'anti-terrorist' or 'anti-coup', as given birth to by the Summit of Heads of State and Government in December, 2022, was revolutionary and very innovative. However, the high hopes and aspirations nurtured by the Authority of Heads of State and Government were watered down at the level of the Army Chiefs of Staff who were in charge of determining the feasibility of such initiatives, to the point that the Army Chiefs ended up discrediting the move. That comes as a surprise when one considers the fact that these same Army Chiefs of Staff are usually, not only the brains behind, but the chief architects of most of the coups d'état which continue to proliferate in the ECOWAS space.

³³¹<https://rfi.fr/fr/afrique/20221221-la-c%C3%A9d%C3%A9cise-son-projet-de-nouvelle-force-antiterroriste-et-anti-coup-d-%C3%A9tat> (accessed April 7, 2023)

Once again, unfortunately, all hopes may already have been lost, that the very healthy project of an 'anti-terrorist' and an 'anti-coup' force, may end up as stillborn, just like the MISMA project described earlier, because just because it was not sufficiently welcomed by the Army Chiefs of Staff; whereas the Chiefs of Staff are the very ones, who, for the right or wrong reasons, are at the center of the coups d'état; the national Armed Forces, as institutions headed by the Army Chiefs of Staff, are well accustomed to the frequent occurrence of coups d'état in the Member States.

6. How Insecurity and Political Instability Trigger Migration

The notion of migration, very central to the discussion of this theme, should be understood in its plural sense, as it relates in particular to refugees and internally displaced persons,³³² or even exiled persons. Consequently, in the context of our discussion, we will indiscriminately be referring alternatively to situations of vulnerable groups, people forced to settle temporarily or permanently in a part of their own country where they would usually not live, and also people forced to live in countries other than theirs. These groups of people are no less in need of assistance, protection and care. Moreover, they are people who are made to go through the sort of forced migration whose roots causes can sometimes be traced to insecurity, and at other times, to political instability, or both. We have decided to treat both contexts in this chapter.

With the 1991 Mechanism and its 2001 Supplementary Protocol on Democracy and Good Governance, ECOWAS had equipped itself, among other things, with enactments towards attaining the objectives it had set out in the 1993 Revised Treaty, particularly objectives regarding improvements upon the standard of living of the people in the ECOWAS Member States. However, here and there, across the Community, the expected standard of living of the people has not been enviable in any way, for various reasons. This has led to phenomena of migration related to situations of insecurity and political instability.

What are the causes of insecurity and instability, compelling the Community inhabitants to migrate? How do they manifest? What are the countries affected? Among the causes of insecurity and instability, armed conflicts and (or) civil wars feature prominently, and they stem from multiple sources:

³³²For more details on the key terms of migration, see <https://www.iom.int/fr/termes-cles-de-la-migration>

Political: such as poorly conducted electoral processes, with examples in Côte d'Ivoire, Senegal, Togo, Benin, etc. Military: like the numerous coups d'état experienced almost everywhere within the Community, with the exception of Senegal and Cape Verde. Social-cultural: firstly, bitter tensions related to farm lands and pasture for grazing cattle, often between herders and farmers, practically everywhere within the Community; and secondly, religious conflicts between members of various communities of believers like Christians (Evangelicals, Messianic), Muslims and others, Nigeria as a typical example.

The consequences of insecurity and instability, as they relate to the above-mentioned conflicts, do manifest in the form of the relatively significant number of migrants observed within the Member States (internally displaced persons in Burkina Faso, Mali, Niger, Nigeria, etc.) or across Member States (refugees in the Liptako-Gourma area, refugees from Burkina Faso, Mali and Niger for the most part). Besides, the migration of peoples, as recorded in Côte d'Ivoire, in the aftermath of the 2010-2011 post-electoral crisis, attests to the significance and variety of the number of persons affected by the insecurity and instability in that instance, including internally displaced persons, refugees and even exiled persons.³³³

In Togo, the situation was quite similar to that of Côte d'Ivoire; serious violent incidents took place following the electoral crisis of 2005³³⁴ in Togo. The UNHCR estimated that about forty thousand people fled due to insecurity and instability at the time, to seek refuge in neighbouring countries: Benin hosted twenty five thousand while Ghana hosted another fifteen thousand. UNHCR spent USD 4.7 million³³⁵ to cater for the humanitarian aid of the Togolese refugees in Benin and Ghana.

³³³According to the United Nations High Commissioner for Refugees (UNHCR), some 51,000 Ivorians were affected by this crisis and found themselves turned into refugees in countries such as Liberia (in the majority), Ghana, Togo, Guinea, Mali and Mauritania. This lasted for about 10 years; 30 June 2022 was the date the UNHCR declared to be date on which the status of the Ivorian refugees came to an end. On that date, according to the Ivorian authorities, 90% of the refugees must have returned to the country.

See <https://www.la-croix.com/Monde/cote-dIvoire-fin-statut-refugie-politique-2021-09-10-1201174811> (accessed April 7, 2023)

³³⁴For more information on the 2005 post-election crisis in Togo,

see https://www.alternatives-non-violentes.org/Revue/Numeros/152_La_non-violence_en_Afrique/Apres_les_violences_postelectorales_au_Togo_quelle (accessed April 7, 2023)

³³⁵See <https://www.unhcr.org/fr/news/briefing/2005/8/4acf40caf/togo-40-000-personnes-maintenant-fui-linstabilite-post-electorale.html> (accessed April 7, 2023)

In connection with the above analyses, we can also cite the Sierra Leonean crisis, a civil war which lasted from ²³ March, ¹⁹⁹¹, to ¹⁸ January, ²⁰⁰², resulting from one of the most pervasive cases of extreme insecurity and political instability. The civil war was started by the Revolutionary United Front (RUF) led by Fonday Sankoh, an ally of the Armed Forces Revolutionary Council (AFRC), with the active involvement of the then Liberian President Charles Taylor, very close to Fonday Sankoh. That conflict is of huge significance as an illustration of how the double-headed monster of insecurity and instability produces death and desolation in its trail: some one hundred and twenty thousand persons died and more than ^{2.5} million people were displaced, some becoming refugees, as a result of the horrors of the crisis.

The Sierra Leonean crisis referred to here, represents, more than any other, the effects of the intricate mix of unconstitutional change in government and serious post-election violence, to the point of needing extreme measures³³⁶ to be taken as an antidote. Apart from ECOWAS intervening directly, the crisis also brought on board United Nations, among others. It was through that collaboration with a group of experts from a UN group that it came to light that some rebels had also been supplied with weapons by the then President of Burkina Faso, Blaise Compaoré, in violation of the arms embargo then applicable to Sierra Leone. Atrocities and trauma in Sierra Leone (kidnappings, enrolment of child soldiers, mass rape and sexual slavery of young girls and women, teenage suicides, etc.) gave rise to the establishment of the UN Special Tribunal for Sierra-Leone on 16 January 2002. In 2012, the Special Tribunal sentenced Charles Taylor to fifty years in prison for war crimes and crimes against humanity.

Moreover, and following the deterioration of the national health infrastructure, this generally grim outlook was further darkened by the terrible Ebola epidemic, which ravaged Liberia and Guinea. Sierra Leone was the second most affected country with three thousand, eight hundred and ninety six (3,896) cases and one thousand, two hundred and eighty one (1,281) deaths. Ever since the disease first broke out in 1976 in the present-day Democratic Republic of Congo, the Ebola virus had never taken a more devastating toll on human beings.

³³⁶On 29 August 1997, the Economic Community of West African States (ECOWAS) gave a mandate to its intervention force (ECOMOG) to reinstate the elected President, Ahmad Tejan Kabbah, to his post. Consequently, the RUF and the AFRC were ousted from power by ECOMOG on 12 February 1998 and the government of President Ahmad Tejan Kabbah officially returned to power on 10 March 1998. See https://fr.wikipedia.org/wiki/Guerre_civile_sierraléonaise (accessed April 7, 2023)

On 7 July 1999, the RUF and the government of Sierra Leone finally signed the Lomé Agreements which provided, among other things, an amnesty for crimes committed before the Agreements in question made. As the crisis wore on, on 22 October 1999, the United Nations Security Council passed Resolution 1270 establishing the United Nations Mission in Sierra Leone (UNAMSIL), with a mandate to ensure compliance with the Lomé Agreements. Today, Nigeria seems to have permanently overtaken Sierra Leone, with insecurity assuming a definite shape and pattern in that country, and with massive displacements of the Nigerian people on a daily basis. The situation compelled the Nigerian President, Muhammadu Buhari, to remark one day that Nigeria was facing a state of emergency caused by permanent insecurity.³³⁷

We certainly have to bear in mind, the activities of the terrorist group Boko Haram, raging in the north-east of the country, with other marginal Islamist groups, not to mention many other security challenges such as the different activities of criminal groups (murders, kidnappings for ransom, looting and destruction of goods, etc.), religious extremists, land and pastoral tensions between farmers and herders, abuses committed by private security and self-defence groups set up in most localities, etc.

Mostly, the above-mentioned activities causing insecurity occur in the north-west of the country. States like Kano, Borno, Katsina, Sokoto, Zamfara, Kaduna, etc. feature, among others, in the red alert zones of the more affected localities. Indeed, very few States of the Federation are immune from the venom of insecurity, and this has been driving thousands of Nigerian civilians into exile, particularly to the Republic of Niger,³³⁸ not to mention the internally displaced persons (IDPs).

As we finally observe, the problem of migration, linked as it is to national insecurity and instability in the political systems of West Africa, affect more than one Member State within the Community, and therefore require the most sustained attention.

³³⁷See <https://africacenter.org/fr/spotlight/les-diverses-menaces-envers-la-securite-du-nigeria/> (accessed April 7, 2023)

³³⁸ <https://www.unhcr.org/fr/news/briefing/2021/3/603e24d2e/montee-violence-nigeria-pousse-civils-fuir-exil-niger.html> (accessed April 7, 2023)

Conclusion

What lessons do we need to draw from this study on 'The ECOWAS Mechanism for the Prevention, Management, Settlement of Conflicts, Maintenance of Peace and Security?'

Like many other regions of the African Continent, West Africa is reeling under the shocks of repeated conflicts from governance issues. Prominent among these problems, one can point to the unconstitutional changes of government, leading further to post-electoral crises of various magnitudes, and followed by massive displacements of the inhabitants of the affected countries, with the citizens fleeing the consequent insecurity and instability, under appalling conditions as refugees and exiled or displaced persons.

To deal with this endemic situation of conflict, ECOWAS promulgated in 1975 an instrument which is all at once, regulatory, judicial and operational; a device constantly being amended. That move stands as a practical demonstration of the will of ECOWAS to urge the Member States on to take ownership of the rules of good governance which have been enacted therein, in the management of the affairs of the Community. Under this many-sided legal instrument, one sees provision being made for an ECOWAS peace and security architecture, together with various supplementary acts, decisions of the Community Court of Justice, ECOWAS, operations of ECOMOG, etc.

On the whole, we will need to take note of a permanently lingering and very strong political ambition: the most obvious illustration of which is the project to set up a force against unconstitutional changes of government. This remains to be embraced in practical terms, especially by the national Armed Forces of the Member States, an institution very much accustomed to coups d'état, which are still occurring in the sub-region: if one should only limit oneself to citing the very recent cases of Burkina Faso, Mali and Guinea.

One looks forward to a resolute move of common purpose among the various national stakeholders of ECOWAS, to adhere to the peace and security architecture which has already been put in place, coupled with other legal acts and mechanisms derived therefrom, almost everywhere within the Community. This, so that all

subsequent moves will be directed solely towards bringing the available mechanisms to bear fruit, and towards the realisation of 'The ECOWAS of the Peoples by 2050'.

Achieving an 'ECOWAS of the Peoples by 2050' is all the more desirable because attaining that goal could insulate the sub-region from the huge migratory movements and tensions of all kinds still plaguing the Community from within. Provided that the Armed Forces wholeheartedly accept to make their non-partisanship to the political class an unquestionable daily reality of the ECOWAS region.

SUB-THEME 3

**HUMAN RIGHTS AS A CRITICAL FACTOR IN
DEMOCRACY, PEACE AND SECURITY: DUTY OF
MEMBER STATES TO RESPECT, PROTECT
AND FULFIL HUMAN RIGHTS**

**HUMAN RIGHTS AS A CRITICAL FACTOR IN DEMOCRACY,
PEACE AND SECURITY: DUTY OF MEMBER STATES
TO RESPECT, PROTECT AND FULFILL HUMAN RIGHTS
BY
JUSTICE DR. RICHMOND OSEI-HWERE
JUSTICE OF THE HIGH COURT OF GHANA**

Introduction

The classical definition of democracy was given by Abraham Lincoln as government 'of the people, by the people, and for the people'. Lincoln's definition promotes the view that political power emanates from the people and therefore custodians of such power must act in the interest of the people. It also promotes popular participation in the decision-making process. The spirit and letter of most written constitutions seek to advance the tenets of Lincoln's classical definition of democracy.

The importance of democracy was aptly noted by Ghana's 1968 Constitutional Commission as follows:

We hope that the concept of democracy will permeate the machinery of government and that Governments under the Constitution we propose will realize that the individuals who form the body politic of Ghana should be elevated above the State. We do not want the denial of individual rights. We conceive that by this very nature the individual has moral claims which should be impartially considered. In the words of Bishop Buller, "Besides benevolence, there is justice". We do not want the Ghanaian as an individual to be sacrificed as a means to the advantage of others. The struggle for democracy in Ghana must not be a struggle for forms and mere abstract principles for their own sake but a struggle for good governance.³³⁹

Democracy is not only about representation of the people and majority rule – it strikes a balance between majority rule and individual rights. In fact, at the heart of democracy is human rights.

Democracy is undermined if the majority takes away the rights of the minority, which is why in a constitutional democracy, extensive provisions are made to protect the rights of individuals and minority groups. A democratic State acts in the interest of all the people in the State.

It is obvious that democracy and human rights are intrinsically linked. Closely related to these values are peace and security. The United Nations (UN) Charter, signed on 26 June 1945, is premised on three pillars: peace and security, development, and human rights. Development thrives in a democratic environment where peace and security prevail.

³³⁹Ghana Constitutional Commission, 'The proposed constitution of Ghana' (State Publishing Corporation, 1968) p.1.

War and violent situations often result in the denial of human rights. Similarly, human rights violations also trigger violence and conflict. Fulfillment of human rights ensures lasting peace and security.

This paper discusses the domestic and international actions Member States within the Economic Community of West African States (ECOWAS) can pursue to enhance human rights protection within their jurisdictions. Respect for, and fulfillment of human rights obligations would no doubt deepen democracy and ensure peace and security within the West African sub-region. On the domestic front, the discussion would focus on the following thematic areas:

- i. Right to personal liberty – focus on the 48-hour rule;
- ii. Freedom of expression and right to information;
- iii. Right to vote in a free and fair elections; and
- iv. Welfare rights and directive principles of state policy.

On the international front, the discussion would focus on the State's role in ensuring that international human rights instruments, particularly the ECOWAS Human Rights mechanism are enforced within the Member States.

1. Domestic Human Rights Protection

A State's responsibility to protect human rights within its territory is deeply rooted in the notion of sovereignty. It is the sovereign power of the State that enables it to make elaborate legislations to protect the rights of its citizens. It is also the State that establishes and strengthens the institutional architecture charged with protection of rights. State sovereignty is, however, a double-edged sword as far as the subject of human rights protection is concerned. This is due to the fact that it can also be used to trample on the rights of citizens by State actors. Many a times violating States find comfort in the sovereign rights of self-determination worldview when their human rights credentials are questioned by the international community. A State's democratic credentials are enhanced through observance and deepening of human rights ethos within its jurisdiction. A State's approach to the following human rights issues is key to the value judgment placed on its reputation – whether it respects, protects and fulfills human rights.

Right to Personal Liberty – Focus on the 48-Hour Rule

The right to personal liberty requires that persons shall not be subject to arrest and detention except as provided for by law, and provided that neither the arrest nor the detention is arbitrary. These rights apply to all forms of detention where people are deprived of their liberty. In a democratic State, State institutions including law enforcement agencies and the courts are expected to protect the rights of suspects and accused persons within the criminal process through the enforcement of the constitution. This may sound as if the State is pandering to the desires of criminal elements in society, but the position reflects the fundamental values of our society. Treatment of persons in a dignified manner is a human right value which is central to our traditional ethos and the ideals of democracy.

One of such rules deployed in the protection of personal liberty is the 48-hour rule. Constitutions of Member States protect an arrested person against unlimited infringement to his personal liberty by requiring that he be brought to a court of law within 48 hours of arrest or detention or be released conditionally or unconditionally.³⁴⁰ This would enable the court to determine whether there is probable cause to detain the person for longer than 48 hours to enable the law enforcement agency to continue with their investigations or whether to grant the arrested person bail.

A reality check of the situation, however, suggests that enforcement of this rule is fraught with challenges. There is conflict between protection of personal liberty through enforcement of the 48-hour rule and convenience. The convenient situation where the court breaks on public holidays and weekends means that suspects are sometimes kept in custody well over the 48 hours under the guise that the courts do not sit on such days. There is a school of thought that public holidays and weekends should not be counted in reckoning the 48 hours.

In *Martin Kpebu (No. 3) v Attorney-General*,³⁴¹ the Supreme Court of Ghana was called upon to determine whether on a true and proper interpretation of article 14(3) of the 1992 Constitution of Ghana, Saturdays, Sundays, Public Holidays, periods of civil unrest and any other day that the courts in Ghana cannot sit would be counted in reckoning the 48 hours within which a person arrested or detained on suspicion of committing a crime or in execution of a court order ought to be brought before a court.

³⁴⁰See for example, Article 14 Clauses (3) and (4) of the 1992 Constitution of Ghana.

³⁴¹Writ No. J1/22/2016 (delivered on 18th December 2019) SC.

The Court adopted the plain meaning rule in the interpretation of the phrase 'within 48 hours'. In the judgment of the Court, the language of Article 14(3) is clear and unambiguous. The court emphasised that 48 hours means exactly 48 hours. It took into account the provisions of Sections 33, 35(3) and 42 of the Labour Act, 2003 (Act 651) and Order 79 rule 3(2) of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) by virtue of which the stipulated normal working days of the Courts of law are ordinarily Mondays to Fridays for a maximum number of eight hours each day. It also took into account section 4 of the Public Holidays Act, 2001 (Act 601) which prohibits 'business on public holidays' and rejected the assertion that giving effect to the plain and ordinary meaning of article 14(3) would result in absurdity or make it unworkable.

The Supreme Court held in the *Martin Kpebu case*,³⁴² that the provisions that bar the courts from sitting on public holidays and weekends to determine issues of personal liberty under article 14(3) are unconstitutional. Consequently, the Court concluded that the expression 'within forty-eight hours' in Article 14(3) of the Constitution includes all days – public holidays, weekends, periods of strike action or civil unrest, subject to the reasonable assurance of the safety and security of Judicial Officers and Service Staff. The Supreme Court ordered that court services must be made available on the aforementioned days to determine issues pertaining to personal liberty, in due compliance with Article 14(3) of the Constitution.

Member States can take a cue from the policy direction of Ghana's Supreme Court and establish weekend courts to handle human rights related cases including bail applications and applications for detention of suspects. This would enable law enforcement agencies to legally detain suspects in order for them to continue with their investigations. Other emergency applications such as interim injunction and stay of execution can also be heard by the weekend courts. To make the policy more effective, existing courts within a defined geographical jurisdiction can be tasked to sit as weekend courts on rotational basis. This is an effective way of protecting personal liberty by member States.

³⁴²*Kpebu case*, n 3 above.

Fulfillment of this human right protection mechanism in access to justice during weekends and public holidays would nip in the bud the mischievous situations whereby some law enforcement agents deliberately arrest suspects on Fridays in order to keep them over the weekend without the court's approval – a clear violation of the 48-hour rule. This is done under the pretext that the courts do not sit on weekends and that the need to continue investigations makes the action justifiable.

Freedom of Expression and Right to Information

Freedom of expression and access to information form part of the guiding principles of democracy and good governance. The two are, however, not mutually exclusive. In Ghana, the Constitution guarantees freedom of expression³⁴³ and the right to information but the latter is subject to such qualifications and laws as are necessary in a democratic society.³⁴⁴

Professor Yardley highlights the limits to individual liberty in relation to British Constitutional Law when he wrote:

As far as British Constitutional Law is concerned, our main task is to determine in what ways individual liberty is restricted by law, and not how it is preserved...Some limitations upon the foregoing list [the list included freedom of assembly and association and freedom of speech] are obvious and need not be further explained. Thus, freedom of speech and writing must of necessity be restricted by the law of defamation, which in itself is protecting other individuals, and by such laws as those of sedition, censorship, contempt of court, obscenity, and the prevention of disclosure of matters concerning national security.³⁴⁵

In *Republic v Tommy Thompson Books Ltd, Quarcoo and Coomson*, Adjabeng JSC makes similar point as made by Yardley, in relation to Ghana's Constitutional Law, when he stated:³⁴⁶

I think that one very serious mistake that people in this country make is to think and behave as if constitutional rule or democracy and/or freedom of speech or expression of the press mean freedom to do whatever one likes.

³⁴³1992 Constitution, Article 21(1)(a).

³⁴⁴1992 Constitution, Article 21(1)(f).

³⁴⁵See DCM Yardley, *British constitutional law* (7th ed) Butterworths, London at pp 96-97.

³⁴⁶[1996-97] SCGLR 804.

Freedom of speech is not absolute. It would be a recipe for social anarchy if that was the case. Right to freedom of expression is subject to protection of individual right to dignity. One cannot destroy another's reputation in the name of free speech, which is why the law of defamation exists to vindicate a person's dignity and self-respect. In Ghana, the repeal of laws³⁴⁷ criminalising free expression has advanced the frontiers of free speech and freedom of the media. However, freedom of expression is incomplete unless it is backed by access to information.

Article 19 of the Universal Declaration of Human Rights (UDHR) guarantees the right to freedom of speech and the right to information in the following terms: right to freedom of speech and the right to information in the following terms:

Everyone has the right to freedom of expression: this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Access to public information allows the citizenry to participate in the decision-making process while promoting openness in governance.³⁴⁸ The principle of openness in public administration has become an important legal principle in European administrative law.³⁴⁹ It was introduced to European law by the Amsterdam Treaty, which incorporated it into Article 1 of the Treaty on European Union (TEU).³⁵⁰ The relevant provision states:

This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.³⁵¹

European Institutions are enjoined by the Treaty to observe the principle of public participation in decision-making. Prior to the Amsterdam Treaty, many European countries had adopted the principle of openness as part of their governance system. Sweden, for instance, is renowned for adopting the World's first Freedom of Information Act in 1766 per the enactment of the Ordinance on Freedom of Writing and the Press.

³⁴⁷See Criminal Code (Repeal of Criminal Libel and Seditious Laws) (Amendment) Act, 2001 (Act 602).

³⁴⁸Bugaric, 'Openness and transparency in public administration: challenges for public law' (2012) 22 *Wisconsin International Law Journal* 483, 487.

³⁴⁹As above.

³⁵⁰Treaty of Amsterdam Amending the Treaty of European Union, The Treaties Establishing the European Communities and Certain Related Acts [1997] O.J. C340/1.

³⁵¹Ibid.

³⁵²See Anders Chydenius Foundation, 'The World's First Freedom of Information Act' (2006, Kokkola) 4.

The Ordinance led to the abolishment of political censorship, encouragement of freedom of expression and the creation of an avenue for public access to government documents.²⁷²

Over the years, many countries around the world have enacted freedom of information laws with the aim of enhancing transparency and accountability in public administration. The US Freedom of Information Act 1966 and the UK Freedom of Information Act 2000 are among the plethora of freedom of information legislations adopted around the world. In Africa, significant progress has been made in recent years in the area of access to information. Liberia was the first to adopt an access to information law in 2010. Ten other States in West Africa namely Benin, Burkina Faso, Ghana, Guinea, Ivory Coast, Mali, Niger, Nigeria, Sierra Leone and Togo have followed Liberia's example and passed laws on access to information.²⁷³

Twenty years after the Right to Information Bill was first laid before Parliament, Ghana's Right to Information Act, 2019 (Act 989) was enacted to give substance to Article 21 (1) (f) of the 1992 Constitution. The preamble to Act 989 states that it is:

AN ACT to provide for the implementation of the constitutional right to information held by a public institution, subject to the exemptions that are necessary and consistent with the protection of the public interest in a democratic society, to foster a culture of transparency and accountability in public affairs and to provide for related matters.

Before the enactment of Act 989 (RTI Act), Ghana's Supreme Court had recognised that the constitutional right to information and freedom of expression imposed an obligation on the State media to provide fair opportunities and facilities for the presentation of divergent views. In *New Patriotic Party v. Ghana Broadcasting Corporation*, Francois JSC observed:

³⁵³See His Majesty's Gracious Ordinance Relating to Freedom of Writing and the Press 1766 (Translated by Peter Hogg). The great thinker and politician Anders Chydenius (1729-1803), who hailed from the Finnish city of Kokkola, played a crucial role in creating the law.

³⁵⁴See <<https://www.article19.org/resources/west-africa-access-to-information/#:~:text=Significant%20progress%20has%20been%20made,to%20information%20law%20in%202010>> (accessed 20 March, 2023).

It seems clear, that the Constitution spells out unambiguously a primary objective of making information readily available to allow for valued judgments from all its citizenry.³⁵⁵

It is fair to state that most Member States have through the enactment of the Right to Information law demonstrated their willingness to move towards a more open and transparent society. Despite the existence of such laws in most Member States, their implementation continues to pose challenges due to the inherent deficiencies in the laws and the culture of secrecy amongst public institutions in the sub-region. For example, under Ghana's RTI Act, the following information is exempt from public access: information submitted or prepared for submission to the President or the Vice President; information submitted or prepared for submission to Cabinet; information whose disclosure can reasonably disrupt, endanger, impede or interfere with law enforcement and public safety; information whose disclosure can reasonably affect the security of the State; information whose disclosure can reasonably affect international relations; economic information and any other interests prior to official publication; economic information of third parties; information whose disclosure can reasonably infringe on parliamentary privilege, prejudice fair trial, constitute contempt of court; privileged information; and information on personal matters/personal information.³⁵⁶

Critics have slammed Ghana's RTI Act as not going far enough to guarantee the citizen's access to information. They contend that restricting access to information at the country's presidency and some government institutions flies in the face of transparency.³⁵⁷ According to Centre for Law and Democracy (a civil society organization), while there are legitimate interests to be protected, many of the exemptions go beyond what is permitted under international law.³⁵⁸

³⁵⁵[1993-94] 2 GLR 354.

³⁵⁶See Act 989, sections 5-17.

³⁵⁷DW Report, 'Are Ghanaians ready to take advantage of the new right to information law?' (DW Africa Report, 30 January 2020). < <https://www.dw.com/en/are-ghanaians-ready-to-take-advantage-of-the-new-right-to-information-law/a-52171600> > (accessed 20 March, 2023).

³⁵⁸As above.

The civil society organisation is also worried about the fact that the RTI law failed to specify that in case of conflict with other laws — in particular secrecy provisions in other laws — the RTI law shall prevail.³⁵⁹

Writing on the Nigerian legal framework, Madubuike-Ekwe and Mbadugha identified low literacy rate in Nigeria, a culture of secrecy amongst government institutions, low level of public awareness of the FOI Act and poor record keeping and infrastructure as some of the implementation challenges of Nigeria's Freedom of Information Act, 2011.³⁶⁰

While challenges remain in the fulfillment of citizen's right to information, it is the duty of all Member States to enact 'right to information law' to give effect to the constitutional right of freedom of expression which already exists in the various constitutional frameworks. The law must aim at providing access to official information held by government agencies, and the qualifications and conditions under which access to such information is obtained must also be spelt out in the law with clarity. In the legislative framework, the definition of public institution or government agency must be broadened to include private institutions funded by the public purse. It is further proposed that the right to information law must establish an independent body to promote, monitor, protect and enforce the citizen's right to information.

Governments of Member States must also endeavour to educate its citizens on the usefulness of the right to information law. For, this law can only be tested by citizens who are aware of their rights under the legal framework. Sensitisation of public servants to depart from the culture of secrecy, proper record keeping and digitisation of public records are ways of strengthening the implementation of the law.

Right to Vote in a Free and Fair Elections

Direct democracy prevails when all citizens can participate directly in decision making through the power of voting to select the government in a free and fair election or to take a decision in a referendum. Exercise of universal adult suffrage by the citizenry remains a fundamental condition for legitimacy of governments and a key component of democracy. Democracy was also defined as:

³⁵⁹NJ Madubuike-Ekwe & JN Mbadugha, 'Obstacles to the implementation of the freedom of information act,

³⁶⁰2011 in Nigeria' (2018) 9(2) *NAUJILJ* 104 to 106.

A mode of decision making about collectively binding rules and policies over which the people exercise control, and the most democratic arrangement is that where all members of the collectivity enjoy effective equal rights to take part in such a decision-making directly – one that is to say, which realizes to the greatest conceivable degree the principle of popular control and equality in its exercise.³⁶¹

Elections are classified as human rights events.³⁶² This is because, through the power of voting, a citizen is given a voice in decision making relating to the governance of a State.³⁶³ The right to vote in a peaceful environment devoid of threats and intimidation is indeed a fundamental human right. Elections can only be free and fair when they are conducted in an atmosphere which respects basic human rights.

Free and fair elections involve far more than voters' registration, electioneering campaign and ballot boxes.³⁶⁴ Post voting matters including the counting of ballots is at the heart of the electoral process. A credible vote counting mechanism plays an indispensable role in protecting the right to vote. A flawed vote count can undermine the integrity of the electoral process and decrease public confidence and public acceptance of the results. Rejection of election results can lead to violent conflicts and such conflicts undermine the peace and security of a State.

The use of manually counted ballots is the commonest means of votes tallying in the sub-region. To make the vote counting process more credible, Member States can invest in technology. An automated vote counting system is likely to be faster, more accurate and would give the process more credibility than the manual counting. Manual counting could still be resorted to in the event of failure of technology. It could also be deployed during electoral disputes to cross-check declared results.

Adjudication of electoral disputes must also be reformed. Delays in the adjudication process is a fetter on democracy. It undermines the legitimacy of an elected official, and it creates room for speculation by sections of the public that the judicial process may be rigged in favour of one party as against the other.

³⁶¹D Beetham, 'Liberal democracy and the limits of democratization' (1992) 40 *Political Studies* (Special Issue), 40.

³⁶²I Fall, *Human rights and elections: a handbook on the legal, technical and human rights aspect of elections* Foreword (United Nations, New York and Geneva 1994).

³⁶³As above

³⁶⁴As above

Election petitions are said to be *sui generis*. In other words, they are special proceedings – proceedings of their own kind or class, unique or peculiar. It therefore requires special rules of procedure aimed at speedy and effective justice. It is recommended that Parliament or the Rules of Court Committee of Member States may come out with special rules – where none exists – to ensure expeditious disposal of election disputes so that within a specified timeframe, the matter is disposed of.

Welfare Rights and Directive Principles of State Policy (DPSP)

Almost universally, the welfare principle is one of such general principles that guide public conduct and is rooted in the principle of popular sovereignty as enshrined in written constitutions. This principle requires that the powers of government must be exercised in the name of and for the welfare of the people of a democratic State. An obligation is, therefore, imposed on the government and its agencies to take account of this welfare principle in developing policies that further the interests of people within its territory. Consequently, policy and legislative decisions must be welfare-enhancing to meet the acid test set by the welfare principle. Enhancing the welfare of individuals in a democratic State is not only about promotion and protection of personal liberty or civil rights but it includes enhancement of social and economic rights. After all, the forms of human rights recognised by the United Nations Universal Declaration of Human Rights include social rights, political rights and economic rights.

The idea that States owe a duty to their citizens to cater for their social and economic needs and that citizens have a right against their States to subsistence predates the 1945 United Nations Universal Declaration of Human Rights. For instance, the Prussian Civil Code enacted in 1794 declared that 'it is the duty of the state to provide the sustenance and support of those of its citizens who cannot ... procure subsistence themselves'.³⁶⁵ Also, in 1936, the USSR Constitution granted rights to education, to work, to rest and leisure among other welfare rights.

Welfare rights are widely acclaimed as human rights, but this notion is fraught with numerous criticisms.

³⁶⁵Quoted in R L. Siegel, 'Socioeconomic human rights: past and future', (1985) 7 *Human Rights Quarterly*, 262.

It is argued that welfare rights cannot be classified as human rights and that the most fundamental welfare rights are at best civic rights, moral rights of the individual as a citizen holding against his or her state.³⁶⁶ It is further argued that it is only in this way that the problems of scarce resources of the State could be resolved in theory and the responsibility for meeting human need fixed in practice.³⁶⁷ Critics of welfare rights are mainly worried about the expansion in the role of the State associated with the enforcement of these rights as against liberty rights which require minimal State apparatus that all countries would want to and are able to supply: namely, police and courts.³⁶⁸ Welfare rights require vast resources of the State in the sustenance of human life through the provision of education, health care, work among the tall list of human needs.

Making a case for welfare rights, James Griffin argues that human rights are protection of human standing and that it appeals to our picture of human standing that both life and minimum material provision, the former of which may be and the latter of which certainly is a welfare right, are integral to it.³⁶⁹ Indeed, liberty is meaningless unless it is linked to sustenance of life. And therein lies the basis of welfare rights which imposes an obligation on the part of the State to make basic provision for the sustenance of life of its citizens.

Closely related to welfare rights are the directive principles of state policy (DPSP). A considerable number of written constitutions make provision for directive principles of State policy which generally highlight fundamental aspirations in the governance of the State. It is the duty of the state to apply these principles in making laws to promote welfare rights of citizens.

In Ghana, the directive principles of state policy (DPSP) is contained in chapter 6 of the 1992 Constitution. The preamble to the directive principles of state policy reads:

- (1) The Directive Principles of State Policy contained in this Chapter shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying

³⁶⁶C Wellman, *Welfare Rights* (Totowa, New Jersey: Rowman and Allanheld, (1982),

³⁶⁷181.

³⁶⁸As above.

³⁶⁹J Griffin, 'Welfare rights' (Jan. - Mar., 2000, Vol. 4, No. 1/2) *The Journal of Ethics*, , Rights, Equality, and

³⁷⁰Liberty Universidad Torcuato Di Tella Law and Philosophy Lectures 1995-1997 (Jan. -

³⁷¹Mar. 2000), 38.

³⁷²Griffin (n 30) above, 40.

or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.

- (2) The President shall report to Parliament at least once a year all the steps taken to ensure the realization of the policy objectives contained in this Chapter and, in particular, the realization of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education.³⁷³

From the preamble, the signposts for the realisation of a free and just society envisaged by the constitution lies in the existence of human rights, healthy economy, right to work, good health care and right to education. The Norwegian Constitution also incorporates DPSP by tasking the authorities of the State with the responsibility to create conditions enabling every person capable of work to earn a living by his work.³⁷⁴ The right to live in an environment conducive to health is also guaranteed by the Norwegian Constitution.³⁷⁵ Thus, the universal aspirations of liberty rights, job opportunities, health and education should be kept in focus when policy and legislative decisions are being carried out.

The enforceability and justiciability of the directive principles of state policy were normally brought to question in the light of the fact that they only appear to guide the executive, legislature and the judiciary. The 1991 Committee of Experts which made proposals for Ghana's 1992 Constitution drafted the following proposals for the directive principles of state policy:³⁷⁶

- (1) The Directive principles of state policy contained in this chapter are for the guidance of Parliament, the President, the Council of Ministers, Political Parties and other bodies and persons in making and applying public policy for the establishment of a just and free society.
- (2) The principles shall not of and by themselves be legally enforceable by any court.
- (3) The courts shall, however, have regards to these principles in interpreting any laws based on them.

This attempt by the 1991 Committee of Experts to make the directive principle of state policy non-justiciable was rejected by the Consultative Assembly which deliberated upon the proposals set out by the former.

³⁷³1992 Constitution, article 34.

³⁷⁴Norwegian Constitution, article 100.

³⁷⁵Norwegian Constitution, article 100(b).

³⁷⁶1991 Committee of Experts Proposals 274

This is because no provision in the 1992 Constitution expressly states that the DPSP is non-justiciable. The Supreme Court, however, per the majority in the case of *New Patriotic Party v Attorney General (CIBA Case)*³⁷⁷ held that the DPSP were not legally enforceable by the courts, but they provide goals for legislative programmes and also serve as a guide for judicial interpretation. The majority were swayed by the Committee of Experts proposal that it should not be justiciable. It is submitted that if the framers of the 1992 Constitution wanted the DPSP to be non-justiciable it would have expressed it in the provision just as article 37 of the Indian Constitution expressly provides that DPSP are not justiciable.

In an earlier case of *New Patriotic Party v Attorney General (31st December case)*³⁷⁸ the Supreme Court of Ghana, by a majority decision ruled that DPSP were justiciable. In the face of two conflicting Supreme Court decisions, the issue was however settled by the Supreme Court in the more recent case of *Ghana Lotto Operators Association & Others v. National Lottery Authority*³⁷⁹ where the Court by unanimous decision followed the *31st December case* rather than the *CIBA case*. The court held:

The next point we wish to stress is that Bamford–Addo JSC fails (as do the other members of the court who agreed with her) to consider the implication of the fact that the Committee of Expert's proposal of explicit language proclaiming that the principles should not be in and of themselves enforceable by the courts was not accepted by the Consultative Assembly. We think the omission of that language is a strong pointer in favour of the Adade viewpoint.

As far as this present Court is concerned, we are of the view that, because there is a conflict between two previous Supreme Court decisions, we are free either to choose between the two decisions or to formulate a different rule that is right in our view, since there is currently no binding precedent. We would humbly submit that the right rule is a presumption of justiciability in relation to the provisions of Chapter 6 of the Constitution, 1992, as outlined above.

³⁷⁷[1996-1997] SCGLR 729.

³⁷⁸[1993-1994] 2 GLR 35

³⁷⁹[2007-2008] 2 SCGLR 1088.

Applying this presumption of justiciability, our view is that the economic objectives laid out in Article 36 of the Constitution are legally binding and are not merely a matter of conscience for successive governments of our land. The objectives have, though, to be liberally construed in order not to interfere with the democratic mandates of successive governments. Where, however, a government introduces legislation which is flagrantly at odds with any of the objectives set out in the Article, we believe that this Court has jurisdiction to strike down the provisions in the legislation which are incompatible with the objectives concerned. In short, article 36 (2) (b) is justiciable.³⁸⁰

In Ghana, the *Ghana Lotto Operators Association & Others v. National Lottery Authority* case (supra) has elevated DPSP from what was proposed as a mere moral code to enforceable principles.

These principles can make significant impact in the promotion of welfare rights. It must, however, be emphasised that DPSP is not an open sesame for citizens to make extravagant welfare claims from their governments. DPSP are principles that compel the state to prioritise the welfare needs of its citizens in the allocation of its limited resources. Social intervention policies and programmes in education, health care, housing and job opportunities among others must be pursued by member states with alacrity.

Member States must also ensure that the constitutional framework relating to DSPS are not mere guidelines but enforceable or justiciable codes. This would in no doubt influence policy and legislative interventions in the fulfilment of welfare rights of citizens. Accordingly, any policy or legislative framework that is inconsistent with the DPSP shall to the extent of the inconsistency be declared null and void. There is no better way of respecting, protecting and fulfilling welfare rights!

³⁸⁰[2007-2008] 2 SCGLR 1113. The question of the justiciability of the chapter on the Directive Principles of State Policy was debated at length in the 1979 Constituent Assembly which drafted the 1979 Constitution. At its twentieth sitting on Friday, 2 February 1979 the assembly expressly resolved to make the chapter justiciable: 'Mr. Chairman [Justice VCRAC Crabbe]: Now I am going to put the question. And the question is the amendment as proposed by Mr. Zwennes that we should make chapter four non-justiciable be accepted by the house'. The question was then put and the result of the exercise was: 'Question put and negatived'. See *New Patriotic Party v. Attorney-General* (31st December Case) [1993-94] 2 GLR 35, S.C at 68-71.

2. Enforcement of International Human Rights Instruments by Member States – Focus on ECOWAS Human Rights Mechanism

States are obliged in international law to respect their human rights obligations to its citizens if the State has ratified a human rights treaty. The obligation to respect requires that States must refrain from interfering with or curtailing the enjoyment of human rights enshrined in the international instrument. Member States of the ECOWAS Community owe this duty to its citizens through the enforcement of the ECOWAS Human Rights mechanism.

ECOWAS Human Rights Mechanism

ECOWAS is a fifteen-member group of West African States formed in 1975 to promote economic integration of Member States. It was established by virtue of the 1975 Treaty which was concluded in Lagos on 28th May 1975. The ECOWAS Treaty was focused on,

... accelerated and sustained economic development of their states and the creation of a homogeneous society, leading to the unity of the countries of West Africa, by the elimination of all types of obstacles to the free movement of goods, capital and persons.³⁸¹

The 1975 Treaty was replaced by the Revised ECOWAS Treaty, signed in Cotonou, Benin Republic, in July 1993. The 1993 Revised ECOWAS Treaty could be said to have revolutionised the perception and reception of human rights in the constitutional framework of ECOWAS.³⁸² With the advent of the Revised Treaty, ECOWAS is, among other objectives, focused on promoting co-operation and development in all fields of economic activities; enhancing social and cultural matters for the purpose of raising the standard of living of its peoples; increasing and maintaining stability; fostering closer relations among its members; and contributing to the progress and development of the African Continent.³⁸³

³⁸¹See the Sixth Preamble of the 1975 ECOWAS Treaty.

³⁸²S T. Eboobrah, 'A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice' (Research Partnership 1/2008, The Danish Institute for Human Rights) 10.

³⁸³See Article 3(1) and (2) of the Revised ECOWAS Treaty.

Thus, the scope of co-operation amongst Member States has expanded over the years to include objectives such as promotion of human rights and good governance.

The Revised Treaty makes specific reference to human rights from its preamble.³⁸⁴ The Revised Treaty also recognises 'promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights' as one of the fundamental principles the Community would adhere to in the pursuit of its objectives.³⁸⁵ By Article 56(2) of the 1993 Revised ECOWAS Treaty, ECOWAS Member States that are 'signatory states ...to the African Charter on Human and Peoples' Rights' agree to 'cooperate for the purpose of realising the objects' of that instrument. It must be noted that all Member States of ECOWAS have signed and ratified the African Charter on Human and Peoples' Rights.

In further contrast to the 1975 Treaty, the Revised ECOWAS Treaty provides citizens with 'the right of entry, residence and establishment' and records an undertaking by Member States 'to recognise these rights of Community citizens'.³⁸⁶ These, and many other provisions in the Revised Treaty have given effect to the 1954 United Nations Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights – these international instruments promote liberty rights, political rights, social rights and economic rights. It therefore goes without saying that protection of human rights is a core and cardinal value of the ECOWAS Community. Ratification of the Revised ECOWAS Treaty is meaningless unless it is linked to effective enforcement mechanism deployed by member states.

Duties of Member States

Prominent amongst the obligations that a Member State owes to ECOWAS includes a duty to adhere to the principle of 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.³⁸⁷ An important step in the fulfillment of this obligation is the domestication of the principle in the domestic realm of Member States. ECOWAS Member States have by and large incorporated international human rights principles (including the ECOWAS Human Rights mechanism) in their written constitutions and other pieces of legislation.

³⁸⁴Para 4 of the Preamble to the 1993 Revised ECOWAS Treaty.

³⁸⁵See Article 4(g) of the 1993 Revised ECOWAS Treaty.

³⁸⁶Article 59 of the 1993 Revised ECOWAS Treaty.

³⁸⁷See article 4(g) of the Revised Treaty.

The constitutional provisions on human rights are mostly entrenched provisions which can only be amended through a referendum.

Ghana's 1992 Constitution contain extensive entrenched provisions that guarantee fundamental human rights and freedoms of its citizens.³⁸⁸ There are other pieces of legislation that promotes human rights standards. Beside the legislations mentioned above, the Labour Act, 2003 (Act 651) for instance, is a key piece of legislation which regulates conditions of work. Also, the Environmental Protection Agency Act, 1994 (Act 490) seeks to protect the citizens' right to clean environment. These domestic laws are inspired by and are aimed at enforcing international human rights instruments.

As part of the enforcement requirement of international human rights law, States are expected to put in place procedural rules geared towards the protection of rights by the courts.³⁸⁹ In Ghana, enforcement of fundamental human rights and freedoms fall under article 33 of the 1992 Constitution. Thus, where a person alleges a breach or likelihood of a breach of fundamental human rights and freedoms in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.³⁹⁰ The High Court after hearing the application for the enforcement of fundamental human rights, may issue such directions or orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition, and quo warranto for the purpose of enforcing any of the provisions on fundamental human rights and freedoms guaranteed by the Constitution.³⁹¹

The Rules of Court Committee is mandated to make rules with respect to the practice and procedure of the Superior Courts regarding the violation of the rights of citizens in reference to article 33 of the Constitution. In pursuance of Articles 33(4) and 157(2), the Rules of Court Committee made the High Court (Civil Procedure) Rules, 2004, Constitutional Instrument (CI) 47. The specific rules in C.I. 47 can be found under Order 67.

³⁸⁸See 1992 Constitution, Chapter 5.

³⁸⁹For example, by article 24(2) of the Supplementary Protocol A/SP.1/01/05 relating to the Community Court of Justice, each Member State has the responsibility for the enforcement of the judgments of the Court in accordance with its Rules of Civil Procedure

³⁹⁰1992 Constitution, article 33(1).

³⁹¹1992 Constitution, article 33(2).

³⁹²1992 Constitution, article 33(4).

The High Court has jurisdiction for the enforcement of fundamental human rights of the individual but where the human right being enforced is of public interest then it is the Supreme Court that has the jurisdiction.³⁹³ The technicalities involved in the enforcement of fundamental human rights in Ghana call for the services of lawyers. However, the high cost of litigation (including legal services costs) in many countries including Ghana, has discouraged individuals from going to court to vindicate their rights.

In fulfillment of its international human rights commitments, member states should ensure that free legal services are available to the poor, marginalised and vulnerable groups within the country who are unable to afford the services of a lawyer. In this regard, the Legal Aid Schemes within the Community should be well-resourced to bolster the enforcement of fundamental human rights of indigenes. To make the Legal Aid Scheme very effective, governors of the Scheme should liaise with the Bar for the latter to provide free legal services in support of the Scheme. It is proposed that this collaboration can be enhanced through statutory intervention. A legislative arrangement could be put in place to ensure that one of the requirements for renewal of a lawyer's license is for the lawyer to have conducted at least one pro bono case under the Legal Aid Scheme biannually or the lawyer must have proven that he made his services available to the Scheme during the period. This is a way of fulfilling the duty of the State to promote and protect the ECOWAS Human Rights mechanism.

A Member State's obligation also includes a duty to comply with the decisions of institutions of the ECOWAS Community particularly the ECOWAS Community Court of Justice (ECCJ) relating to human rights. The ECCJ is the legal organ of the Community and remains the most important institution in the enforcement of the Community human rights mechanisms. By Article 3(4) of the 2005 Supplementary Protocol which among other provisions, revises Article 9 of the 1991 Protocol by stating that '[t]he Court has jurisdiction to determine case[s] of violation of human rights that occur in any Member State'. Article 4, which adds a new Article 10 to the 1991 Protocol, clothes the Court with jurisdiction to hear matters involving 'individuals on application for relief for violation of their human rights'.

³⁹³See *Adjei Ampofo (No. 1) v. Accra Metropolitan Assembly and Attorney-General (No. 1)* [2007-2008] 1 SCGLR 611.

This is a stark departure from the norm where the State has been the bearer of legal personality in the international arena.³⁹⁴ The Protocol has guaranteed rights to individuals, not as nationals but as human beings who are able to protect their rights even against their own governments at the ECCJ.

A key challenge facing the ECCJ is the enforcement of its judgments or orders within the jurisdictions of Member States. This is, in spite of the provision of a method of enforcement of the decisions of the Court in the 2005 Protocol. The provision stipulates that each Member State has the responsibility for the enforcement of the judgments of the Court in accordance with its Rules of Civil Procedure.³⁹⁵ Unfortunately, even though Member States have ratified the 2005 Protocol, they have failed or refused to incorporate same in their domestic laws. In the Ghanaian case of *Chude Mba*³⁹⁶ and the Nigerian case of *General Sani Abacha & Ors v. Fawehinmi*,³⁹⁷ the various courts failed or refused to enforce decisions of the ECCJ as the Courts came to the conclusion that they are not bound by Article 24 of the 2005 Supplementary Protocol relating to the ECOWAS Court. In both cases, the courts emphasised that an international treaty entered into by government does not become binding until enacted into law by Parliament.

The absence of enforcement mechanisms trumps international human rights supervisory mechanisms. Member States are therefore obliged to put in place enforcement mechanism in the domestication of Article 24 of the 2005 Supplementary Protocol. Naming and shaming States which fail or refuse to enforce the judgment or order of the ECCJ can also be employed by the ECOWAS Community.

Conclusion

From the foregoing, it is palpably clear that every Member State owes a duty to its citizens – duty to respect, protect and fulfill human rights. The paper has demonstrated that observance of human rights mechanism is indeed a critical factor in ensuring democracy, peace and security.

³⁹⁴A Brudner, 'The domestic enforcement of international covenants on human rights: a theoretical framework' (Summer, 1985), 35(3) *The University of Toronto Law Journal* 219.

³⁹⁵Article 24(2) of Supplementary Protocol A/SP.1/01/05 relating to the Community Court of Justice, ECOWAS.

³⁹⁶In the Matter of an Application to Enforce the Judgment of the Community Court of Justice of the ECOWAS against the Republic of Ghana and In the Matter of *Chude Mba v. The Republic of Ghana*, Suit No. HRCM/376/15 (High Court, Ghana, 2016) (unreported).

³⁹⁷(2000) NWLR (pt. 660) p. 247.

The paper has suggested actions which Member States can pursue to enhance human rights protection within their jurisdictions.

In all these, the role of the legal regime and the courts cannot be underestimated. It is the legal regime that gives the citizenry the right to insist on their fundamental human rights. Thus, a robust legal framework which recognises and incorporates international human rights instruments particularly the ECOWAS human rights mechanism is an insurance to human rights protection. This, coupled with an independent judiciary which is emboldened to protect the rights of individuals, without fear or favour is the surest way of upholding the rights of citizens of Member States.

**HUMAN RIGHTS AS A CRITICAL FACTOR IN DEMOCRACY,
PEACE AND SECURITY: DUTY OF MEMBER STATES TO RESPECT,
PROTECT AND FULFIL HUMAN RIGHTS
BY
PROF. JOY NGOZI EZEILO, OON, SAN
DEAN EMERITUS, FACULTY OF LAW, UNIVERSITY OF NIGERIA**

1. Background

Universally, the concept of human rights, linked to natural rights, defines human rights as 'rights that we are born with as humans'; 'that inheres in us'; 'attached to all human beings everywhere and in all societies' by virtue of our humanity and since it is natural and God-given, it cannot be taken away by state fiat (government).³⁹⁸

As Jack Donnelly stated:

If all human beings have human rights simply because they are human, then human rights are held equally by all. Because being human cannot be renounced, lost, forfeited, human rights are also inalienable.³⁹⁹

Given the fact that all human may invoke it, it becomes 'a special kind of moral claim'.⁴⁰⁰ Of course, being a moral claim or right does not elevate or transform it to a legal right protected in legal systems– municipal and international. Thus, if the obligation to protect is on the State, it then means that it is only what is protected in the constitution or other legal framework that could be called human rights 'law'. When we speak of 'right' in the legal but narrower sense of entitlement, we speak of something we can have, claim, exercise, enforce. In theorising 'rights', White stated that:

Rights are something one can have or be given, earn, enjoy or demand, assert, insist on, or secure or what one can waive, surrender, relinquish, or forfeit. They can be recognized and protected or disregarded, altered, abridged, infringed, whittled away, violated, or trampled on.⁴⁰¹

Osita Eze, posits that:

Human Rights represent demands or claims which individual or groups make on society, some of which are protected by law and have become part of *lex lata* while others remain aspirations to be attained in future.⁴⁰²

³⁹⁸J Ezeilo, *Women, law and human rights: global and national perspectives*, Abuja/Enugu: ACENA Publishers (2011) 5- 19. Notwithstanding, human rights, as observed, must not be confused with natural rights or natural law. Natural rights remain largely philosophical. As has been rightly observed, 'In various circumstances, natural law was used to justify various different anti-democratic types of "States" – including absolutism and monarchy'.

See R Künnemann, *Human rights for people's sovereignty*, Published by FIAN International, (2017), 23.

³⁹⁹See J Donnelly, *International human rights*, 3rd ed. (University of Denver: West View Press, (2007), 21

⁴⁰⁰See F Viljoen, *International human rights law in Africa* (Oxford: University Press, (2007) p. 4

⁴⁰¹AR White, *Rights* (Oxford: Clarendon Press, (1984) 1 – 31 at p. 17.

⁴⁰²E Osita, *Human rights in Africa: some selected problems*, (Lagos: Nigeria Institute of International Affairs and Macmillan Publisher 1984) 4.

According to Rhoda Howard:

There is only one universal conception and formulation of human rights. Human rights are universal. They inhere in human beings by virtue of their humanity alone. Furthermore they are neither privileges nor contingent upon any duties but entitlements against the state.³¹⁹

International human rights, protected in international instruments,³²⁰ are called human rights law, while domestic or municipal level legal systems protect human rights either through the constitution or other bills of rights legislations that transform it to positive law. In other words, not all human rights are protected by the law such that the 'right' can create a remedy either in national, regional or international law.³²¹

Human rights is imperative for the notion of a legitimate democratic state based on the sovereignty of the people.³²² The idea of free human beings, enjoying civil and political freedom and freedom from fear and want, can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his social, economic and cultural rights.³²³ This idea, which has been given the force of law, trickled down to the regional and domestic/national legal systems, it is a settled principle of law that all human rights are indivisible, inter-dependent, and of course, inter-related.³²⁴ Therefore, all rights are designed to be equally respected, protected and promoted irrespective of generation or its categorisation.³²⁵

The Economic Community of West African States (ECOWAS) is a supranational organisation vested with the responsibility to foster integration and cooperation among independent

⁴⁰³ Quoted in IG Shivji, *Concept of human rights in Africa*, (1989) 21.

⁴⁰⁴ That includes both the hard law (the legally binding treaties/covenants) and the soft law (which does not have the force of law) and which is in the form of declaration, claims or aspirations. At national level only human rights recognised in the positive law can be described as legally binding and enforceable in domestic courts.

⁴⁰⁵ Ezeilo, (n 1) above, 8.

⁴⁰⁶ See Künnemann, (n 1) above, 26.

F Abubakar *An appraisal of the role of ECOWAS Court of Justice and the Southern African Development (SADC) tribunal in the protection of human rights*, <https://kubanni-backend.abu.edu.ng/server/api/core/bitstreams/0f565704-5efd-44bf-aedd-b44f26ac6311/content>. (accessed 20 April, 2023)

⁴⁰⁷ See the Maastricht Guidelines on Violations of Economic, Social & Cultural Rights, reprinted in 20 Hum. Rts. Q. 691- 705 (1998); Limburg Principles on the Implementation of the International Convention on Econ. Soc. & Cultural Rights at UN. Doc. E/CN/4/1987/17; Vienna Declaration and Programme of Action (VDPA) 1993 WCHR Vienna 14- 25 June, 1993; Committee on the Rights of the Child, General Comment No. 15 on the Rights of the Child to enjoy the Highest Attainable Standard of Health, 62nd session, U.N Doc. CRC/C/GC/15 (2013). M F Tinta 'Justiciability of economic, social and cultural rights in the inter-American system of protection of human right: beyond traditional paradigms and notions' (2007) 29 *Hum. Rts. Q.* 431.

⁴⁰⁸ Vienna Declaration and Programme of Action (VDPA) 1993 WCHR Vienna 14-25 June, 1993, see also O J Edeh, *The ECOWAS Court and the justiciability of Socioeconomic Rights in Nigeria*, <https://rwi.lu.se/wp-content/uploads/2021/10/Obinna-James-Edeh-University-of-Nigeria-The-Ecowas-Court-and-the-Justiciability-of-Socioal-Economic-Rights-in-NigeriaRG.pdf>. (accessed 20 April, 2023)_

countries in the West Africa Region.⁴⁰⁹ The ultimate beneficiaries of this sacrosanct duty are the citizens of these nations whose fundamental human rights are both guaranteed and protected by the ECOWAS. The history of ECOWAS dates back to May 1975, when the original Treaty of the Economic Community⁴¹⁰ was ratified in Lagos, Nigeria by 15 West African Heads of States.⁴¹¹ Founded as a vehicle for economic integration, ECOWAS came into existence at a time the 'search for an excellent economic performance and social stability led African leaders to seek integration and/or cooperation among their countries'.⁴¹² Essentially, the formation of ECOWAS was prompted by the need to forge a collective response to the economic challenges that the states in the West African sub-region were faced with upon gaining political independence.

The main objective of ECOWAS is to promote cooperation and integration in the sub-region leading to the establishment of an economic union in West Africa. In line with that aim, ECOWAS adopted its fundamental principles wherein it guarantees its peoples under Article 4(g) of the Revised Treaty 'The recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples Rights' ⁴¹³(African Charter). Chapter 10 of that Treaty contains general provisions relating to various aspects of human rights, including immigration, regional peace and security, legal and judicial matters, women and development, health and labour rights, information, radio, television and the press. Additionally, other protocols touching on human rights have been adopted by the Community. They include the Protocol on Free Movement of Persons, Protocol on Democracy and Good Governance, and the Protocol on Mechanism of Conflict Prevention.⁴¹⁴ The ECOWAS Community Court of Justice (ECCJ) has accepted individual complaints for human rights violations since 2005. Established in 1991 and located in Abuja,

⁴⁰⁹ <https://ecowas.int/about-ecowas/> Accessed on 14/4/2023

⁴¹⁰ The ECOWAS Treaty of 1975 is reprinted in 1010 UNTS 17, [1975], 14 International Legal Materials 1200.

⁴¹¹ http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en (accessed 23 October 2008). See EM Edi, *Globalization and politics in the Economic Community of West African States*, (2007). 28. The founding members of ECOWAS were Benin, Burkina Faso, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. Cape Verde acceded to the ECOWAS Treaty in 1978. However, Mauritania withdrew its membership of ECOWAS in 1999/2000.

⁴¹² ST. Ebobrah, *A Critical Analysis of The Human Rights Mandate of The ECOWAS Community Court of Justice*, (2009).

⁴¹³ ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> [accessed 19 August 2023]

⁴¹⁴ A Paper Presented by Franca Ofor at a Training Workshop on Strengthening the Promotion and Protection of Human Rights in West Africa through the ECOWAS Community Court, Bamako,

Nigeria, the court hears cases from all the Member States of ECOWAS: Nigeria, Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Senegal, Sierra Leone, and Togo.⁴¹⁵

The Court, with headquarters in Abuja, adopts the jurisprudence of extant human rights *corpus coram*, and normative frameworks including instruments adopted by United Nations and the African Union to which ECOWAS Member States are parties. The Universal Declaration on Human Rights, (UDHR), the International Covenants on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR), the African Charter on Human and Peoples Right as well as the European Convention on Human Rights have all been invoked before the ECCJ.

The decisions of the ECCJ are legally binding to the ECOWAS Member States.⁴¹⁶ The Court has competence to rule on human rights violations through an individual complaint procedure since 2005. One of the innovative features of the ECJ is the non-inclusion of the requirement to exhaust local remedies before approaching the court.⁴¹⁷ The effect is that complaints can be filed directly to the Court at first instance.⁴¹⁸ Furthermore, matters can also move from national courts to the ECOWAS Court without the need to go through the string of appellate processes. But against the background of this 'wide access' is the obtruding question as to the concurrence of this procedure to established international law and practice. This concern stems from the popular narrative that the requirement to exhaust domestic remedies as an aspect of international law jurisprudence is customary international law. Some critics of the ECOWAS Court system hold the position that the Court is bound by the 'exhaustion of local remedy notwithstanding that its constitutive charter is silent on this requirement'.⁴¹⁹

⁴¹⁵ <https://www.justiceinitiative.org/publications/ecowas-community-court-justice> (Accessed 20 April 2023).

⁴¹⁶ <http://www.claiminghumanrights.org/ecowas.html>. (accessed 20 April, 2023)

⁴¹⁷ AO Enabulele, 'Sailing against the tide: exhaustion of domestic remedies and the ECOWAS Community Court of Justice' (2012) 56(2) Journal of African Law, 268-295.

⁴¹⁸ The 2005 Supplementary Protocol A/SP.01/01/5 of 19 January 2005 which amended the 1991 Protocol ensured that such obstacles were not placed in the way of litigants.

⁴¹⁹ OJ Edeh, 'The ECOWAS Court and the Justiciability of Socioeconomic Rights in Nigeria', <https://rwi.lu.se/wp-content/uploads/2021/10/Obinna-James-Edeh-University-of-Nigeria-The-Ecowas-Court-and-the-Justiciability-of-Social-Economic-Rights-in-NigeriaRG.pdf>. (Accessed 20 April, 2023)

Following the same argument, Ebobrah warned that a complete negation of this requirement could engender unhealthy conflicts and rivalries between the national courts and the ECOWAS Court.⁴²⁰

2. Protection of Human Rights as a Core and Cardinal Value of the Community

In the course of its existence, ECOWAS has experienced a major shift in its approach to human rights as a community. From a treaty regime that paid little or no conscious attention to human rights, the Community has moved to a regime that can lay claim to a delicate but apparent competence in human rights adjudication and encouraging jurisprudence of human rights enforcement. Admittedly, this competence is buried in the Treaty, instruments and documents of the Community and gives rise to questions of propriety and legitimacy.⁴²¹ The aims of ECOWAS as stated under Article 3(1) of the Treaty, *inter alia* are:

to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent.⁴²²

Almost all ECOWAS Member States have ratified core human rights treaties of both the United Nations and the African Union. As the emerging ECOWAS human rights regime operates within the territories of Member States and within the jurisdiction of the African human rights system, the need for symmetry with both national and continental human rights mechanisms cannot be over emphasised. Hence, while it seeks efficacy in order to be relevant, it is essential for the ECOWAS regime to ensure that it complements rather than disrupt the existing human rights architecture. To the extent that it relies on national and continental human rights norms, the duty to find symmetry rests with the ECOWAS regime.⁴²³

Article 4, 'Fundamental Principles' of the ECOWAS Treaty includes as principles of ECOWAS: 'g) recognition promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.⁴²⁴

⁴²⁰Ebobrah (n 16) above.

⁴²¹ <https://repository.up.ac.za/bitstream/handle/2263/27990/04chapter4.pdf?sequence=5&isAllowed=y> (accessed 20 April 2023)

⁴²²Ofor (n 18) above.

⁴²³As above.

⁴²⁴<https://co-guide.info/legal-basis/ecowas-treaty>. (accessed 20 April, 2023)

It has been canvassed that since the formation or formalisation of the Court, experts have assessed the potential of the Court to meet the human rights demands from the community members. Scholars have examined the importance of regional and sub-regional court systems as platforms for the enforcement of human rights by non-state actors.⁴²⁵ It has been alluded that the pressure from activist forces and the boldness of these courts have the potential to positively change the narrative on the enforcement of human rights in Africa.⁴²⁶ Indeed, civil society organisations have been in the forefront of efforts to hold government to account for the promotion of human rights in Nigeria. This position is supported by Viljoen⁴²⁷ and Murray,⁴²⁸ who examined and reaffirmed the indispensable role of domestic actors towards promoting international human rights at national and sub-national levels. The liberalisation of the rules relating to *locus standi* and the negation of the requirement to exhaust internal remedies have made the ECOWAS Court attractive to non-state actors wishing to enforce socio-economic rights of the citizens.⁴²⁹

3. ECOWAS Human Rights Mechanism

The human rights mechanism of ECOWAS is emerging and can be categorised as a work in progress. Generally, human rights protection in Africa has traditionally consisted of two layers: the regional human rights system hinged on the African Charter and national human rights mechanisms of individual African States. A third layer has emerged at the sub-regional level through the re-purposing of some sub-regional economic community regimes (mainly courts or tribunals) to determine claims of human rights violations.⁴³⁰ Recently, there is a steady recognition of the obligation by the ECOWAS to not only propagate cohesive interest in the economic affairs of the community, but also to strengthen the organisation's commitment towards human rights obligations and ideas.

⁴²⁵O. C. Okafor: *The African human rights system, activist forces and international institutions* (Cambridge: CUP, (2007).

⁴²⁶As above.

⁴²⁷F. Viljoen, 'Exploring the theory and practice of the relationship between international human rights law and domestic actors', (2009) 22 *Leiden Journal of International Law*, 1

⁴²⁸R. Murray: *The role of national human rights at the international and regional levels: The experience of Africa* (Bloomsbury Publishing 2000)

⁴²⁹Edeh, (n 23) above.

⁴³⁰F. Viljoen, (1999). 'The realisation of human rights in Africa through sub-regional institutions', 7(1) *African Yearbook of International Law Online / Annuaire Africain de droit international Online*, 185-214. doi: <https://doi.org/10.1163/221161799X00075> (accessed 20 April, 2023). See also C Y Nyinevi and Y E Ayalew, 'The emerging role of African sub-regional courts in protecting human rights on the internet' (2022) *Afronomicslaw*, <https://www.afronomicslaw.org/category/analysis/emerging-role-african-sub-regional-courts-protecting-human-rights-internet>. accessed 20 April, 2023

It will be germane to note that economic integration and human rights protection are inter-connected and mutually reinforcing. Accordingly, protecting human rights is not only a moral or political issue, but also an essential factor in economic development. For instance, the freedom of movement, including the right of persons to leave and return to their countries freely, is essential for economic integration.⁴³¹

The jurisdictional change introduced by the 2005 Supplementary Protocol of the ECOWAS Court is rather expansive in the sense that it affects the material, personal, temporal and territorial aspects of the Court's jurisdiction with respect to human rights.⁴³² In addition to conferring the ECCJ with jurisdiction over cases of violation of human rights that occur in any member state,⁴³³ the Supplementary Protocol grants access to the Court to individuals and corporations with respect to different cases of human rights violation. This new jurisdiction is added to the original jurisdiction of the ECCJ and does not replace the original jurisdiction.⁴³⁴ Thus, in the cases of *Peter David v Ambassador Ralph Uwechue*, *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The President of the Federal Republic of Nigeria*⁴³⁵ and *Tandja v Djibo and Another*,⁴³⁶ the ECCJ⁴³⁷ has ruled that only ECOWAS Member States and Community institutions can be sued before it. These three cases have brought, at least from the Court, an emphatic resolution of the ambiguity which has trailed the adoption of article 9(4) of the 2005 Supplementary Protocol, regarding who can be a defendant in a human rights case before the Court. In effect, the ECCJ reached significant conclusions on the horizontal application of human rights,

⁴³¹Nyinevi and Ayalew, as above.

⁴³²ST Ebobrah, 'A rights-protection goldmine or a waiting volcanic eruption: competence of, and access to the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 2 *African Human Rights Law Journal* 307.

⁴³³New article 9 of the Protocol of the ECOWAS Court as introduced by article 3 of the 2005 Supplementary Protocol.

⁴³⁴New article 10 of the Protocol of the ECOWAS Court as contained in art 4 of the 2005 Supplementary Protocol.

⁴³⁵(ECW/CCJ/RUL/03/10) (*Uwechue*).

⁴³⁶(ECW/CCJ/APP/07/10) (*SERAP*).

⁴³⁷(ECW/CCJ/05/10) (*Tandja*).

⁴³⁸E S Nwauche, 'The ECOWAS Community Court of Justice and the horizontal application of human rights' (2013) 13 *Afr. Hum. Rights Law J.*

this standpoint is important not just for ECOWAS but for other regional economic communities (RECs) in Africa and elsewhere.⁴³⁹

4. Duty of Member States to Respect, Protect and Fulfil Human Rights and Holding Them Accountable to Their Treaty Obligations

The concept of human rights concerns the relationship between the individual and the State, therefore, individual enjoyment of these rights depends on state responses to their international obligations to promote, protect, respect, enforce and fulfil rights.⁴⁴⁰

Modern human rights, anchored since the end of the Second World War and the formation of the United Nations in 1945, have become a springboard that gave birth to several human rights instruments at international, regional and national levels. These include: the ICCPR; the ICESCR; the Convention on Elimination of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention Against Torture (CAT); the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities, 2006. In the African continent, under the banner of African Union (formerly Organization of African Unity), major treaties have been adopted for protection of human rights at the regional level, including the African Charter; the African Charter on the Rights and Welfare of the Child (1990); and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (2003).

Thus, to protect these rights from abuse, especially seeing the atrocities of the Nazi regime, human rights were codified in international law instruments. Civil and political rights are enshrined in articles 3 to 21 of the UDHR⁴⁴¹ and in the ICCPR. Economic, social and cultural rights are enshrined in articles 22 to 28 of the Universal Declaration of Human Rights (UDHR) and in the ICESCR. The UDHR included economic, social and cultural rights and civil and political rights because it was based on the principle that the different rights could only successfully exist in combination.

⁴³⁹ As above.

⁴⁴⁰ Ezeilo, (n 1) above.

⁴⁴¹ <https://www.un.org/en/about-us/universal-declaration-of-human-rights>. (Accessed 20 May 2023).

One of the prominent features of international human rights instruments is their universality and that the rights contained therein are for all peoples.⁴⁴² Human rights are universal. They inhere in human beings by virtue of their humanity alone. In pursuit of global human rights, the problem is no longer standards setting, as the international community, through the United Nations and similar regional/continental bodies, have adopted extensive human rights standards and norms. Rather, the challenge, in fact, is ensuring effective implementation of international human rights instruments that States are parties to, thus, the importance of development around state responsibilities and the obligations to protect, respect and fulfill or remedy human rights. Implementation is a major problem in making the system of international protection of human rights effective at national level, hence the scepticism, about international law's dependence on the will of nation States. To be clear, a treaty becomes binding on States upon ratification and deposit of instruments thereof. However, application at municipal level may depend on the constitutional system of a particular State. Each State is left free by international law to make its own constitutional arrangements for the exercise of its treaty-making power.⁴⁴³

International law, which of course includes regional normative framework, determines the validity of treaties in the international legal system—that is when and how a treaty becomes binding upon a state as regards other State Parties. It also determines the remedies available on the international plane for its breach. But it is the national legal system that determines the status or force of law which will be given to a treaty within that legal system.⁴⁴⁴ The view that 'international supervisory procedures and control mechanisms can never be considered as substitutes for national mechanisms and national measures with the aim of giving effect to human rights standards'⁴⁴⁵ is a popular one among lawyers, jurists, scholars and commentators.⁴⁴⁶

⁴⁴²Ezeilo, (n 1) above.

⁴⁴³See DJ. Harris, *Cases and materials on international law*, 6th edn. (London: Thomson/Sweet and Maxwell, (2004) p. 799 and Leary, *International labour conventions and national law* (1982) at p. 1, excerpts in Steiner and Alston, 3rd ed., 1095.

⁴⁴⁴Leary, as above. See also Articles 18, 26 and 27 of the Vienna Convention on the Law of Treaties, 1969. The Treaties Making Procedure, (etc.) Act 1993 No. 16 Cap. T 20, LFN classified treaties into three types. Multilateral treaties on Human Rights will fall under section 3(1)(a): 'law making treaties, being agreements constituting rules which govern inter-state relationship and cooperation in any area of endeavour and which have the effect of altering or modifying existing legislation or which affects the legislative powers of the National Assembly'. This type requires to be enacted into law for its domestic application – see section 3(2) (a). Furthermore, section 12 of the Constitution deals with treaty implementation.

⁴⁴⁵T Van Boven, 'The international system of human rights: an overview', in a *Manual on Human Rights Reporting* (New York: United Nations, 1991) p. 4.

⁴⁴⁶Ezeilo, (n1) above, 131.

All Member States of ECOWAS are under international, regional and national laws obligation to uphold the human rights standards. In furtherance of the aims and objectives of the ECOWAS Treaty, Member States affirmed among others to adhere to the principles of recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples Rights [Article 4(g)]; and the promotion of a peaceful environment as a prerequisite for economic development [Article 4(1)]; while Article 15 (3) provides for the independence of the Court, Article 15(4) makes the judgment of the Court binding.⁴⁴⁷ In the case of *Hadijatou Mani Koraou v. Republic of Niger*,⁴⁴⁸ the ECCJ condemned Niger for failing to protect the complainant from enslavement by a third party. In this case, the applicant, who was born to a mother in slavery, was sold to a local chief at age 12. For the next nine years, she was subjected to rape, violence, and forced labour without remuneration. When Niger's Supreme Court failed to convict her 'owner' under Article 270.1-5 of the Nigerien Criminal Code, which made slavery illegal in 2003, the Applicant brought her case before the ECCJ under Article 9(4) of the Supplementary Protocol A/SP.1/01/05. The court ruled that the Applicant had been a slave under the definition in Article 1 (I) of the Slavery Convention of 1926 and that in failing to convict her former 'owner,' Niger had not upheld its legal responsibility to protect her from slavery under international law. This case was the first ECOWAS ruling on slavery and only the second conviction made under Niger's 2003 anti-slavery law. The case gained a high level of publicity, setting the precedent for women to fight back against the traditional slavery practices common to Niger and other ECOWAS nations.⁴⁴⁹

The ECOWAS Court on 12 October 2017 delivered its judgment in the case between *Dorothy Njemanze and 3 others v. The Federal Republic of Nigeria*⁴⁵⁰ and made history as the first international court to make pronouncement based on violations of the African Charter's Protocol on the Rights of Women in Africa, otherwise known as the Maputo Protocol. The case centered on the violent, cruel, inhuman, degrading and discriminatory treatment the Plaintiffs suffered at the hands of law enforcement agents in Abuja Nigeria. The women by name, Dorothy Njemanze, Edu Ene Okoro, Justina Etim and Amarachi Jessyforth were abducted and assaulted sexually, physically,

⁴⁴⁷Ofor (n 18) above.

⁴⁴⁸ECW/CCJ/JUD/06/08

⁴⁴⁹ https://www.law.cornell.edu/women-andjustice/resource/hadijatou_mani_koraou_v_republic_of_niger#:~:text=The%20court%20ruled%20that%20the,from%20slavery%20under%20international%20law. (Accessed 20 April, 2023).

⁴⁵⁰SUIT NO: ECW/CCJ/APP/17/14 Judgment no: ECW/CCJ/JUD/08/17 See also the decision in a domestic violence case- *WARD, IHRDA & Mary Sunday v FRN*, ECW/CCJ/JUD/08/17 - ECOWAS Court of Justice

verbally and unlawfully detained at different times between January 2011 and March 2013 in the hands of the Abuja Environmental Protection Board (AEPB) and other government agencies, such as the police and the military. They were arrested and accused of being prostitutes simply on the grounds that they were found on the streets at night. In its judgment, the Court held that the arrest of the Plaintiffs was unlawful and violated the right to freedom of liberty, as the Defendant State had submitted no proof that these women were indeed prostitutes. The Court also found that branding the women prostitutes constituted verbal abuse, which violated the right of these women to dignity. Further, the Court held that the arrest violated the right of these women to be free from cruel, inhuman or degrading treatment and also constituted gender-based discrimination.

The Court found that there were multiple violations of articles 1, 2, 3 and 18 (3) of the African Charter on Human and Peoples' Rights; articles 2, 3, 4, 5, 8 and 25 of the Maputo Protocol; articles 2, 3, 5 (a) and 15(1) of CEDAW; articles 2(1), 3, 7 and 26 of the ICCPR; Art(s). 10, 12, 13 and 16 of the Convention against Torture (CAT); and articles 1, 2, 5, 7 and 8 of the UDHR. The 1st, 3rd and 4th Plaintiffs were each awarded damages in the sum of Six Million Naira. However, the claim of the 2nd Plaintiff was dismissed for being statute barred under the Protocol creating the Court.⁴⁵¹

Furthermore, it is pertinent to mention that ECOWAS Member States have preserved the idea of human rights in their supreme laws. This provision is also known as the supremacy clause, and it elevated the constitution and its provisions (including human rights provisions) over and above any other law, practice, policy or norm. For instance, Section 4 of Gambia (The)'s Constitution provides that:⁴⁵²

This constitution is the supreme Law of The Gambia and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.

The legal implication of the above provision is that any law, policy or practice which contravenes any provision like the (Chapter IV- Protection of Fundamental Rights and Freedom, sections 17-38) of the Gambian Constitution shall be null and void to the extent of its contravention.

⁴⁵¹J Ezeilo, 'Are we born free and equal? law, justice and human rights in Nigeria', Being the 144th Inaugural Lecture, University of Nigeria, 11 October, 2018 (p. 127- 128).

⁴⁵² https://www.constituteproject.org/constitution/Gambia_2004.pdf?lang=en. (Accessed 20 April 2023)

This has also been featured in the section 1(3) of Nigeria's 1999 Constitution thus: If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.⁴⁵³

The above provision reinforces the status and position of Chapter four (fundamental human rights) of the Federal Republic of Nigeria 1999 Constitution as a matter of *jus cogens* which would not permit any derogation.

Similarly, Section 1(1)(2) of the Constitution of Ghana⁴⁵⁴ provides that:

1. The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.
2. This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void. Again, under Chapter five of the Ghanaian Constitution (Protection of Fundamental Human Rights and Freedoms), any law that is inconsistent with these provisions shall pursuant to section 1(1)(2) be rendered null and void.

However, the Senegalese Constitution did not specifically provide for the supremacy of the constitution as can be seen in the Anglophone constitutions discussed above, but under article 1 of the Constitution, it provides that:

Article 1 The Republic of Senegal is secular, democratic, and social. It assures the equality before the law of all the citizens, without distinction of origin, of race, of sex [and] of religion.

⁴⁵³ https://www.constituteproject.org/constitution/Nigeria_1999.pdf (accessed 20 April, 2023)

⁴⁵⁴ https://www.constituteproject.org/constitution/Ghana_1996.pdf (accessed 20 April, 2023)

It respects all beliefs [croyances].

The official language of the Republic of Senegal is French. The national languages are the Diola, the Malinké, the Pular, the Sérère, the Soninké and the Wolof and any other national languages which shall be codified.

The motto of the Republic of Senegal is: "Un Peuple - Un But - Une Foi" [One People, One Goal, One Faith].

The flag of the Republic is composed of three bands [,] vertical and equal, of green, gold and red color. It has [porte], in green, in the center of the gold band, a star of five points.

The law determines the seal and the anthem of the Republic.

The principle of the Republic is: government of the people [,] by the people [,] and for the people.

The legal implication of this Article 1 is that the provisions of articles 7⁴⁵⁵ to 25 of the Constitution and other domesticated international law instruments in the area of human rights are all applicable in Senegal without any exemption. Thus, Title II of the public freedoms and the [freedoms] of the human person of the economic and social rights and of the collective rights, shall be protected without exemption in Senegal.

The ECOWAS Community Court of Justice has been the champion of entrenching democracy, human rights, rule of law, peace and stability in the ECOWAS region by the interpretation and enforcement of sources of the Community's law and order.

⁴⁵⁵Article 7: The human person is sacred. It is inviolable. The State has the obligation to respect it and to protect it. Every individual has the right to life, to liberty, to security, to the free development of his personality, to corporeal integrity, notably to protection against all physical mutilations. The Senegalese people recognise the existence of the inviolable and inalienable rights of man as the basis of all human community, of peace and of justice in the world. All human beings are equal before the law. Men and Women are equal in right [droit]. The law promotes [favorise] the equal access of women and men to the mandates and functions. There is in Senegal no constraint [sujet], or privilege arising from birth, from person or from family.

Article 8- The Republic of Senegal guarantees to all citizens the fundamental individual freedoms, the economic and social rights as well as the collective rights. These freedoms and rights are notably: the civil and political freedoms: freedom of opinion, freedom of expression, freedom of the press, freedom of association, freedom of assembly, freedom of movement [déplacement], [and] freedom of manifestation, the cultural freedoms, the religious freedoms, the philosophical freedoms, the syndical freedoms, the freedom of enterprise, the right to education, the right to know how to read and to write, the right to property, the right to work, the right to health, right to a healthy [sain] environment, [and] the right to plural information. These freedoms and these rights are exercised within the conditions provided for by the law.

In the case of *Ifoema Nnalue & 20 Ors v. Federal Republic of Nigeria*, the Court held that the Federal Republic of Nigeria, as a party to the African Charter, is under obligation to preserve human lives, prohibit the practice of torture, respect the integrity of human beings (Article 5) and respect the freedom and security of human beings (Article 6). The Court held that every State Party to the said Charter, and more generally, any State Party to any legal instrument prescribing respect for right to life, physical integrity of human beings and prohibition of torture, remains under obligation to employ all the means at its disposal to prevent all acts and practices which tend to go contrary to those obligations. The State shall guarantee the actual implementation of the stipulated rights, notably within the context such as submitted before this Court in the instant case, where it is against the State's agents, i.e. against persons acting directly under the State's authority—State police and security forces—that the complaints are made. That hierarchical relationship of authority creates, at any rate, a presumption of default on the part of the State in its obligations.

Also, in *Chude Mba v. Republic of Ghana*, the Court held that:

Those instruments on which the present action is based are legal instruments ratified by and binding on Member States of ECOWAS, including the Defendant who is under the duty to respect and protect the rights enshrined therein. See this Court's decision in Suit No. ECW/CCJ/APP/01/09 Amoussou Henri V. The Republic of Cote D'ivoire, Judgment No. ECW/CCJ/JUD/04/09 of 17th December 2007.

Moreso, in *Deyda Hydara Jr. & 2 Ors v. Republic of Gambia*, the Court held that these provisions guarantee the right to life and also freedom of expression. The right to life imposes an obligation on States to investigate all acts of crime and bring perpetrators to book. A State will be neglecting its obligation under international law and treaty if it does not carry out effective investigations into crimes committed on its territory. A State also will be in breach of international law and treaty obligations if it fails to protect media practitioners, including those critical of the regime. Freedom of expression also includes the freedom to criticise the government and its functionaries, subject to limitations imposed by the domestic laws.

Article 2(3) (a) of International Covenant on Civil and Political Rights is equally applicable to the Defendant to ensure effective investigations into the matter. On the question of the enforceability of the judgment of the ECOWAS Community Court, the provision of Article 19(2) of the Protocol (A/P1//91) on the Community Court of Justice provides that the decisions of the Court are final and immediately enforceable. Thus, for the ECCJ, judgments of the court are binding.

The Member States are required to take immediate steps to comply with the remedies imposed on them. Notwithstanding, concerns have arisen regarding the legitimacy of the enforceability of the ECOWAS Court, as the power given by the ECOWAS Revised Treaty⁴⁵⁶ to Heads of State and Governments to impose sanctions has yet to be exercised.⁴⁵⁷

It must be noted that Article 24(2) and (3) of the Supplementary Protocol of the ECOWAS Court provides that:

execution of any Judgment of the Court shall be in the form of a 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 that Member State. Upon the verification by the appointed authority of recipient Member State that the writ is from the Court, the writ shall be enforced.⁴⁵⁸

Articles 22(3) of the Protocol and 5(2) of the ECOWAS Revised Treaty mandates Member States, in accordance with their Constitutional provisions, to immediately take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of the Treaty, including the execution of the decisions of the Court. By virtue of these provisions, Member States of ECOWAS are mandated to ratify and domesticate the ECOWAS Treaty, protocol and other legal instruments for the effective and unimpeded implementation of the provisions of the Treaty including the enforcement of the judgments of the Court. Thus, any refusal, failure and/or neglect by any Member State to implement the above provisions shall not render the judgments of the Courts unenforceable, it will only lead to depriving a successful party of the enjoyment of the fruits of his judgment.⁴⁵⁹

It is important to note that Article 77 of the ECOWAS Revised Treaty empowers the Authority of Heads of State and Government of ECOWAS to impose certain sanctions on any Member State who fails to fulfill its obligations to the community.⁴⁶⁰ This power is however yet to be exercised by the apex organ of ECOWAS. Thus, unless Member States are compelled to comply with the judgments of the ECOWAS Court, the confidence in the Court will be eroded so much so that the Court may be unable to entertain any applications from any person in respect of the violations of the fundamental rights of the citizens of ECOWAS.³⁷⁸

⁴⁵⁶See article 24(4) of the Supplementary Protocol.

⁴⁵⁷Media defence, introduction to litigating digital rights in Africa <https://www.mediadefence.org/ereader/wp-content/uploads/sites/2/2020/12/Module-10-Introduction-to-litigating-digital-rights-in-Africa.pdf> (accessed 6 April 2023).

⁴⁵⁸See C Okeke and K Lamidi, Nigeria 'Enforcement of The Judgments of The ECOWAS Court' (2018) <https://www.mondaq.com/nigeria/human-rights/755842/enforcement-of-the-judgments-of-the-ecowas-court> (accessed 6 April 2023).

⁴⁵⁹As above.

5. Human Rights Protection as a Critical Factor in Democracy, Peace and Security

Human rights remain one of the most fundamental bases for rule of law, democracy and development across the world. Recognition of citizens' rights has become a pillar in constitutional democracy and a major principle of constitutionalism. The right to life, freedom of expression, privacy, association, movement, and to participation in the Government of one's country, amongst others, all accrue to us by virtue of the fact that we are human beings. It originates from the Magna Carta Charter (1215) which set limits on the powers of royal Government in Thirteenth Century England; the 1776 American Declaration of Independence; the 1789 French Declaration *des droits de l'Homme et du citoyen* (Declaration of the Rights of Man and Citizen)³⁷⁹; and the First Geneva Convention of 1864.

The concept of justice is rooted in the fabric of human rights, even as law, justice and human rights are at the core of democracy, survival and development of individual and nation States. However, it is not treated with the seriousness that it deserves in order to enthrone a just society where freedom and equality are hallmarks of sustainable development.³⁸⁰ Although all human beings are said to be equal in law, in reality discrimination and inequality persist in law and access to justice.

The global political, cultural, social and economic environment has witnessed the proliferation of regional economic blocs for the purpose of integration, increase in trade and removing restrictions to international trade and flow of goods and services, since the birth of the World Trade Organisation in 1995.³⁸¹ The purpose of integration is to present a common objective set for socio-economic attainment in order to preserve democracy, peace and security.

³⁷⁷As above. These sanctions include the suspension of new community loans or assistance, suspension of disbursement on on-going community projects or assistance programmes, exclusion from presenting candidates for statutory and professional posts and suspension from participating in the activities of the community.

³⁷⁸Good examples are the case of *SERAP v. Federal Republic of Nigeria & Anor* and *Sambo Dasuki v. Federal Republic of Nigeria*. In the SERAP case, the ECOWAS Court ruled that the Federal Government of Nigeria should provide free and compulsory basic education to every Nigerian child but it has not been enforced by the government though it was a judgment gotten in 2010. Also, in the Sambo Dasuki case, the Federal Government was ordered to release the former National Security Adviser which the government failed to obey.

³⁷⁹F Viljoen *International human rights law: a short history*. (2012). <https://www.un.org> (accessed 6 April 2023).

³⁸⁰Ezeilo, *Are we born free and equal?* (n 55) 13.

³⁸¹World Trade Organisation (WTO).

It has been contended that socio-economic and cultural integration would translate to maintenance of peace and order in the world. Integration could be for different reasons. For economic intents, nations can agree on policies which would result in greater economic reliance. Regional Integration involves the process of removing barriers to trade among countries irrespective of their geographical affinity to each other. It aims to remove trade tariffs and dichotomy between locally made goods and those of foreign origin.³⁸² Economic integration could be defined as a process and as a state of affairs. It is viewed as a process where integration entails the removal of all forms of discrimination between economic units of various nationalities; while as a state of affairs, it deals with the non-existence of different forms of discrimination between national economies.³⁸³

However, the mandate of ECOWAS, which was originally conceived as an economic bloc, has transcended economy and now dovetailed into propagation of democracy, entrenchment of rule of law and prevention and/or resolution of conflicts. The Treaty of Lagos, from 1975 did not contain components relating to the issues of peace, security, stability and governance. The maintenance of regional peace, stability and security, through the promotion and strengthening of good neighborliness, was therefore incorporated to the Revised Treaty of ECOWAS in 1993 as one of the fundamental principles outlined in Article (4).³⁸⁴ However, due to the regional instability in the ECOWAS region, Member States adopted the Protocol on Non-Aggression in 1978. The Protocol was enriched and in May 1981, ECOWAS Member States signed the Protocol on Mutual Assistance Defense for mutual assistance in defense against any armed threat or aggression on a Member State.

The Defense Committee and Council as well as the Allied Armed Force of the Community were both created to serve the stated purpose. With growing tensions in the West African region, a coalition of Anglophone Member States decided to establish a multilateral armed force in 1990 to maintain peace and security, known as the Economic Community of West African States Monitoring Group (ECOMOG).

³⁸²N, E Onyeabor & O Alozie 'The Economic Community of West African States and its members: a success story of integrated development' (2018) *Recht in Afrika – Law in Africa – Droit en Afrique* 21

³⁸³B Balassa, 'Theory of economic integration' (Westport, Connecticut, USA: Greenwood Publishing Group 1961) 173

³⁸⁴ <https://ecowas.int/wp-content/uploads/2022/08/Revised-treaty-1.pdf> (accessed 6 April 2023).

The Monitoring Group intervened in, among others, Liberia in 1990, Sierra Leone in 1997 and in Guinea-Bissau in 1999.³⁸⁵ The fundamental objective of the ECOMOG is to safeguard against the abuse of the human rights of citizens of Member States due to internal and or external conflicts.

Additionally, under the Economic Community of West African States, the region has witnessed the rejuvenated resolve, not only to achieve complete economic integration by establishing functional organs of operation such as the parliament, Commission, Court of Justice and others, but also in the area of human rights. The regional economic bloc, ECOWAS, has successfully integrated human rights into its economic development regime. Consequently, ECOWAS citizens can confidently seek redress in the ECCJ for various forms of violations to their human and environmental rights.³⁸⁶ In *Mr. Sikiru Alade v Federal Republic of Nigeria (FRN)*,³⁸⁷ Sikiru Alade, a citizen of Nigeria, applied to the ECOWAS Community Court of Justice, alleging that on the 9th of March 2003, he (Mr. Alade) was arrested by a plainclothes person, who claimed to be a police officer. He stated that the said police man forcefully dragged him to Ketu Police Station and detained him until the 5th of May 2003, when he was arraigned before a Magistrate Court in Yaba, Lagos, Nigeria for an alleged crime of armed robbery. That after the arraignment he was detained and ordered to be remanded in prison custody under a procedure in the Nigeria Criminal Justice System known as 'Holding Charge'. Hence, he (Mr. Alade) filed an application against the violation of human rights, pursuant to Article 9(4) of Protocol A/P1/7/91 as amended for the reliefs stated. He sought for a declaration that the indeterminate detention without trial under the holding charge constitutes a violation of the right to fair trial within a reasonable time, presumption of innocence and the right to personal liberty guaranteed under Article 6 of the African Charter of Human and Peoples Rights, Articles 2 (3) sub (1) and (2) of the International Covenant on Civil and Political Rights,

³⁸⁵<https://archive.uneca.org/oria/pages/ecowas-peace-security-stability-and-governance>

³⁸⁶Nwafor, *et al* (n70)

³⁸⁷(2001) AHRLR 60.

among other reliefs. The ECCJ held firstly, on the issue of jurisdiction, that the court has jurisdiction to determine cases of violation of human rights that occur in the country of any Member State.³⁸⁸ Furthermore, the Court upheld the application that the detention of applicant from 2003-2004 in Kirikiri Maximum Prison, Apapa, Lagos on a holding charge is a manifest violation of the applicant's human right as provided under Article 9(4) of the Protocol of the ECCJ and Articles 6 and 7 of the African Charter. The Court awarded the sum of Two Million, Seven Hundred Thousand Naira damages to Mr. Sikiru Alade for the violation of his right. This case has buttressed the ECCJ inclination to work as a watchdog for the protection of human rights and promotion of peace and security in the member States.

Nevertheless, in the area of preventing conflicts and restoring peace and security within the region, the ECOWAS has performed very well with the successes recorded in Liberia and Sierra Leone.³⁸⁹ The ECOWAS Army³⁹⁰ in these instances intervened for the first time in the internal armed conflict of sovereign States which are members of the regional economic bloc for the purpose of restoring peace and security. This could not have been achieved without the regional integrating platform provided through the auspices of ECOWAS, which is the only regional economic bloc in the world with a standby Army. The development of ECOWAS security mechanisms emerged during the 1990s mainly as a consequence of ad hoc conflict intervention in Member States facing domestic turmoil and fighting.³⁹¹ The standby army of the ECOWAS Monitoring Group became the mechanism for conflict prevention, management and control in the region.³⁹² ECOWAS intervened in the political conflict in Guinea Bissau in 1998 and Gambia in 2017. ECOWAS has also been involved in mediations over political impasse in Guinea, Liberia, Mali, to ensure political stability, peace and security of the sub-region. In the area of food security, ECOWAS has liberalised the trade which has multiplied the impact on the movement of food products within the sub-region, notwithstanding the challenge of food security within the region.

³⁸⁸Protocol of ECOWAS Court, Article 9 (4), also *Afolabi v FRN* (2008) CCJELR (pt 1), paras 31-33.

³⁸⁹Democracy cannot flourish in the absence of security.

³⁹⁰ECOWAS Monitoring Group (ECOMOG)

³⁹¹S Page and S Bilal, '*Regional integration in Western Africa*', *overseas development institute* (2001), 21.

³⁹²As above.

It is worth mentioning that:

Food security exists where all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.³⁹³

It is important to point out that the West African food market system depends on cross-border flows of food produce and the entrenched right of free movement of ECOWAS citizens. The sub-region of ECOWAS is the first Regional Economic Cooperation (REC) to take action towards the implementation of the African Union (AU) Comprehensive Africa Agricultural Development Programme (CAADP). ECOWAS took a step further by signing the regional compact in 2009 for the Regional Agricultural Investment Plan (RAIP) in 2010.³⁹⁴ Undoubtedly, conflict is a major threat to food security and the enjoyment of the right to food. Furthermore, it demonstrates the interrelatedness or connectedness of human rights, democracy, peace, and development. As has been rightly observed, the right to food requires States to provide an enabling environment in which people can use their full potential to produce or procure adequate food for themselves and their families.³⁹⁵

6. CONCLUSION

The concept of human rights primarily concerns the relationship between the individual and the State. Individual enjoyment of these rights often depends on state responses to their international obligations —what is also known as state responsibility to respect, protect and fulfil rights.³⁹⁶

Article 2 of the ICCPR reiterates the obligation of each State party to the Covenant to take necessary steps, in accordance with its constitutional processes by adopting such laws or other measures as may be necessary to give effect to the rights recognised in the p Covenant.

The obligation to respect, protect and fulfil (RESPROFIL) human rights is reinforced by ICCPR and other human rights instruments.

³⁹³World Food Summit 1996.

³⁹⁴J Bossuyt, 'Political Economy of Regional Integration in Africa', ECOWAS Report 2016, 36.

³⁹⁵J Ezirigwe 'Human Rights, Human Wrongs: Addressing Injustice in Agri- Businesses in Nigeria' in O Nnamuchi and N Nwafor (eds), *Joys of Human Rights: Essays in Honour of Professor Joy Ngozi Ezeilo* (Lagos: Malthouse Law Books, 2021) 287.

³⁹⁶Ezeilo, *Are we born free and equal?* (n 55) above, 72.

First, the 'obligation to respect' requires States to refrain from interfering in the enjoyment of the rights of individuals and groups.³⁹⁷ This obligation prohibits States from taking actions that may undermine the enjoyment of rights.³⁹⁸ Second, the 'obligation to protect' refers to the duty of State parties to protect individuals against abuses by third parties such as non-State actors, foreign State agents, or State agents acting outside of their official capacity.³⁹⁹ There are two dimensions to this obligation, namely, preventive and remedial- that is, taking measures to prevent such abuse and responding to the abuse when they occur, by providing access to an effective remedy for the violation.⁴⁰⁰ Thirdly, with regard to the 'obligation to fulfil', there is a requirement upon States to take positive action to ensure the actualisation of human rights.⁴⁰¹

ECOWAS has stood the test of time in terms of fulfilling its traditional aims and objectives as an economic bloc and additionally by building strong institutions which help to preserve, promote and disseminate democratic values and ideas of human rights as a critical factor in the region. It is also germane to add that the West Africa region is a focal point of old and new forms of conflicts. These include terrorism, violent extremism, organised crime, piracy, unrest due to social inequality, land use conflicts, herders/farmers attrition and election-related violence, all which can negatively impact on the human rights of the ECOWAS citizens in many ways. Some of these security and democratic challenges cannot be resolved with national measures alone. They require regional responses, coordinated by the ECOWAS.⁴⁰²

The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security which was adopted in December 1999, is arguably the most comprehensive Protocol relating to peace and security in the region. It addresses peacekeeping, humanitarian support and peace building capabilities as well as the issue of cross border crime. Moreover, ECOWAS Member States also adopted the Supplementary Protocol on Democracy and Good Governance in 2001 as an instrument to promote peace and security in West Africa. In this context, ECOWAS has established institutions, and programmes in order to realise the commitments of the above-mentioned Protocols, including: the Mediation and Security Council, Early Warning and Response Network,

397Nnamuchi and Nwafor (n 83) above, 545.

398As above.

399As above.

400As above.

401As above.

402 <https://www.giz.de/en/worldwide/78115.html> (accessed 6 April 2023).

the ECOWAS Standby Force, the ECOWAS Conflict Prevention Framework, and the ECOWAS and Civil Society.⁴⁰³

In the final analysis, the ECOWAS is fortunate to have a court of justice with an iconoclastic bench which has enforced the duty of the Member States to uphold the precepts of human rights. The ECCJ has lived up to the expectations of the saying that 'judiciary is the last hope of a common man', especially in the area of human rights grievance remedial mechanism.

What remains for its Member States is to observe their duties and obligations to respect, protect and fulfil human rights.

⁴⁰³ <https://archive.uneca.org/oria/pages/ecowas-peace-security-stability-and-governance>. (Accessed 6 April 2023).

SUB-THEME 4

**LACK OF FREE, FAIR AND TRANSPARENT ELECTIONS AS
A MAJOR SOURCE OF CONFLICT: HOLDING MEMBER
STATES ACCOUNTABLE TO THEIR TREATY OBLIGATIONS
AND THE SANCTIONS REGIME**

**LACK OF FREE, FAIR AND TRANSPARENT ELECTIONS AS A
MAJOR SOURCE OF CONFLICT: HOLDING MEMBER STATES
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SANCTIONS REGIME
BY
HASSANE DIANE**

SECRETARY GENERAL OF THE NATIONAL COUNCIL OF HUMAN RIGHTS
(NCHR), CÔTE D'IVOIRE

Introduction

In recent years, West Africa seems to have returned to the old demons of military coups from a certain era that was thought to be over with the democratisation processes that began in the 1990s. The willingness of Member States of the Community to “*promote and consolidate a democratic system of government in each Member State as provided for in the Declaration of Political Principles adopted on 6 July 1991 in Abuja*”⁴⁰⁴ is still confronted with the endogenous practical realities of the accession to power and the exercise of political powers in the countries of the sub-region. In the space of eighteen months, three democratically elected regimes in states of the Organisation have suddenly experienced unconstitutional changes of government following the coup de grace of three military putsches. After Mali on 18 August 2020, Guinea on 5 September 2021, Burkina Faso experienced the overthrow of its democratic constitutional order on 24 January 2022.

The exasperation of public opinion in the face of democratic, social, economic and security governance deficits in these countries seems to have provided a breeding ground for these coups de force, acclaimed by populations disillusioned by unfulfilled promises of a better future from democratically elected governments. These same peoples, as well as those of other countries in the sub-region, had, ten or twenty years ago, expressed their displeasure at the excesses and violations of their rights by previous regimes led by the military, some of whom had exchanged their uniforms for politicians' outfits.

This situation of democratic backsliding in the sub-region for the accession to state power undermines all the efforts of the international community, the African Union (AU), and particularly those of ECOWAS. Indeed, these regional organisations are working to entrench participatory democracy and political pluralism in member countries through the adoption of a set of instruments and Declarations of Political Principles banning the use of force against democratically elected governments.

⁴⁰⁴Article 4 of the ECOWAS Revised Treaty

The process of strengthening constitutional governance through free, fair and transparent elections as the only means of democratic accession to state power, which has been part of the political agenda of the sub-regional organisation since July 1991, is being challenged more than ever.⁴⁰⁵ Its insistent demands for the restoration or rapid return to constitutional orders addressed to the transitional regimes put in place by the military and the sanctions deployed against some of them seem to have counterproductive effects with a hint of nascent nationalism noted, which is not without consequences for the dynamics of the sub-regional integration process itself.

However, ECOWAS does not lack resources and tools to anchor democratic and participatory governance in the customs of member states. It has developed a range of instruments to prevent and manage political crises, and to address institutional weaknesses in member countries, in order to preserve sub-regional peace and security. To this end, it has developed a framework of political principles whose objective is to ensure the democratic transfer of power in member states through free, fair and transparent elections, thereby excluding all modes of gaining or retaining power without elections that could be sources of conflict.

Consequently, there are questions about the content of the architecture put in place by ECOWAS to ensure free, fair and transparent elections in the sub-regional space in the member states. Doesn't the multiplication of crises linked to the democratic accession to power in the ECOWAS region reveal the ineffectiveness of state obligations and the sanctions regime resulting from the treaties? Is it not time to rethink the Community's legal framework for democratic elections in order to significantly reduce conflict?

To address this question, considering the points we have been asked to examine under this sub-theme, the paper will focus on the ECOWAS architecture for free, fair and transparent elections in member states (I), and on the regimes of accountability and sanctions in case of failure by member states to comply with their treaty obligations (II).

⁴⁰⁵Date of adoption of the ECOWAS Declaration of Political Principles by the Authority of Heads of State and Government in Abuja.

I. ECOWAS Structure for Free, Fair and Transparent Elections in Member States

Elections are at the heart of democracy and remain the principal means by which individuals can exercise their right to participate in public affairs. Democracy and the rule of law include free and fair elections, the key to peace and stability in a country. The absence of elections therefore appears to be a source of political conflicts and serious crises that threaten the very fabric of life together and lead to armed clashes or military intervention in the political sphere to overthrow the democratic governments.

ECOWAS and other community integration organisations have not been indifferent to the conflictive political history of member states in the West African sub-region and the overthrow of civilian powers in contexts of deteriorating democracy due to the absence of free and transparent elections or the refusal to hold them on time in order to remain in power after the constitutional deadline. The latter is committed to putting in place mechanisms and instruments aimed at preventing and curbing problems that destabilise the constitutional order in the Member States, with a view to preserving security, peace and stability throughout the Community space. However, it can be observed that despite the existence of this legal and institutional framework to definitively anchor the political principles adopted in July 1991 in Abuja in the political cultures of the member states, factors responsible for the undermining of the constitutional order and participatory democracy linger more than twenty years later.

1- The ECOWAS legal and institutional framework for the institutionalisation and consolidation of the constitutional order and participatory democracy in member states

The democratisation winds of the 1990s were marked by democratic transitions on the African continent in general and in West Africa in particular, with varying fortunes depending on the country. There have been conflicts and crises of various kinds leading to unconstitutional changes of government, linked to what could be described as election crises (absence, refusal to hold elections, etc.).

In order to embody the values and defend the political principles of refusing any unconstitutional change of government and accession to power by any means other than free, fair and transparent elections, the Community legislator has, by means of two legal instruments, opened up the peaceful way for all the States of the Community to resolve the problems destabilising the constitutional order and putting a stop to political democracy. These are the ECOWAS

Protocol/A/SP1/12/01 on Democracy and Good Governance adopted in December 2001, supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security adopted in December 1999, but above all, and more specifically, the African Charter on Democracy, Elections and Governance, adopted on 30 January 2007 and which came into force on 15 February 2012. Indeed, these instruments explicitly link the objective of conflict prevention and resolution with the desire to establish strong political principles such as the Community's opposition to any accession to power by unconstitutional means and the possibility of intervening in a Member State in the event of serious and massive human rights violations.

a. Supplementary Protocol on Democracy and Good Governance

The determination of the community organisation to always frame its member states with new political and institutional norms to promote peace, security and stability in the region by developing the “Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security” is very real. The Supplementary Protocol of 21 December 2001, which complements the Protocol of 10 December 1999 in the field of “internal crisis prevention, democracy, good governance, the rule of law and human rights”, clearly establishes a direct link between respect for democratic standards and good governance in the Member States and the prospects for peace and security. It defines constitutional principles common to all ECOWAS Member States which include, among others, the separation of executive, legislative and judicial powers; the enhancement and strengthening of parliaments; the independence of the judiciary; and the prohibition of unconstitutional changes and undemocratic ways of gaining or keeping power.⁴⁰⁶ It also sets out a series of principles regarding elections in member states and the role of ECOWAS in observing and assisting them.⁴⁰⁷ For example, it provides that “*no substantial reform of the electoral law should take place in the six months preceding the elections without the consent of a large majority of political actors*”; and that “*the bodies in charge of the elections should be independent and/or neutral and have the confidence of the actors and protagonists of political life*”. Furthermore, at the request of any Member State, ECOWAS may provide aid and assistance in the organisation and conduct of any

⁴⁰⁶Art. 1 (a), (b), (c) of the Supplementary Protocol of 21 December 2001

⁴⁰⁷Section II of the Supplementary Protocol of 21 December 2001

election in any form. The President of the ECOWAS Commission may send an election monitoring or observation mission to the country concerned. In the run-up to an election in a Member State, he sends a fact-finding mission to the country concerned to collect all the texts to be used in the elections concerned. He may also collect all information and elements characterising the framework and conditions in which the elections are to take place. In addition, it may gather all relevant information on competing candidates or political parties, meet with all candidates, political party officials and government authorities and other relevant officials. Finally, the President of the ECOWAS Commission assesses the state of preparations and collects all useful elements for an accurate assessment of the situation.

The Protocol details the operation of election observation missions until the report is submitted to the President of the Commission, who forwards it, together with any personal observations, to the Mediation and Security Council, which decides on the recommendations to be made to the State concerned and/or to all Member States and, where appropriate, on the measures to be taken. The main purpose of these fact-finding and election observation missions is to prevent the usual tensions during election periods from degenerating into violent conflict.

The Supplementary Protocol also aims to set community standards for the role of the military and security forces in a democratic framework. It states, *inter alia*, that “the army and public security forces shall be subject to the regularly constituted civilian authorities”, prohibits “the use of arms for the dispersal of non-violent meetings or demonstrations”, authorises “only the use of minimal and/or proportionate force in the event of a violent demonstration”, and prohibits “in any case the use of cruel, inhuman and degrading treatment”. It states that “The armed forces, the police and other security agencies shall during their training receive instructions on the Constitution of their country, ECOWAS principles and regulations, human rights, humanitarian law and democratic principles”.

To ensure that the West African sub-region is spared crises, the Supplementary Protocol finally includes in its Chapter II, a system of sanctions that the Authority of Heads of State and Government can take against a Member State in the event of “breakdown of democracy by any means whatsoever and in the event of massive violation of human rights ...”.

On the proposal of the Mediation and Security Council, it may be decided at an appropriate time to take sanctions which may vary by gradation from the refusal to support the candidatures presented by the Member State concerned for elective positions in international organisations to the suspension of the State concerned from all ECOWAS bodies through the refusal to hold any ECOWAS meeting in the State concerned. In the event of suspension, the Protocol provides that ECOWAS will continue to “monitor, encourage and support any effort by the suspended Member State to return to normal democratic institutional life”.

b. The ECOWAS Conflict Prevention Framework

The Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security as defined by the Initial Protocol of December 1999 and supplemented and amended by the Supplementary Protocol of December 2001 has enabled ECOWAS to further legitimise and structure its interventions in emerging or declared political crises in member countries. At the level of the Authority of Heads of State and Government, but also at the level of the Executive Secretariat (and later the Commission), it has been called upon to pronounce on the quality of electoral processes in a number of member countries, as well as on unconstitutional modes of accession to power, such as the situation in Togo after the death of President Gnassingbé Eyadema in 2005. The outbreak of armed conflict in Côte d'Ivoire in September 2002, the return to civil war in Liberia prior to Charles Taylor's exile in August 2003, the continued stabilisation of Sierra Leone, the deterioration of the political and economic situation in Guinea, the 2005 elections in Guinea-Bissau and the persistence of politico-military tensions immediately put the ambitions of the Community Mechanism to the test.

The transformation of the Executive Secretariat into the ECOWAS Commission, which became effective in January 2007, has also enhanced the visibility and supranational character of the organisation. The Mediation and Security Council adopted on 16 January 2008 a Regulation defining the ECOWAS Conflict Prevention Framework (ECPF), a document that aims to clarify the strategy for implementing the principles contained in the two protocols of 1999 and 2001. In the new document, it is stated that ECOWAS has “established several promising conflict prevention bodies to support its mandate, including the Early Warning System, the Mediation and Security Council, the Council of Elders and Special Mediators”.

As can be seen, the Community's framework for avoiding conflicts related to the non-organisation of periodic elections in member countries with a view to

consolidating participatory democracy is well robust with the legal instruments adopted and the conflict prevention mechanism. However, pernicious factors still threaten democratic electoral processes and constitutional order in member states with political crises and military coups in recent years.

2- Factors responsible for undermining democratic electoral processes and the constitutional order

The periodic holding of democratic elections is an obligation for the Member States of the Community under their international obligations resulting from treaties ratified by them and other international commitments. The vitality of a democracy is measured by credible and regular elections aimed at ensuring a peaceful transfer of state power and political alternation in the exercise of state power. The Bamako Declaration of 2000 recalls that democracy “*requires, in particular, the holding of free, reliable and transparent elections at regular intervals*”. It stipulates that States must ensure that their organisation “*from the preparatory operations and the electoral campaign to the counting of votes and the proclamation of results, including, where appropriate, disputes, is carried out in complete transparency and is the responsibility of credible bodies whose independence is recognised by all*”.

Although enshrined in the Declaration of Political Principles adopted in Abuja and in the binding legal instruments of the community organisation to which member states have acceded, democratic electoral processes in West African countries continue, after a time of hope for democratic renewal, to suffer from ills or vices, thus perpetuating unconstitutional changes of government through undemocratic means. The new factors undermining free, fair and transparent elections are mainly characterised by unconstitutional changes of government, which some have described as constitutional coups d'état, as well as indefinite postponements of elections in turbulent political contexts that are often orchestrated to that end.

Indeed, the constitutional mutations on the grounds of tidying up the constitution have appeared today as means tinted with the varnish of legality with a view to modifying the fundamental law and thus changing or distorting the rules of the electoral game in the run-up to electoral events. They are also used to lift the constitutional ban on exceeding tenure limits, thus leading to a monopolisation of power by the rulers. Such gimmicks and practices, which undermine trust between political actors and discredit the institutions responsible for regulating relations between the different powers, inevitably preclude the holding of fair and

transparent elections. They result in the violation of the International obligations of the Member State⁴⁰⁸, obligations with which all its organs are obliged to comply. The referendum of 22 March 2020 organised by the Guinean President Alpha CONDE to claim a third mandate and the setting in motion of a procedure to revise the Constitution of 2 June 1991 by President Blaise COMPAORE in Burkina Faso to challenge the constitutional provision relating to the presidential term of office are quite illustrative of these constitutional tricks which sow the seeds of conflicts linked to undemocratic electoral processes.

These practices of circumventing the rules of electoral competition in order to remain in power in defiance of democratic norms and transparency not only weaken the institutions and make them lose the confidence of the actors, but also open the way to permanent contestation of the legitimacy of the established power. A poisonous national social and political climate is developing, exposing the country to the inevitable overthrow of the constitutional order by a popular revolt or by the military, which will claim to be the guarantor of stability or of the recovery of political and institutional life in danger.

It is in order to avoid such factors leading to the political destabilisation of countries and the West African sub-region that member states are subject to a regime of community accountability by virtue of their international obligations, and to sanctions in case of failure to comply.

II. Liability and sanction regimes in the event of failure by Member States to comply with treaty obligations

The ECOWAS legal and institutional arsenal for preserving stability in the region and protecting it from crises of any kind linked to the absence of democratic elections or the holding of those likely to lead to post-electoral conflicts, contains a regime of liability for member states and sanctions

1- The mechanism of the State liability regime

In accordance with the principle of *Pacta sunt servanda*, ECOWAS member states are held accountable for their treaty obligations to respect electoral democracy and

⁴⁰⁸According to its Article 23.5, the ACDEG considers "Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.

⁴⁰⁹Art. 26 of the 1969 Vienna Convention on the Law of Treaties, which provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith. »

⁴¹⁰Universal Declaration of Human Rights of 10 December 1948, International Covenant on Civil and Political Rights, etc.

These standards imply as part of the responsibilities of Member States the assurance of a separation of executive, legislative and judicial powers, as well as popular participation in decision-making, strict adherence to democratic principles, and the decentralisation of power at all levels of government.

Member States should ensure that elections are held periodically, “at sufficiently short intervals to ensure that the authority of the government continues to be based on the free expression of the will of the people”⁴¹². In this regard, it is important to establish an adequate and realistic electoral timetable so that each stage of the process allows for the effective exercise of the right to vote and to be elected, as well as all other necessary rights, with sufficient time for effective campaigning, public information, voter registration, training and administrative, legal, logistical and training arrangements. Such a timetable is essential for a sustainable and resilient democratic order and is necessary in view of the obligation of States to give effect to the rights recognised in the provisions of treaties ratified by them, and in particular those of the Protocol on Democracy and Good Governance, which prescribes in Article 2.2 that “*All the elections shall be organised on the dates or at periods fixed by the Constitution or the electoral laws*”.

To this end, existing laws that may have the effect of discouraging political participation must be repealed or amended, as well as emergency or other exceptional laws that unduly restrict fundamental rights. Guarantees of the fundamental right to periodic, free and fair elections should be enshrined in constitutional or other relevant laws. Fundamental freedoms in electoral processes - freedom of expression, opinion, information, peaceful assembly, association and movement and the right to non-discrimination, education and security of the person - should also be guaranteed by law and not be impeded in their implementation. Legal provisions should be clear, concise and sufficiently specific to ensure legal certainty and predictability and to avoid the risk of abuse of power, discriminatory application or infringement of the rights of free expression or full participation.

⁴¹¹Art. ¹ of the ECOWAS Protocol on Democracy and Good Governance.

⁴¹²General Comments No. 25 (57) of the United Nations Human Rights Committee, adopted under article 40, paragraph 4, of the International Covenant on Civil and Political Rights.

The legal framework for elections should also encourage the participation of women, be available in minority languages and be accessible to all persons with disabilities. States should establish an effective legal framework for the exercise of electoral rights, in accordance with their international obligations and through a participatory, non-discriminatory and transparent process, to enhance its acceptance and legitimacy. This includes observance of the principles of legal certainty and predictability. The participation of civil society can strengthen the appropriation of these rules by all members of society. This, in turn, can reduce disputes over electoral frameworks and procedures, and limit and mitigate tensions and the risk of electoral violence.

For the UN Human Rights Committee, the circumstances for postponing elections in a transparent process must be limited, legal and proportional. They should not be intended to corrupt or unnecessarily delay the electoral process. Deferral measures must comply with all international standards applicable to such derogations and must not threaten democracy. Any decision to postpone elections must be based on broad consultations and the necessary conditions must be in place to foster and ensure an inclusive dialogue and achieve political consensus.

It is therefore incumbent on Member States, by virtue of their international obligations, to fully assume their responsibilities through the establishment of electoral management bodies or institutions, capable of independently guaranteeing the integrity of elections.

2- The regime of sanctions in the event of breaches of treaty obligations

In order to spare the sub-region from constitutional overthrows or undemocratic changes of government in member states, the ECOWAS normative and institutional crisis management architecture has non-military coercive mechanisms. Formerly constituting sanctions of a general nature through embargoes and trade bans, aimed at the very functioning of states run by regimes that came to power by undemocratic means, these mechanisms now take on a targeted character through selective and individual sanctions. These include the freezing of financial assets, travel restrictions and other measures to deprive people of the use of their property.

In this regard, Article 45 of the ECOWAS Protocol on Democracy and Good Governance specifies that *“in the event of a breakdown of Democracy by any means whatsoever and in the event of a massive violation of Human Rights in a Member State, ECOWAS may impose sanctions against the State concerned.*

According to this provision, these sanctions are generally reduced to the refusal to support the candidacies presented by the Member State concerned for elective positions in international organizations; the refusal to organise ECOWAS meetings in the Member State concerned; the suspension of the Member State concerned in all ECOWAS bodies.

It should be noted that the Protocol does not provide for individual sanctions that could be taken by the Authority of Heads of State and Government against the leaders of exceptional regimes that undermine the constitutional order. This does not, however, preclude the use of so-called smart sanctions aimed directly at these leaders by the supreme decision-making body of the community organisation on the basis of the international commitments of the member states, in particular, the rights contained in the African Charter on Human and Peoples' Rights, and the instruments guaranteed in each of the member states of the community as is clear from Article 1.h) of the Protocol on Democracy and Good Governance. Chapter 8 of the African Charter, entitled '*Sanctions for Unconstitutional Changes of Government*', provides for a range of repressive measures for perpetrators of such situations, from prosecution in the State concerned, to denial of political asylum or reception in any other State Party, to the possibility of extradition to the State concerned. Furthermore, the Charter also provides for the imposition of sanctions on any State Party that promotes or supports an unconstitutional change of government in another State

Notwithstanding this repressive deterrent mechanism, the rejection of unconstitutional changes of government is hampered by the persistent intrusion of the military into the political arena in view of the multiplication of coups d'état or attempts to overthrow legitimate government in West Africa. This is happening with total indifference to the sanctions provided for in African legal instruments such as the 2001 ECOWAS Protocol on Democracy, Elections and Good Governance and the 2007 African Charter on Democracy, and taken by the highest authorities of the organisation against military regimes. Peace and security seem to be more threatened than ever in the sub-region. This raises questions about the effectiveness of sanctions taken by ECOWAS leaders to force the military juntas to restore constitutional order. The injunctions of the community organisation and the international community, instead of soft-pedalling the positions of these illegal authorities, lead them to radicalise when they have the support of important sections of their people.

It is therefore imperative for ECOWAS to demand compliance by member states

with its legal and institutional framework on democracy and good governance. In this sense, the introduction of mandatory constitutional convergence rules for the Member States seems more than necessary to strengthen the existing system. The organisation should also encourage and promote democratic change in member countries, strongly condemning all forms of undemocratic regime change. For this reason, open cooperation and synergy of action between the member states is essential if the sanctions taken by the organisation are to be productive and lead to compliance with political rules or the restoration of constitutional order.

CONCLUSION

After this analysis, it should be noted that the democratic deficit still remains a real challenge in West Africa, despite the legal and institutional resources for avoiding political crises linked to electoral processes and political alternation. The disillusionment of ECOWAS peoples with the promises of the democratic offer of the 1990s, which fell short of expectations, is certainly one of the endogenous causes. Efforts by the community organisation must therefore be pursued to constantly rethink the means of democratisation in the African sub-region, so that the people can give their approval to its actions and decisions and constitute the barriers against unconstitutional overthrow of governments and fraud on constitutions in order to maintain power.

It is important to note, however, that all the answers to the overthrow of governments in the member states lie in real, true democracy, and that elections do not exhaust democracy. In his *Report on Improving the Effectiveness of the Principle of Periodic and Genuine Elections of 19 November 1991*, UN Secretary General Javier Perez de Cuellar rightly pointed out the difference between democracy and elections as follows:

“Elections, in themselves, are not the mark of democracy, nor do they establish it. They are not an end, but merely a step, however important or even essential, on the way to the democratisation of societies and the realisation of the right to participate in the government of one's country, as provided for in the main international human rights instruments.”⁴¹³

⁴¹³Report quoted by Kazadi Mpiana, J, in 'The African Union and the Management of Unconstitutional Changes of Government', *Revue québécoise du droit international*, 25(2), p. 141.

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**LACK OF FREE, FAIR AND TRANSPARENT ELECTIONS AS A
MAJOR SOURCE OF CONFLICT: HOLDING MEMBER STATES
ACCOUNTABLE TO THEIR TREATY OBLIGATIONS AND THE
SANCTIONS REGIME**

BY

AMIE N.D. BENSOUDA

MANAGING PARTNER AMIE BENSOUDA & CO. BANJUL, THE GAMBIA

1. INTRODUCTION

This Paper seeks to contribute to the central theme of this very important and timely Conference on Sub-theme 4 - Lack of Free, Fair and Transparent Elections as a Key Source of Conflict: Holding Member States Accountable for their Treaty Obligations and the Sanctions Regime. The Paper explores the connection between the failure to secure the right to free and fair elections as an indivisible part of the political rights assured by the constitutions of Member States to their citizens and the phenomenon of the coup d'état as a means of changing governments - a spectre which has refused to be exorcised, Community efforts notwithstanding. The subject is approached from the perspective of the legal infrastructure and the mechanisms put in place by the Economic Community of West African States (ECOWAS) to address the issue, based on the following suggested parameters:

- (a) Parameters for Free, Fair and Transparent Elections under the Protocol on Democracy and Good Governance.
- (b) Elections Monitoring and ECOWAS Assistance to Member States.
- (c) Factors responsible for the undermining of Free, Fair and Transparent Elections.
- (d) Factors Responsible for the Subversion of Constitutional Democratic Order.
- (e) How to hold Member States accountable for their Treaty Obligations.
- (f) Sanctions Regime for Unconstitutional Change of Government.

The author is mindful that coups are neither a West African nor an African regional phenomenon. Therefore, in discussing the outlined issues the paper examines unconstitutional changes of government not only in the ECOWAS Member States, but also with reference to occurrences elsewhere in the region where this is found to be appropriate or relevant to contextualise the discourse. It is also noted that the present theme is one of several sub-themes within the wider theme which are interrelated. The paper has therefore endeavoured as much as possible to focus the discussion on the issues raised. However, given the scope and interconnection of the sub-themes, there is bound to be some overlap.

The discourse is in five broad parts - a narrative overview which provides a historic context or background; the relevant ECOWAS legal framework and mechanisms in effect; factors which have contributed to undermining the political rights of Community citizens and which have been employed as reasons, whether justified or not, for the perpetuation of unconstitutional takeovers of the state; the ECOWAS accountability and sanctions regime and how these have been applied; and conclusions and recommendations on how adherence to Treaty obligations may be enhanced.

2. OVERVIEW

It seems surreal that a record number of over 100 coup d'états have taken place on the African continent and that the earliest coups date back to the 1950s⁴¹⁴ when movements towards independence from colonial rule had just begun to gather momentum. In 1963, the first military coup d'état in the newly independent West African states occurred in Togo. The coup followed the rise of Etienne Eyadema to power and the tragic murder of the first President of Togo, Sylvanus Olympio, outside the American embassy in Lome. It was met with swift condemnation by multiple African countries and is also credited with being one of the key factors that led to the formation of the Organisation of African Unity (OAU). For the sub-region it was to mark the beginning of numerous military takeovers that were to impede the growth of the continent and to stunt its attempts to transcend its colonial imperial past into democratic systems whereby government and power would be acquired and transferred through free, fair and transparent elections. Between 1963 to 1975, over 30 heads of state in Africa were deposed through coups d'état carried out by the military. Over half of said coups happened in West Africa. Thus, at the time that ECOWAS was founded in 1975, the region was rife with unconstitutional military takeovers.

As is stated in the preamble and Article 2 of the ECOWAS Treaty of 1975, ECOWAS was founded with the sole aim of promoting co-operation and development in all fields of economic activity such as in the fields of industry, transport, telecommunications, energy, agriculture.

⁴¹⁴In 1952 King Farouk's reign was brought to an end, by way of "the Egyptian Revolution of 1952" in a bloodless military coup- d'état led by the Free Officers Movement, a group of army officers led by Mohamed Naguib and Gamal Abdel Nasser. Egypt transformed from a kingdom to a republic. Since 1952, no Egyptian president has left office voluntarily or after losing an election, it has either been ruled by former military officers or controlled by the army, except for two years; during the rule of late leader Mohamed Morsi, the first democratically-elected president who was overthrown on 3 July 2013 by the defence minister Abdel-Fattah El-Sisi.

The spate of military takeovers as a common alternative to democratic and peaceful transfer of power notwithstanding, it would appear that at sub-regional level (at least for a while) there was no discernable apprehension that the coup would become a lasting political phenomenon, which would require a special dispensation to address it at multilateral level.

Subsequent to the establishment of ECOWAS as a West African bloc for economic integration, numerous coups d'état have also occurred across Africa. In particular, consecutive coups occurred in Ghana, Burkina Faso, Mauritania, Nigeria and Sudan. However, it was not until 1991, during their annual meeting in Abuja, that the ECOWAS Heads of State and Governments grappled with broader governance and human rights issues when they adopted a “Declaration of Political Principles” comprising nine guiding precepts, including:

- respect for human rights and fundamental freedoms in all their plentitude, including in particular freedom of thought, conscience, association, religion or belief;
- to promote and encourage the full enjoyment by all our peoples of their fundamental human rights, especially their political, economic, social, cultural and other rights;
- belief in the liberty of the individual by means of free and democratic processes in the framing of the society in which he lives;
- to strive to encourage and promote in each Member State, political pluralism and those representative institutions and guarantees for personal safety and freedom under the law.

As a declaration, it had no binding force on the Member States, nonetheless it marked a milestone since it was a recognition by ECOWAS Member States that the economic and development aspirations enshrined in the 1975 treaty could not be achieved without peace and political stability in Member States. A legal framework was therefore needed to expand and transform this philosophical base into something broader. This, among other things, culminated in the adoption of the ECOWAS Revised Treaty of 1993 ('the Revised Treaty') which incorporated the Political Principles of 1991. The Revised Treaty provided the political framework and mandate for the mechanisms which followed.

Between the Declaration and the revision of the Treaty in 1993 three more coups occurred. In Mali in 1991 Lieutenant Colonel Amadou Toumani Toure overthrew the Government of President Moussa Traoré. In Sierra Leone in 1992, Captain Valentine Strasser overthrew the Government of President Joseph Saidu Momoh. In Nigeria in 1993, Defence Minister General Sani Abacha forced the resignation

of Interim President Chief Ernest Shonekan. A year later in 1994, The Gambia witnessed its first successful coup d'état⁴¹⁵ when former President Yahya Jammeh, then a lieutenant in The Gambia armed forces, led a group of junior officers and deposed the late President Sir Dawda Kairaba Jawara, the first President of The Gambia.

In 1999 ECOWAS Member States adopted the **Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (the 1999 Protocol)**.⁴¹⁶ Among the principal objectives of the 1999 Protocol are the implementation of the provisions of Article 58 of the Revised Treaty and the provision of assistance to Member States for the **observance of democratic elections**; to maintain and consolidate peace, security and stability within the Community; and to constitute and deploy a civilian and military force to maintain or restore peace within the sub-region, whenever the need arises.

By December 1999, however, five more coups had occurred- Niger (twice), Sierra Leone (twice), Guinea-Bissau and Ivory Coast.⁴¹⁷

In 2001 the **Protocol on Democracy and Good Governance 2001 (the Protocol on Good Governance)** was adopted to enhance and complement the 1999 Protocol through the incorporation of provisions concerning issues such as prevention of internal crises, democracy and governance, the rule of law and human rights.

The necessity for the 1999 Protocol and the Protocol on Good Governance, which accorded ECOWAS the legal mandate to employ various means of conflict prevention, management and resolution, was manifested and reinforced in the unfortunate internal conflicts that occurred in Liberia and Sierra Leone in the 1990s.

⁴¹⁵This was preceded over a decade earlier by a 1981 rebel-backed coup attempt against President Jawara, which was quashed with Senegalese military intervention.

⁴¹⁶This Protocol was adopted on 10 December 1999.

⁴¹⁷1996, Niger- General Ibrahim Baré Maïnassara ousted Niger's first democratically elected president, Mahamane Ousmane
1996, Sierra Leone- Julius Maada Bio and high-ranking soldiers of the National Provisional Ruling Council junta ousted Captain Valentine Strasser
1997, Sierra Leone- Major Johnny Paul Koroma overthrew the government of President Ahmad Tejan Kabbah

1999, Guinea Bissau- Brigadier-General Ansumane Mané led a military rebellion against President João Bernardo Vieira
1999, Niger- Military leader Daouda Malam Wanké was installed as President after the assassination of President Ibrahim Baré Maïnassara
1999, Ivory Coast- Military Officer Tuo Fozie deposed President Henri Konan Bédié

In 1989, when Charles Taylor launched a rebellion to overthrow the government of Liberia under the leadership of Samuel Doe, ECOWAS, in the absence of an empowering treaty to do so, was constrained to, as it were, manufacture a mechanism that would enable it to respond to the catastrophic humanitarian crises unleashed on the civilian population. At its summit in Banjul in May 1990, ECOWAS adopted a peace plan that included a ceasefire and the establishment of the ECOWAS Ceasefire Monitoring Group (ECOMOG) in August 1990. The case which was put forth by the ECOWAS heads of state to justify this initiative was that the Liberian civil war had been internationalised by the fact that Charles Taylor had bases in Cote d'Ivoire and that refugees and rebels were migrating across borders thereby threatening regional security. The 1978 ECOWAS Protocol on Non-Agression and the 1981 ECOWAS Protocol on Mutual Assistance in Defence therefore gave them the legal basis for the intervention.

A year later, when the civil war started in Sierra Leone in 1991, ECOWAS was able to respond more swiftly by the deployment of ECOMOG once again to end military rule and reinstall President Kabbah with the assistance of Nigerian troops whose government had a bilateral security agreement to intervene (if requested by Sierra Leone and the UN mission). This intervention in Sierra Leone (unlike the one in Liberia which was meant to end the war) was another milestone for ECOWAS in that it marked the first African intervention for the purpose of restoring democracy.

Although coups had persisted from 1991, the pace of their occurrence appeared to be on the wane in the 2000s along with the phenomenon of consecutive coups within a country at almost regular intervals. This downward trend continued with the result that only eight coups were witnessed in the subregion between 2003 to 2014.⁴¹⁸ Democratic values appeared to have taken root. The ECOWAS sub-region enjoyed relative stability from 2014 up to 2020, with no coups d'état witnessed at all. Unfortunately, this was to change from 2020 when in fairly rapid succession Mali, Guinea and Burkina Faso regressed into unconstitutionality.⁴¹⁹

The 1999 Protocol and the 2001 Protocol on Good Governance together with the Revised Treaty on which they are founded remain the principal legal instruments that reflect the Community's stance on unconstitutional change of government.

That they have had an impact on shaping the democratic evolution of the Member States and perhaps even exerted some influence on the rest of the Region, seems apparent. However, questions have justifiably been raised about their effectiveness, given the political regression of the past two years. There is no doubt that there appears to have been a fundamental shift away from the democratic path which Member States appeared to have been following in line with democratic principles and values that ECOWAS had so painstakingly crafted. Will this be a temporary aberration which will be quickly surmounted? Or, are we witnessing a more ominous shift away from democratic pluralism? The author posits that the future might well depend on the ECOWAS resolve and how that resolve can be translated into a more robust accountability system and sanctions regime against unconstitutional change of government.

⁴¹⁸2003, Guinea Bissau- General Veríssimo Correia Seabra overthrew the government of President Kumba Yalá. 2005, Mauritania- The Armed Forces of Mauritania headed by Ely Ould Mohamed Vall ousted President Maaouya Ould Sid'Ahmed Taya.

2008, Mauritania-The Armed Forces of Mauritania led by a group of recently dismissed high-ranking generals ousted President Sidi Ould Cheikh Abdallahi. 2008, Guinea- The junta- the National Council for Democracy and Development led by Captain Moussa Dadis Camara seized power following the death of President Lassana Conde. 2010, Niger- Lieutenant General Salou Djibo captured and ousted President Mamadou Tandja. 2012, Mali- Captain Amadou Sanogo overthrew the government of Amadou Toumani Touré. 2012, Guinea- Bissau- General Mamadu Ture Kuruma seized control of the country before the second round of a presidential election between Carlos Gomes Júnior and Kumba Yalá. 2014, Burkina Faso- During the Burkina Faso uprising, General Honoré Nabéré Traoré assumed control of the country following the resignation of President Blaise Compaoré.

⁴¹⁹2020, Mali- Colonel Assimi Goïta in a mutiny assumed control of the country and detained President Ibrahim Boubacar Keïta, who resigned and dissolved the government. 2021, Mali- The Malian Army led by Vice President Assimi Goïta overthrew the transitional government of President Bah N'daw. 2021, Guinea- Special forces commander Mamady Doumbouya deposed President Alpha Condé. 2022, Burkina Faso- Lieutenant colonel Paul-Henri Sandaogo Damiba seized control and deposed President Roch Marc Christian Kaboré. 2022, Burkina Faso- Captain Ibrahim Traoré ousted Interim President Paul-Henri Sandaogo Damiba.

3. THE ECOWAS DEMOCRATIC LEGAL FRAMEWORK

The parameters for ensuring free, fair and transparent elections in ECOWAS Member States are more comprehensively set out in the 2001 Protocol on Good Governance. The central objective was to set a new standard to the effect that governments can attain legitimacy **only** through free, fair and transparent elections. To achieve this, certain safeguards are required to be put in place at domestic levels to ensure that the possibility of manipulating or even “rigging” elections through supposedly legal means is eliminated completely premised on fundamental democratic principles.

3.1 Constitutional Principles

Section I of the 2001 Protocol deals with the Constitutional Convergence Principles. It specifically provides that Member States shall recognise and share the following constitutional principles which are necessary in any democratic society:

- Separation of powers - executive, legislation and judiciary.
- Empowerment and strengthening of parliaments and guarantee of parliamentary immunity.
- Independence of the judiciary.
- **Every accession to power must be made through free, fair and transparent elections.**
- **Zero tolerance for power obtained or maintained by unconstitutional means.**
- Popular participation in decision making, strict adherence to democratic principles and decentralisation of power at all levels of governance.
- **The armed forces must be apolitical and must be under the command of a legally constituted political authority; no serving member of the armed forces may seek to run for elective political.**
- Political parties shall be formed and shall have the right to carry out their activities freely, within the limits of the law. The freedom of the opposition shall be guaranteed.
- The freedom of association and the right to meet and organise peaceful demonstrations shall also be guaranteed.
- The freedom of the press shall be guaranteed.

Generally speaking, these democratic principles are, by and large, incorporated in the constitutions of ECOWAS Member States.⁴²⁰ The criminal codes or laws of ECOWAS Member States (most of which precede the protocols) generally also regard any attempt to overthrow a government (irrespective of whether the sitting government was itself established through elections or not) as treason punishable by either death or imprisonment for life upon conviction by a court of law.⁴²¹ However, there is an attendant jurisprudential irony,

⁴²⁰For example, the Constitution of the Republic of Togo 1992 (as amended in 2007) contains the following sacred and democratic principles: Article 146- “The source of all legitimacy follows from this Constitution (Article 146).” Article 147 - The Togolese Armed Forces are a national, republican and apolitical army. They are entirely subject to the political constitutional authority regularly established. (Article 148)”

Article 148 - “Any attempt to overthrow the constitutional regime by the personnel of the Armed Forces or [Forces] of Public Security, by any individual or group of individuals, is considered as an imprescriptible crime against the Nation and sanctioned in accordance with the laws of the Republic (Article 148)”

Article 150 - “In case of coup d'etat, or any coup of force whatever, any member of the government or of the National Assembly has the right and the duty to call on all means to reestablish the constitutional legitimacy, and including the recourse to existing agreements of military or of defence cooperation.

In these circumstances, for any Togolese, to disobey and to organize themselves to resist the illegitimate authority constitutes the most sacred of the rights and the most imperative of the duties.

Any overthrow of the constitutional regime is considered as an imprescriptible crime against the Nation and sanctioned in accordance with the laws of the Republic.”

⁴²¹ The Criminal Code of The Gambia, for example, deals with treason and other offences against the Sovereign's State and provides in section 35 that: - “(1) A person who

(a) prepares or endeavours to overthrow the Government by unlawful means;

(b) prepares or endeavours to procure by force any alteration of the law or the policies of Government; Section 36 further provides that “a person who knowing that any other person intends to commit treason, does not (a) give information thereof within all reasonable despatch to a Minister, a Magistrate, a police officer or a member of the Armed Forces; (b) use other reasonable endeavour to prevent the commission of the offence - commits an offence and is liable on conviction to imprisonment for life.

... commits the offence of treason and, subject to subsection (2) of this section, is liable on conviction to be sentenced to death or to imprisonment for life.”

Similarly, the Nigerian Criminal Code makes it a criminal offence punishable by death to levy “war” against the State in order to intimidate or overawe the President. Any attempt or abet or intention to commit treason is punishable by imprisonment for life or a lesser term. The 1960 Criminal Offences Act of Ghana criminalised “treason felony” in almost identical terms as the Criminal Code of The Gambia, and the 1992 Ghana Constitution provides a broad definition of treason to include “attempt by force of arms or other violent means to overthrow the organs of government established by or under

which is that the offence of treason in the context of constitutional subversions is only prosecutable when attempts to overthrow governments are foiled. A successful coup d'état *de facto* absolves and redeems the offender. The *de jure* position becomes muted. Historically therefore, once a coupist is able to weather the storm and self-transform or hand over to civilian rule (often to himself), he is safe. This Paper posits that the legal paradox posed by this situation undermines the ECOWAS Zero Tolerance principles and the efficacy of its sanction's regime. This aspect is discussed further on in this paper.

3.2 Pre-electoral Safeguards

Section II of the Protocol on Good Governance specifically deals with elections. Article 2 under this section provides that “*No substantial modification shall be made to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of Political actors*”. This provision is an important safeguard against any attempts by sitting governments to seek to employ legal means to amend electoral laws to give them an advantage or edge over the opposition. The authority to amend the electoral laws within six (6) months to elections would no longer be vested in parliament and the president alone, but also with the consent of the majority of political actors.

The basis of the 6 months as a reasonable threshold is uncertain. It can however be easily circumvented by a parliamentary majority making timeous unilateral changes before the 6-month period kicks in. The time bar does not also address an emerging trend by sitting governments seeking to amend their constitutions to extend their term limits. According to the African Centre for Strategic Studies, as at 2017, ten (10) African Presidents had successfully modified or removed constitutional term limits whilst six (6) attempts were unsuccessful. Out of those that succeeded, one is from West Africa i.e. Togo during the reign of Eyadema in 2002, whilst four (4) out of the six that did not succeed came from West Africa (Nigeria 2006, Niger 2009, Senegal 2012 and Burkina Faso 2014).⁴²² Subsequently, in 2020 Alassane Ouattara of Côte d'Ivoire and Alpha Conde of Guinea Conakry

this Constitution”.

⁴²²Constitutional Term Limits for African Leaders, Sep. 2014 - African Center for Strategic Studies.

used constitutional reforms to extend their term limits to remain in power beyond the two-term limit.⁴²³ In Guinea, this precipitated mass demonstrations leading to violence and ultimately to the September 2021 coup by Colonel Mamady Doumbouya.

This trend, which has been shown to have serious destabilising consequences on the region, exposes a major weakness, lacuna, or flaw in that the ECOWAS mechanisms are primarily focused on military takeovers or constitutional change by overtly illegal means⁴²⁴ and not other political manipulations of the constitutional order for self-perpetuation. By default, therefore, the ECOWAS instruments, *ex facie*, appear to legitimise the practices of self-perpetuation. The practice also appears to have rendered ECOWAS incapable of any form of meaningful intervention or redress since the processes usually deployed are legal even if they conflict with ECOWAS democratic values.

Other important safeguards provided under section II of the Protocol on Good Governance include the following: (i) each ECOWAS Member State shall ensure the establishment of a reliable registry of births and deaths (Article 4); (ii) the voters' list shall be prepared in a transparent and reliable manner, with the collaboration of the political parties and voters who may have access to them whenever the need arises (Article 5); (iii) the preparation and conduct of elections and the announcement of results shall be done in a transparent manner (Article 6); and (iv) that adequate arrangements shall be made to hear and dispose of all petitions relating to the conduct of elections and announcement of results.

The extent to which ECOWAS Member States have effectively domesticated these safeguards is questionable having regard to perennial allegations of election rigging in the wake of elections in the sub-region and proven inadequacies of the domestic adjudication system to deal with election petitions.

⁴²³Tierno Monenembo & Veronique Tadjou, The Africa Report: "African Presidents extending terms: 'Let's express our disapproval loud and clear'" <https://www.theafricareport.com/40199/african-president-extending-terms-lets-express-our-disapproval-loud-and-clear/>

⁴²⁴The Effectiveness of ECOWAS in Mitigating Coups in West Africa, 2022 - Leonie Mills.

This is perhaps one area which could benefit from model legislation, rules and systems to encourage harmonisation and the development of sub-regional capacity in election administration that can be deployed if found to be necessary.

3.3 Election monitoring and ECOWAS Assistance to Member States

Section III of the Protocol on Good Governance provides ECOWAS with the legal mandate to play an active role in ensuring that free, fair and transparent elections are conducted in Member States. Under Article 12 any Member State may request ECOWAS to provide assistance in the conduct of any election and ECOWAS may provide such assistance in any form. Under Articles 13, 14 and 15, on the other hand, ECOWAS is required to provide assistance to Member States regardless of whether a request was made to that effect by a Member State. Such assistance takes place in two stages. First a fact-finding mission; then the Observer or Supervisory Mission based on the report of the fact-finding mission, which is required to submit a report comprising its assessment, findings and recommendations for the improvement of the conduct of future elections and monitoring Missions. Since 1998, ECOWAS has been providing Election Observation Assistance to Member States in presidential and parliamentary elections. In some cases, ECOWAS conducted joint missions with the European Union (in Togo 2010) or with the African Union and United Nations (Niger 2011).⁴²⁵

ECOWAS electoral observation missions have been criticised for not providing a reliable assessment of the quality of electoral processes as most reports end with the finding that elections were “fair, peaceful and transparent”⁴²⁶. This assessment has been given to both countries that are perceived to be non-democratic as well as countries that are perceived to be more democratic. Anecdotal evidence has shown that elections are often determined long before the elections are held, for instance, by the manipulation of the voter registration processes etc, that the pre-election safeguards are designed to avert. In such circumstances, monitoring missions are akin to the proverbial securing of the stable after the horse has bolted and, generally, result in reputational risk to ECOWAS.

⁴²⁵SFB - Governance Working Paper Series. No.47. December 2013, pages 41-43.

⁴²⁶Ibid, page 43.

3.4 Role of the Police and Armed Forces

In addition to the constitutional convergence principles articulated in Article 1 of the Protocol on Good Governance, Section IV sets out the role of the armed forces, the police and other security forces in a democracy. Article 19 requires armed forces and police to be non-partisan and remain loyal to the nation. It further provides that their role is to defend the independence and the territorial integrity of the State and its democratic institutions. The police and other security agencies are expected to be responsible for the maintenance of law and order and the protection of persons and their properties. The Protocol requires that the armed forces, the police and other security agencies be under the authority of legally constituted authorities, and imposes the corresponding obligation on the civilian authorities to respect the apolitical nature of the armed forces and police.

Article 23 requires Member States to ensure that the “*armed forces, the police and other security agencies shall during their training receive instructions on the Constitution of their country, ECOWAS principles and regulations, human rights, humanitarian law and democratic principles. In this regard, seminars and meetings bringing together members of the armed forces, Police and other security agencies shall be organised from time to time*”. It further provides that joint training sessions shall also be arranged for members of the armed forces from different ECOWAS countries, the police, other security forces, university dons and members of the civil society.

Paradoxically, it is evident from the persisting phenomenon of the military coups, that there is an apparent disconnect between the purpose of Article 23 and the perception of the military about their role. Wherever the Faultline lies, it is clearly not for want of adequate ECOWAS strictures that address the role of the security forces in an aspiring democracy. The issue therefore is, perhaps, how this disconnect is to be bridged.

FACTORS RESPONSIBLE FOR UNDERMINING FREE, FAIR AND TRANSPARENT ELECTIONS AND CONSTITUTIONAL DEMOCRATIC ORDER

A confluence of interconnected factors has contributed, both before and after elections, to the deterioration of constitutional democratic orders that have led to coups. The recent resurgence of military coups and interventions in democratic regimes signalling a reversal of the political gains of prior decades, brings these factors to the fore anew.

Many academic jurists have proffered an insight into the causes of military takeovers. At page 91 of his book, *The Military and Democratisation in The Gambia 1994 - 2003*- the author Ebrima Jogomai Ceesay writes:

There exist two main schools of thought which seek to explain the frequency and nature of military interventions in Africa. The first - the External School - emphasises the broader political environment in which the military operate..... The second school of thought - the Internal School - centres on the internal characteristics of the military itself, such as nationalistic attributes, perceived challenges to the military's corporate interests, ethnic rivalry or personal fear.

For the **External School**, the author posits that there are preconditions for military coups which are brought about by performance shortcomings of civilian regimes, be they economic crisis, persistent poverty, regional or ethnic rivalries, government corruption and repression, maladministration and “contagion”. This school of thought suggests that military intervention is the sign of how much legitimacy is enjoyed by the civilian regime in the eyes of the public. In situations where civilian regimes benefit from widespread and popular legitimacy, military takeovers are less likely to occur. Whenever, there is popular dissatisfaction with the civilian government, then coups will be much more of a possibility. In such situations, the coupists are likely to present themselves as saviours motivated solely by a “mission” to rescue the state from the incompetence of the civilian regimes ousted.

The **Internal thesis** on the other hand, posits that the reasons for military seizures of power are to be found inside the army itself. Whenever the military feels that its interests are under threat, then the likelihood of a coup increases. In addition, the internal school suggests that coups d'état may also be based on personal greed and the desire for personal gain.⁴²⁷

In reality, the reasons for a coup are usually multifaceted, and most (barring national peculiarities) are interrelated, with some facets more predominant on occasion than others. The most common factors have been identified as: Relations between the military and government; Public discontent; Excesses in presidential and executive power; Economic crisis and failure; Elections; Tribalism; Regional instability; etc. Corruption is usually also a pervading issue.

⁴²⁷The author cites Decalo in the book 'Military Rule in Africa: Etiology and Morphology' in S. Baynham 9Ed) Military

Ultimately, however, the author posits that coups, in the main, are predatory and opportunistic. In a fledgling democracy with serious political issues including regional instability, economic challenges, weak democratic institutions and accountability framework both within and outside the military, the existence of “factors” abounds. In many cases the proffering of these factors are a smokescreen for military intervention and an afterthought which, tragically, sometimes feed off and into public discontent.

In this section, the Paper reviews the foregoing factors as they have played out in some unconstitutional capture of power in the past five decades of post-colonial rule.

4.1 Relations between the Military and Government

During the early post-independence era, discontent in the military or security forces regarding the lack of equipment particularly during times of instability, even wages, appeared to be a motivating factor in the overthrow of governments. The first recorded African coup of 1952 in Egypt was triggered by the loss of the Egyptian army during the 1948-49 Palestine War; the military blamed King Farouk for the defeat.⁴²⁸ In Togo in 1963, the repatriated soldiers from the French Army were disgruntled by Olympio's decision to keep the army small because he considered the military unnecessary, thus leaving many unemployed despite repeated, unsuccessful requests by the eventual coup leaders to increase funding and enlist more of the ex-French soldiers.

Power and Politics in Black Africa (Crook Helm, 1986)

“an empirical examination of the internal dynamics of African military hierarchies, and a much more critical analysis of formal justifications for coups, reveals a bewildering array of very strong personal and corporate motivations for power grabs, that supplement or are camouflaged beneath the more noble justifications offered by coup leaders.”

⁴²⁸History.com Editors (2020) Military seizes power in Egypt.

<https://www.history.com/this-day-in-history/military-seizes-power-in-egypt>.

Although in the Sergeants' Coup of 1968 by the soldiers of Sierra Leone Armed Forces the highly contested elections of March 1967 was cited as the reason for the coup, in reality they had been dissatisfied with low wages and poor conditions for an extended period preceding the elections of March 1967, which went unaddressed.⁴²⁹ In 1971 in Uganda, the rift between General Idi Amin and President Obote, which resulted in Obote taking over control of the armed forces, demoting Amin from the position of Commander in Chief, triggered the resulting coup amidst accusations of corruption and tribalism.⁴³⁰ Similarly in 1975 in Chad, President François Tombalbaye's growing distrust for the army, partly due to the Chadian Armed Forces' inability to deal with the rebel insurgency in the Muslim north created tensions,⁴³¹ which were aggravated by the arrest of the Army Chief of Staff, the purging of the gendarmerie,⁴³² and the eventual death of the President.

In Guinea-Bissau in 2003, the last straw seemed to have been the government's failure to pay several months of wages to soldiers. General Veríssimo Correia Seabra had warned the President that the military would be forced to intervene unless salaries were paid.

4.2 Public Discontent

From the advent of coups, public discontent arising from socio-economic challenges and the government's handling of the situation has played a significant role in the outbreak of unrest and protests, which sometimes eventually led to a military takeover. The 1969 Libyan coup was partly influenced by the discovery of significant oil reserves in 1959⁴³³ and the alleged concentration of the nation's wealth in King Idris resulting in widespread resentment and discontent.⁴³⁴ This ensured public support for the coup carried out by the Free Unionist Officers Movement led by Colonel Muammar Gaddafi.

In Burkina Faso, in both 1966 and 2014, popular unrest and mass demonstrations due to failed economic policies, mainly austerity measures and deeply entrenched corruption and mismanagement in the government,

⁴²⁹Sierra Leone: The Sergeants' Coup". Time.

<https://asq.africa.ufl.edu/files/Miller-V12Is2.pdf&ved=2ahUKEwj4otWE0drpAhUOm->

⁴³⁰Cooper, Tom; Fontanellaz, Adrien (2015). Wars and Insurgencies of Uganda 1971–1994. Solihull: Helion & Company Limited.

⁴³¹"Conflict In Chad, 1975 To Present: A Central African Tragedy" (CSC 1984)

⁴³²Ibid.

⁴³³Little, Douglas (2013). "To the Shores of Tripoli: America, Qaddafi, and Libyan Revolution 1969–89". The International History Review. 35 (1): 70–99.

⁴³⁴Ibid.

was a precursor to the military coups.⁴³⁵ Similarly in Mali in 1991, the effects of President Traoré's austerity programs to satisfy the International Monetary Fund negatively impacted all but, allegedly, his rich inner circle.⁴³⁶ In Sierra Leone in 1992, public discontent with the rampant corruption and mismanagement within the All-People's Congress government was a factor in the Sierra Leone coup.³⁴⁷

The 1994 coup d'état in The Gambia has been reported to have been precipitated mainly due to public discontent. At page xviii of Volume 1 of their Report, the Truth, Reparations and Reconciliation Commission (TRRC) notes as follows: *"The July 22, 1994, coup d'etat abruptly ended one of Africa's longest serving functioning democracies, with a reputation for its commitment to human rights, the rule of law and democracy. After being in power from 1965, despite winning elections at the constitutionally mandatory five (5) year intervals, **President Sir Dawda Kairaba Jawara** lost a considerable degree of legitimacy in the eyes of ordinary Gambians due to rising discontent on what many attributed to the slow pace of development and accusations of corruption. Within the context of political power and the country's direction there was a gap between the government and the governed. This facilitated the easy takeover by coupists, for many Gambians wanted a change of leadership."*

Notably, public discontent does not only emanate from economic hardships. In 2003 when a military coup led by General Veríssimo Correia Seabra in Guinea-Bissau deposed President Kumba Yala, it appeared to be a culmination of factors including dismissals of ministers and other high officials, detention of opposition party members without charge, concerns about the government's financial management which prompted protests and strikes, and the suspension of International Monetary Fund aid.⁴³⁸

⁴³⁵Kandeh, Jimmy D. (2004). *Coups from Below: Armed Subalterns and State Power in West Africa*. Basingstoke: Palgrave Macmillan. p. 121.

⁴³⁶"Mali's March Revolution (1991)". International Center on Nonviolent Conflict.

⁴³⁷Anne M. Simmons (13 May 2000). "Background: Sierra Leone". Los Angeles Times. Akam, Simon (2 February 2012). "The vagabond king". New Statesman.

⁴³⁸Ferreira, Patricia M (26 March 2004), *Guinea-Bissau: Perspectives on the up-coming elections* (PDF), Institute for Security Studies Situation Report, p. 4. Roque, Silvia (May 2009), *Peacebuilding In Guinea-Bissau: A Critical Approach*

The 2019 Sudanese coup was a result of popular protests in December 2018 about the dramatically rising costs of living, and economic deterioration following the secession of oil-rich South Sudan in 2011, and a 70% inflation rate second only to Venezuela.⁴³⁹ However, in January 2019, the protests shifted from economic matters to demands for the resignation of President al-Bashir, who had been in power for 30 years.⁴⁴⁰ He was overthrown by the army led by Ahmed Awad ibn Auf in April 2019.

4.3 Excess in Presidential and Executive Powers

The abuse of the constitutional and executive powers, particularly in the form of amendments to extend term limits or to alter election rules has been a recurrent theme in the overthrow of Presidents. Unfortunately, such abuse is sometimes perpetuated to keep incumbents in power. In 1966, Mali's President Keïta suspended the constitution and parliament, and replaced it with a Comité National de Défense de la Révolution, a de facto sole party with full powers.⁴⁴¹ This compounded by overwhelming economic difficulties, poor harvest and increasing public discontent gave way to the 1968 coup led by Lieutenant Moussa Traoré.⁴⁴²

In 1976, Burundi's President Michel Micombero, whose regime was essentially a military dictatorship, introduced a new constitution allowing him to run for a further 7-year term. He was removed in a bloodless military coup led by Deputy Chief of Staff Jean-Baptiste Bagaza.

(PDF), Norwegian Peacebuilding Centre, p. 2.

⁴³⁹Amina Ismail and John Davison (12 December 2017). "IMF says Sudan must float currency to boost growth, investment". Reuters. "'We are all Darfur': Sudan's genocidal regime is under siege". The Economist. 10 January 2019.

⁴⁴⁰Several killed in Sudan as protests over rising prices continue". Al Jazeera. 21 December 2018. "Sudanese police fire on protests demanding president step down". The Guardian. 17 January 2019

⁴⁴¹oger, Benjamin (25 March 2016). "Mali : retour sur le régime de Moussa Traoré en dix dates".

⁴⁴²"President Modibo Keita of Mali is deposed by the army". sahistory.org.za

⁴⁴³Chrétien, Jean-Pierre (2008). "Micombero, Michel". In Gates, Louis, Jr.; Akyeampong, Emmanuel K. (eds.). Dictionary of African Biography. Vol. 4. Oxford: Oxford University Press.

With respect to The Gambia, its TRRC has found that following the 1994 coup, President Jammeh utilised his executive power to systematically suppress political opponents and ban political parties leading to his landslide win in the 1996 elections, which were observed to not be free and fair. He would go on to win the 2001, 2006 and 2011 elections employing the same repressive tactics.

President Ibrahim Baré Maïnassara of Niger, who seized power in the 1996 coup from the democratically elected President Mahamane Ousmane, was elected after dissolving the electoral commission and replacing it with a new commission. On the same day, he also placed all his opposition candidates under house arrest.⁴⁴⁴ In 2010, President Mamadou Tandja of Niger orchestrated a year-long constitutional crisis in an effort to extend his second term.⁴⁴⁵ Tandja dissolved the National Assembly in May 2009, appointed a new Constitutional Court that enabled him to move forward with a constitutional referendum in August 2009, that extended his mandate for an additional three years.⁴⁴⁶ The new constitution also enhanced Tandja's power by scrapping the semi-presidential system⁴⁴⁷ of government in favour of a presidential system. When the National Assembly and the constitutional court held that the referendum was illegal, President Tandja responded by dismissing both parliament and the courts and ruled by decree.⁴⁴⁸ This crisis resulted in the military coup led by Lieutenant General Salou Djibo that captured and deposed Tandja. Similarly in Burkina Faso, President Blaise Compaoré attempted to extend his 27-year rule by enacting a constitutional amendment to lift term limits for the 2015 elections.⁴⁴⁹ The opposition called for protests against this measure resulting in the 2014 uprising that forced his resignation.⁴⁵⁰

⁴⁴⁴"Elections in Niger". African Elections Database. "NIGERIA: Partial result of local elections announced". IRIN.

⁴⁴⁵Niger President Reported Held in Coup Attempt <https://swap.stanford.edu/was/20100225195905/http://www1.voanews.com/english/news/africa/Niger-President-Reported-Held-in-Coup-Attempt-84722687.html>

⁴⁴⁶Todd Pitman, "Armed soldiers storm Niger presidential palace", Associated Press, 18 February 2010

⁴⁴⁷Ibid.

⁴⁴⁸Ibid.

⁴⁴⁹"Burkina Faso's revolution 2.0". The Guardian. Retrieved 30 October 2014.

⁴⁵⁰"Two days, three leaders and a tricky transition for Burkina Faso". Retrieved 3 November 2014

Most recently, in 2020, Guinea's Alpha Condé changed the two-term presidential limit by constitutional referendum.⁴⁵¹ Condé went on to win a third term in the October 2020 presidential election, which was marred by protests and opposition candidates' allegations of ballot stuffing and fraud.⁴⁵² In September 2021, Commander Mamady Doumbouya led the armed forces in arresting and overthrowing Conde.

4.4 Economic Crisis and Failure

Extended or repeated periods of economic hardship have emerged as one of the main reasons proffered for coups. The initial coup of February 1966 in Ghana was jointly led by the Ghana Police Service and the Armed Forces in collaboration with the Civil Service in response to the country's deteriorating economic situation. This was brought about by the Nkrumah government's structural adjustment policies recommended by the International Monetary Fund (IMF) and World Bank; that resulted in a large foreign debt, nationalisation of the economy, tightening control in currency and taxation, and eventually shortages and price rises.⁴⁵³ The succeeding 1972, 1978, 1979 and 1981 coups, (the latter two carried out by Lieutenant Jerry Rawlings) were all on the basis of rectifying the prevailing economic difficulties namely high foreign debt and austerity programs which intensified food shortages.⁴⁵⁴ The last 1981 coup saw the ousting of President Hilla Limann by Rawlings (who handed over power peacefully just two years earlier); he claimed that civilian rule was weak and that the Limann government was unable to resolve Ghana's neo-colonial economic dependency and overall economic deterioration.⁴⁵⁵

When in Nigeria in 1985, Major-General Ibrahim Babangida overthrew the government of Muhammadu Buhari (who assumed power in the 1983 coup),

⁴⁵¹"Guinea elections: Alpha Condé wins third term amid violent protests". BBC News. 24 October 2020. <https://www.bbc.com/news/world-africa-54657359>

⁴⁵²"Guinea: At least 50 people killed with impunity during protests in less than a year". Amnesty International. 1 October 2020

<https://www.amnesty.org/fr/latest/news/2020/10/guinee-au-moins-personnes-tues-en-toute-impunite-dans-des-manifestations-2/>

⁴⁵³Biney, "Nkrumah's Political Thought in Exile" (2009), p. 84.

⁴⁵⁴David, Owusu-Ansah (1994). *A Country Study: Ghana*. La Verle Berry.

⁴⁵⁵Adedeji, John (Summer 2001). "The Legacy of J.J. Rawlings in Ghanaian Politics 1979–2000" (PDF).

he justified the coup by saying that Buhari had failed to deal with the country's economic problems but instead implemented Buharism.⁴⁵⁶ The succeeding 1993 coup led by General Sani Abacha in which he seized power and forced the resignation of Interim President Chief Ernest Shonekan, was on the basis that the Babangida regime was characterised by "gross incompetence and unbridled waste and mismanagement, the privatisation of public office and public resources, the neglect of non-oil sectors and misplaced priorities".⁴⁵⁷

The mass protests which led to the coups in Burkina Faso in 2014,⁴⁵⁸ Sudan in 2019,⁴⁵⁹ and Guinea in 2021,⁴⁶⁰ were about economic deterioration notably rising living costs, tax hikes, preferential funding of the executive at the detriment of the security and public sectors, and in the latter cases, the global impact of the Covid-19 pandemic.⁴⁶¹

4.5 Elections

Complaints about free and fair elections have been a leading element or factor used by coupists to justify a military takeover. Such complaints include accusations of rigging and ballot stuffing, dismissal and replacement of electoral commissions; repression of opposition parties, the media and civil society; inter-party or parliamentary tensions during campaign periods; lack of democratic electoral reforms and their implementation, blatant non-acceptance of approved election results by a President.

Ghana's first coup in 1996 was partly motivated by Nkrumah winning the heavily rigged 1964 referendum that made his CPP party the sole legal party.⁴⁶² In Sierra Leone in 1968, the armed forces in justifying their coup took issue with the

⁴⁵⁶Sanusi Lamido Sanusi (20 February 2003). "Buharism as Fascism: Engaging Balarabe Musa". An economic ideology centred on economic self-sufficiency, disciplined citizenry, and national development

⁴⁵⁷Ihonvbere, Julius O. (1996). "Are Things Falling Apart? the Military and the Crisis of Democratisation in Nigeria". *The Journal of Modern African Studies*. 34 (2): 193–225.

⁴⁵⁸"Burkina-Faso : Heurts à Ouagadougou – 11 mars – Le Jura Libertaire". 17 April 2011.

⁴⁵⁹"Several killed in Sudan as protests over rising prices continue". Al Jazeera. 21 December 2018.

⁴⁶⁰Wheat Supplies Are Shrinking and It's Bad News for Bread Prices. Bloomberg <https://www.bloomberg.com/news/articles/2021-08-14/wheat-supplies-are-shrinking-and-it-s-bad-news-for-bread-prices>

⁴⁶¹"Coup d'État en Guinée, le président Alpha Condé capturé par les putschistes". AFP (in Canadian French).

5 September 2021 <https://ici.radio-canada.ca/nouvelle/1821827/guinee-afrique-pustsh-coup-armee>

⁴⁶²Hutchful, "Military Rule and the Politics of Demilitarization" (1973), pp. 34–37.

government following the highly contested elections of March 1967.⁴⁶³ Following the 1984 Mauritanian coup, Colonel Taya organised the first democratic election in the country's 26- year post-colonial history in 1986. He received about 63% amidst opposition claims of serious irregularities and fraud. He won again with more than 90% of the vote in the 1997 presidential election, which was boycotted by major opposition political parties anticipating fraud, and the same occurred in the 2003 elections.⁴⁶⁴

The Nigerian 1993 coup was in the run up to the presidential elections that would have established the third republic. Despite his pledge to restore democracy, Abacha issued a decree that placed his government above the jurisdiction of the courts, effectively giving him absolute power along with a record number of human rights abuses.⁴⁶⁵ It was only upon his death in 1998, that his successor Major General Abdulsalami Abubakar adopted a modified version of the 1979 constitution, which provided for multiparty elections.⁴⁶⁶ He transferred power to president-elect Olusegun Obasanjo in May 1999.

In more recent times, the military interventions in Guinea Bissau in 2012 and Mali in 2020 during fragile pre-election periods essentially subverted the whole election process. In Guinea Bissau, General Mamadu Ture Kuruma seized power before the second round of elections, after the opposition claimed the first round was rigged, and called for a boycott of the run-off vote and warned against campaigning.⁴⁶⁷ In Mali, tensions towards the government had been brewing since accusations of irregularities and corruption were reported in the disputed results of the 2018 Malian presidential election.⁴⁶⁸

⁴⁶³"Sierra Leone: The Sergeants' Coup". *Time*. 1968-04-26.

⁴⁶⁴Elections in Mauritania, African Elections Database. "Mauritanian president wins poll", BBC.co.uk, 13 December 1997.

⁴⁶⁵Lewis, Peter M. (1994). "Endgame in Nigeria? The Politics of a Failed Democratic Transition". *African Affairs*.

Sani Abacha, 54, a Beacon of Brutality in an Era when Brutality Was Standard". *The New York Times*.

⁴⁶⁶"NASS and Nigeria's Fourth Republic". *Punch Newspapers*. 12 June 2019.

⁴⁶⁷G.Bissau military takes over ruling party HQ, radio". *Reliefweb.int*. 12 April 2012. 19 September 2012.

⁴⁶⁸Diallo, Tiemoko; McAllister, Edward (June 20, 2020). Fincher, Christina; Harrison, Mike (eds.). "West African bloc urges Mali to re-run disputed elections amid mass protests". *Reuters*.

4.6 Tribalism

In the post-independence era of many countries, ethnic loyalties and entrenched tribalism initiated by colonial powers was a factor in coups, particularly in the 1960s and 1970s. The concentration of power and favouritism in one particular group fueled resentment, civil unrest and conflict, and disintegrated unity during fragile transitional periods. Unfortunately, ethnic tensions have also been exploited by unscrupulous heads of state, both civilian and military, for political gains as evidenced by Juvénal Habyarimana in the 1973 Rwandan coup amidst rising unrest between the Hutu and Tutsi, and Samuel Doe in the 1980 Liberian coup amidst longstanding tensions between the native Liberians and Americo-Liberians settlers.

All the Burundian coups: two in 1966, 1976, 1987 and 1996 emanated from the ethnic tensions between the Hutu tribe and the Tutsi ruling class.⁴⁶⁹ Togo's 1963 coup was fueled by tensions between the Ewe and other ethnic groups during Olmypyio's regime.⁴⁷⁰ Similarly in 1966 in Ghana and Nigeria, the ethnic loyalties among the Ewe,⁴⁷¹ favouritism towards the Igbo and contempt among the Northern Hausa groups influenced both coups.⁴⁷² Within the long history of military rule in

⁴⁶⁹Tshimba, David-Ngendo (21 January 2016). "2015 as a repeat of 1965 in Burundi: the stubbornness of political history". Thinking Africa. The January 1966 coup orchestrated by Crown Prince Charles Ndizeye and Captain Michel Micombero was an extreme Tutsi counter-reaction against moderate policies in trying to balance Hutu and Tutsi demands in government. The July 1966 coup saw Captain Micombero oust Prince Ntare abolishing Burundi's monarchy, and declaring a republic with motivations to establish a military dictatorship with his nationalist- Tutsi party- Union for National Progress (UPRONA) as the only legal party. The 1976 coup was triggered by a rebellion among the Hutu that resulted in subsequent ethnic violence with Tutsi killed, and Micombero's response was to launch a campaign of genocidal violence against the Hutu. The 1987 coup led by Major Pierre Buyoya was motivated by the failure to defuse the interethnic and intra-ethnic tensions between Hutu and Tutsi. The last coup in 1996 followed the assassination of President Melchior Ndadaye, the first democratically elected and first Hutu president. Following Hutu rebel attacks, former president Pierre Buyoya initiated his second successful coup against Hutu leader, Sylvestre Ntibantunganya in the midst of the Burundian civil war.

⁴⁷⁰Wallerstein, Immanuel (1961). *Africa: The Politics of Independence And Unity*. University of Nebraska Press.

⁴⁷¹Hutchful, "Military Rule and the Politics of Demilitarization" (1973), pp. 34–37.

⁴⁷²Siollun, Max (2009). *Oil, Politics and Violence: Nigeria's Military Coup Culture (1966-1976)*. Algora. pp. 98–102.

Nigeria, regional rivalries played a large part in the recurrence of coups as a result of colonialism creating an artificial state encompassing several distinct ethnic groups.⁴⁷³

Prior to the 1973 Rwandan coup, Belgian rule in the 1950s and 1960s created resentment towards colonial rule and the ethnic Tutsi elite among the Hutu.⁴⁷⁴ This led to the formation of the political party in 1957 with aimed to overthrow the monarchy and gain identical rights for the Hutus. This was achieved following the 1961 election and referendum, but the absence of effective Tutsi opposition, regional tensions between Hutu politicians and both groups intensified resulting in the coup led Juvénal Habyarimana with the Rwandan National guard.⁴⁷⁵

The 1980 Liberia coup was brought about by the imbalance of power between the native population of Liberia and the Americo-Liberians settlers, who held an elite position in society and controlled much of the political institutions despite being the minority group.⁴⁷⁶ The reluctance to cede power to the natives led to the indigenous faction of the Armed Forces of Liberia headed by Master Sergeant Samuel Doe seizing power and killing President Tolbert.⁴⁷⁷ Despite Doe presenting himself as a liberator who would bring relief and more democracy, his administration was accused of authoritarianism and violently discriminating against other tribes.⁴⁷⁸ The 1999 coup in Ivory Coast occurred in part due to President Bédié promoting the concept of Ivoirité, placing doubt in the nationality of people of foreign origin, this caused tensions between people from the north,

⁴⁷³Siollun, Max (2009). *Oil, Politics and Violence: Nigeria's Military Coup Culture (1966–1976)*. Algora Publishing.

⁴⁷⁴Prunier, Gérard (1998), *The Rwanda Crisis, 1959-1994*, London: Hurst & Co.

⁴⁷⁵Ibid.

⁴⁷⁶Wegmann, Andrew N (May 5, 2010). "Christian Community and the Development of an Americo-Liberian Identity, 1824–1878". Louisiana State University.

⁴⁷⁷Ellis, Stephen (2001) [1999]. *The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension of African Civil War*. London, UK: Hurst & Company. p. 53

⁴⁷⁸Ibid

who are predominantly of foreign origin and the south.⁴⁷⁹

4.7 Regional Instability

Regional unrest and disputes have occasionally spilled into neighbouring countries and complicated their internal governance, ultimately contributing to military takeovers. Such unrest or disputes usually arise in the form of civil wars and rebel insurgencies, wherein the handling of the situation would result in strained relations between the army, government and public.

The 1978 Mauritanian coup was motivated by President Moktar Ould Daddah's government's failure to contain the Polisario Front's Sahrawi guerrillas during the 1975 Western Sahara War, a conflict that is still ongoing with Morocco. Mauritania was initially involved until 1979 when a ceasefire and peace treaty was reached by the coupists who were said to be worn out by the war.⁴⁸⁰

The 1983 Nigerian coup was triggered by tension between the army and the government during border disputes between Nigeria and Chad. General Muhammadu Buhari, disregarded Shagari's orders to avoid entering Chadian territory.⁴⁸¹ This incident placed the civilian government and military on opposite sides of a highly divisive issue.

The 1990-1995 Tuareg rebellion was one of the primary causes of the 1991 Mali and 1996 Niger coups. The insurgency's objective was the forming of an independent state by various Tuareg groups.⁴⁸² The inability of both governments to quell the rebellion led to General Maïnassara deposing Niger's President Ousmane, and Mali's Lieutenant Colonel Touré deposing President Traore.

⁴⁷⁹Alienation in Abidjan by Pierre Janin

⁴⁸⁰"Military Takes Over in Mauritania with a Reportedly Bloodless Coup". The New York Times. July 11, 1978

⁴⁸¹Omoigui, Nowa. "HISTORY OF CIVIL-MILITARY RELATIONS IN NIGERIA (5)*: THE SECOND TRANSITION (1979-83, Part 2)

⁴⁸²Cartogracy: Tuareg Independence Movement.

The 1996 and 1997 Sierra Leone coups took place during the Sierra Leone Civil War. The military juntas of the National Provisional Ruling Council and the Armed Forces Revolutionary Council usurped power with each citing their support and commitment to return to a democratically elected civilian government and to end the civil war as the motivations for the coup.⁴⁸³ Similarly, during the 1998- 1999 Guinea- Bissau Civil War, Brigadier-General Ansumane Mané led a military rebellion against President Vieira, after he was suspended as the head of the armed forces for allegedly smuggling arms to Casamance separatist rebels in Senegal.⁴⁸⁴

The recent resurgence of military coups in 2012, 2020 and 2021 in Mali and 2022 in Burkina Faso, were premised on their governments failed handling of the 2012 Tuareg Rebellion and ongoing Mali War;⁴⁸⁵ as well as the Jihadist insurgency that emanated from the Sahel affecting Mali, Niger and Burkina Faso simultaneously.⁴⁸⁶ Colonel Assimi Goïta carried out the 2020 Mali coup on the grounds that the government was mismanaging the insurgency. Despite his transitional government stating it would hold legislative and presidential elections in February 2022 to restore a democratic government, opposition figures have warned that the military could move to impose its will and shape the outcome.⁴⁸⁷

In 2022, Burkina Faso experienced two coups in nine months. In January, Lieutenant Paul-Henri Damiba overthrew President Kaboré due to the worsening jihadist insurgency. In September, the loss of 40% of Burkina Faso to rebel forces led Captain Ibrahim Traoré to depose interim President Damiba.⁴⁸⁸

⁴⁸³Bangura, Joseph J.; Mustapha, Marda (2016-04-29). *Democratization and Human Security in Postwar Sierra Leone*. Palgrave Macmillan US. p. 22.

⁴⁸⁴Andrea E. Ostheimer, "The Structural Crisis in Guinea-Bissau's Political System" Archived 2009-08-03 at the Wayback Machine, *African Security Review*, Vol. 10, No. 4, 2001. Evans, Martin (2000). "Briefing: Senegal: Wade and the Casamance Dossier". *African Affairs*. 99 (397): 649–658

⁴⁸⁵"Factbox: Why Mali is in turmoil again". Reuters. 18 August 2020.

⁴⁸⁶Burkina Faso coup: Why soldiers have overthrown President Kaboré". BBC News. 25 January 2022 . <https://www.bbc.com/news/world-africa-60112043>

⁴⁸⁷Akorlie, Christian (9 January 2022). "West African nations sever links with Mali over election delay". Reuters. <https://www.reuters.com/world/africa/mali-eyes-elections-four-years-west-african-bloc-mulls-sanctions-2022-01-09/>

⁴⁸⁸Soldiers say military junta now controls Burkina Faso". AP NEWS. 24 January 2022. <https://apnews.com/article/africa-burkina-faso-ouagadougou-roch-marc-christian-kabore-32e6bd66b5c0ee76631f7d53b308fb6c>

5. SANCTIONS REGIME FOR UNCONSTITUTIONAL CHANGE OF GOVERNMENT

As stated earlier, domestic law sanction regimes for unconstitutional change of government, are by pragmatic necessity enforceable only against failed attempts. It is logical therefore that a multinational force is needed as the only recourse of Member States under such circumstances. The ECOWAS legal framework provides sanctions and mechanisms for non-compliance with treaty obligations including the unconstitutional interruption of democratic order. However, the re-emergence of coups two decades after the 1999 Protocol suggests a need for a re-examination or review of the sanctions regime in place to determine its effectiveness in addressing current challenges.

Chapter II of the Protocol on Good Governance 2001 deals with the modalities for the implementation of sanctions on Member States. Article 45 provides that in the event that democracy is abruptly brought to an end by any means, ECOWAS may impose sanctions on the State concerned and these sanctions may take several forms in increasing order of severity:

- Refusal to support the candidates presented by the Member State concerned for elective posts in international organisations;
- Refusal to organise ECOWAS meetings in the Member State concerned;
- Suspension of the Member State concerned from all ECOWAS decision-making bodies. During the period of the suspension the Member State concerned shall be obliged to pay its dues for the period.
- On the recommendation of the Mediation and Security Council, a decision may be taken at the appropriate time to proceed as stipulated in Article 45 of the Protocol of 10th December 1999.

ECOWAS has not hesitated to suspend Member States from ECOWAS decision-making bodies, arguably because it is the easier option to take and is less confrontational. A notable example is the December 2008 Guinea Conakry coup by Dadis Camara following the death of President Lansan Conte.

In reaction to the coup during an extraordinary summit on 10th January 2009, ECOWAS leaders ruled out a military transition and suspended Guinea from participating in any ECOWAS decision-making processes.⁴⁸⁹ Likewise, when the coup occurred in Niger in 2010, ECOWAS responded by suspending Niger from membership in ECOWAS. The same position was taken by ECOWAS against Cote d'Ivoire in response to Laurent Gbagbo's refusal to yield power to Allasane Ouattara following the elections of 2010;⁴⁹⁰ and more recently against Guinea Conakry in 2021.

Article 44 of the Protocol on Good Governance indicates that it is meant to complement the provisions of Chapter V of the 1999 Protocol. The earlier 1999 Protocol broadens the above sanctions regime. Article 3 sets out one of the objectives of the Protocol as being to constitute and deploy a civilian and military force to maintain or restore peace within the sub-region, whenever the need arises. Hence the establishment of the Defence and Security Commission, the Council of Elders and the ECOWAS Ceasefire Monitoring Group (ECOMOG). The role of ECOMOG is defined under Article 22 to include: (i) observation and monitoring; (ii) peacekeeping and restoration of peace; (iii) enforcement of sanctions including embargo; (iv) preventive deployment; (v) and any other operations as may be mandated by the Mediation and Security Council. By virtue of Article, ECOMOG could be deployed to assume any one of the foregoing roles in the event of an overthrow or attempted overthrow of a democratically elected government.

Furthermore, the 1999 Protocol accords ECOWAS an extended role to ensure the restoration of political authority. By Article 45, ECOWAS is mandated to support processes towards the restoration of political authority in situations where the authority of government is absent or has been seriously eroded. "Such support may include the preparation, organisation,

⁴⁸⁹Ibid (No.7), page 37.

⁴⁹⁰Ibid (No.7), page 39.

monitoring and management of the electoral process, with the co-operation of relevant regional and international organisations. The restoration of political authority shall be undertaken at the same time as the development of respect for human rights, enhancement of the rule of law and the judiciary.”

The approach developed by ECOWAS can be said to be incremental. It involves diplomatic interventions, fact-finding missions, threat of sanctions and military intervention.⁴⁹¹ The first step invariably involves an attempt to restore peace and constitutional order through diplomatic and political means. The last resort is the use of military intervention. In response to the Coup in Mali in 2012, leaders from the ECOWAS gathered for an extraordinary summit on the crises in Mali and Guinea-Bissau, and decided to deploy a stabilisation force to both countries. ECOWAS imposed an embargo including the closing of all borders of ECOWAS states with Mali except for humanitarian reasons. It also closed Mali's access to ECOWAS ports, and the freezing of Malian bank accounts. The same approach was taken by ECOWAS in response to the Niger coup of 2010. At a summit of West African leaders, Colonel Djibrilla Hima, a member of the junta, said that elections would be held at some point, when the situation was stabilised and the appropriate conditions existed. Mohamed Ibn Chambas, then President of the ECOWAS Commission met with the junta and said the transitional process would include a political dialogue, and the timetable of the transition to be determined through that dialogue.

In light of the successive coups in Mali, ECOWAS took a significant hard stance towards Mali, especially when the interim authorities proposed the transition period be extended by five years to December 2025 instead of February 2022 as originally agreed. ECOWAS announced further punitive measures with immediate effect including the closure of land and air borders with Mali, suspension of financial assistance and non-essential economic transactions, and freezing of Malian state assets in ECOWAS commercial banks. At the ECOWAS summit meeting in Accra in July 2022, the junta agreed to hold general elections by February 2024 in exchange for the immediate removal of sanctions.⁴⁹²

⁴⁹¹Ibid (No.7), page 5

⁴⁹²Emergency mini-summit of ECOWAS heads of State and Government on the situation in Mali:

The U.S. and the African Union joined ECOWAS in announcing a travel ban on the coup's leadership. The soldiers were under pressure from ECOWAS to return power to civilian leaders. Eventually president Amadou Toumani Toure and coup leader Amadou Sanogo stepped down after ECOWAS and the military leaders announced a deal on the transition of power in April, and lifting of sanctions, under which National Assembly of Mali Speaker Dioncounda Traoré would become interim President and oversee new elections. Under the terms of the agreement, the mutinying soldiers would be given amnesty for their participation in the coup.

The Gambian case in the wake of the December 2016 elections is a classic instance where ECOWAS employed multi-tiered approach to ensure former President Yahya Jammeh stepped down and yielded power to President Adama Barrow, who was declared the winner of the elections by the Gambia's Independent Electoral Commission (IEC). President Jammeh initially conceded defeat in a televised speech in which he congratulated President Adama Barrow, but reversed his position barely a week later stating that he would contest the results and ask for fresh elections under a different electoral administration. This U-turn by President Jammeh heralded a political crisis and civil unrest and was thus rejected by ECOWAS and the wider international community. ECOWAS heads of states sent a mediation commission headed by President Ellen Johnson-Sirleaf. Other members of the Commission were the Presidents of Nigeria, Ghana and Sierra Leone and the UN Special Representative for West Africa (Ghana's Mohammed Ibn Chambers) to The Gambia. Following several meetings with him, President Jammeh could not be convinced to cede power to President Adama Barrow. ECOWAS therefore had to resort to military intervention which was approved by the UN Security Council unanimous resolution 2337 expressing its full support for ECOWAS' quest "to ensure, by political means first, "that the will of the people of The Gambia as expressed in the results of 1st December elections" be honoured. Although the resolution did not endorse military action under Chapter VII of the UN Charter, on 19 January, 2017 the ECOWAS troops which had already surrounded The Gambia, invaded Gambian territory.

The invasion was suddenly halted by a final attempt at negotiation by President Abdel Aziz of Mauritania, Alpha Conde of Guinea Conakry and Ibn Chambers resulting in President Jammeh's exile to Equatorial Guinea.⁴⁹³

Despite registered successes, ECOWAS efforts to provide military, mediation and peacebuilding efforts have often been criticised as coming up short particularly in terms of prevention, owing to a number of factors. One major factor is the lack of response from ECOWAS to the practice by Member States of amending their constitutions to extend their term limits. As stated earlier on in this paper, the case of Guinea Conakry is a good example of how this practice could spark a constitutional crisis and make room for the military to find justification to forcefully take over power. Because such changes take place through “legal processes”, ECOWAS appears to lack the mandate within its legal framework to address this problem. The 2015 ECOWAS proposal to ban third terms was “shelved” due to opposition from ECOWAS heads of state who themselves had retained power by extending their term limits.⁴⁹⁴

A second criticism levelled against ECOWAS is regarding its history of suspending and sanctioning Member States only to re-admit and allow them to participate in ECOWAS activities” provided they fulfilled the requirements of holding democratic elections. As a result, leaders who seized power through coups get legitimisation from ECOWAS and have in some cases been selected chairperson of ECOWAS. A notable example is the Togolese President Faure Gnassingbe who ascended to power in 2005 in what was deemed to be a coup as the ruling party was under strict instructions to declare him president. This led to nationwide protests resulting in the deaths of over a thousand people at the hands of security forces. ECOWAS reacted by suspending Togo from its membership, implementing sanctions such as travel bans on its leaders and imposing an arms embargo on the country. Some months later elections were held and Gnassingbe was declared victor and the elections was declared free and fair by ECOWAS. Gnassingbe was subsequently elected as chairperson of ECOWAS in 2017.⁴⁹⁵

⁴⁹³Christof Hartman, Sage Journals (2017): ECOWAS and the Restoration of Democracy in the Gambia.
<https://journals.sagepub.com/doi/epub/10.1177/000203971705200104>

⁴⁹⁴The Effectiveness of ECOWAS in Mitigating Coups in West Africa - Leone Mills - April 2022.

⁴⁹⁵Ibid.

Another criticism is that the sanction regime is more focused on the Member States rather than on the coupists. Following the 2020 and 2021 Malian coups, ECOWAS imposed sanctions including border closures and banning trade with neighbouring countries. Grit Lenz of the civil- society network Focus Sahel, which works on peace and development policy issues in the Sahel, stated: *"these sanctions tend to strengthen the Malian military government. And it is indeed the case that there are considerations in Mali. There are voices that are in favor of leaving ECOWAS completely,"* Lenz observed that the sanctioned regime instead turned to non-ECOWAS states such as Mauritania and Algeria for trade: *"There are certainly neighbouring countries that are not [ECOWAS] members with already economic relations and which have also taken over the role very quickly in the past sanctions after the first coup".*⁴⁹⁶

Similarly following the January 2022 Burkina Faso coup, the sanction regime was criticised for its ineffectiveness at the expense of the displaced civilian population. Alexandra Lamarche, Senior Advocate for West and Central Africa at Refugees International warned against sanctions in a country with a million people displaced by an armed conflict:

"In Burkina Faso this could further exacerbate already dangerous resource scarcity... With decreasing food production and with the lean season expected to start earlier this year, it is projected that more than 2.6 million people will be food insecure by this summer. The ripple effects of the coup and possible impacts of ECOWAS sanctions could raise this projected number and leave more people in need of assistance"

Ibrahima Maiga, a Burkina activist, pointed out that many ECOWAS states have leaders who have changed constitutions to stay in power. He also warned sanctions may have other consequences:

"In Mali, we can easily say that it will give the opportunity to Russia to gain more opportunities in this region, because if you put sanctions on our countries, they will for sure change their relationship they have with France and others, because most people believe that France is behind ECOWAS. ECOWAS is really in a jam and it has to come out strongly against"

⁴⁹⁶Ibid

the coup and sanction the coup, but at the same time it's very clear that it doesn't help, right, so it's not really clear what ECOWAS can do, ”

Al Jazeera's Nicolas Haque reporting from Ouagadougou that the latest suspension on Burkina Faso “has very little effect” as the sanctions put in place in Guinea and Mali “has done very little to change things”. While one must therefore conclude that ECOWAS has demonstrated from the above examples that it does have or can garner the resolve to act and to enforce the sanctions regime, the results have been somewhat controversial particularly when the impact affects the general populace. On the other hand, sanctions that affected the coup leaders directly with the support of the US and the AU combined with political and economic sanctions appear to have a positive outcome in Mali 2022.

If, as shown, ECOWAS has the demonstrated resolve to apply sanctions, perhaps then the problem lies with the limitations of the sanction regime itself and its enforcement mechanisms. Is the sanctions regime in place sufficiently responsive? Is it adequate as a mechanism for holding state parties accountable for their treaty obligations? Is it de facto and de jure robust enough to ensure compliance, in cases of breach? Are the enforcement mechanisms adequate? How can Member States be otherwise held accountable?

6. HOW TO HOLD MEMBER STATES ACCOUNTABLE FOR THEIR TREATY OBLIGATIONS

Military regimes have been a set-back for the growth and development of the sub-region including the institutionalisation of democratic norms. Fundamentally, such regimes being authoritarian have survived by undermining the governance systems and weakening democratic institutions. History has shown that once a country has experienced a military coup, the likelihood of recurrence is high. The recent re-emergence of the phenomenon of the coup does not augur well and might embolden the military in other countries. ECOWAS Zero tolerance policy is appropriate but must be made to work to stem the possibility of a further backslide of the sub-region into unconstitutionality. This calls for the review of the ECOWAS accountability framework and sanctions regime with a view to making it more proactive, holistic, robust and fit for purpose. Efforts must be made to address the real weaknesses that have been identified and rightly criticised with a view to improving ECOWAS capacity to forestall coups and avert them. This

would require the re-orientation of the current focus from sanctions after an event has already occurred to a more balanced approach which focuses more on prevention and deterrence.

ECOWAS is a self-regulatory body and, like all such bodies, the powers or authority at its command is limited by what is ceded by its constituent members; its resources by what its constituent members are willing to provide, or otherwise what it is allowed to raise for itself. As has been shown, the point of departure for the ECOWAS accountability framework is the Revised Treaty which can be described as the Grundnorm of the Community. Article 4 of the Revised Treaty which deals with Fundamental Principles provides for the recognition, promotion and protection of human and peoples' rights; **accountability**, economic and social justice and popular participation in development; promotion and **consolidation of a democratic system of governance in each member State**. This is a sufficiently wide mandate for effective action.

By Article 5, **Member States gave an undertaking to honour their obligations under the Treaty and to abide by the decisions and regulations of the Community**. Thus, in joining the Community Member States are agreeing to cede part of their sovereign authority to their peers and to recognise the authority of their collective peers over them. But for successful implementation, there must at any one time be a sufficient number of members that are committed to upholding the fundamental precepts and values of the Community.

It is submitted that an Accountability framework for any self-regulatory system to be effective should comprise at least four components- (1) self-regulation, (2) prevention, (3) sanctions in the case of breach; and (3) enforcement. All these components require appropriate capacity, systems, mechanisms, and tools. As opined, the ECOWAS Constitutional convergence principles form a sufficiently wide basis for the development of these 4 components.

6.1 Self-Regulation

Based on their treaty obligations, Member States are expected to self-regulate without being prompted, and to voluntarily put in place the necessary domestic arrangements, as appropriate, for a democratic system of governance. However, an undertaking to self- regulate does not necessarily translate into action. For

various reasons, some of which may be mere negligence, countries may fail to implement necessary self-regulatory measures particularly where this requires the allocation of resources. A State Member may, in fact, not even have the domestic capacity nor sufficient resources to effectively deliver on treaty obligations. Therefore, it should be part of ECOWAS mandate to put in place an oversight compliance system which audits Member State compliance or capacity to comply. The outcome of such an audit would inform the design of a capacity building program to support Member States and ensure compliance. As part of such a program a country assessment tool could be introduced accompanied by a periodic rating mechanism, which could be used to identify gaps, weaknesses and failures. The outcome of such an assessment could serve as an advance warning system and the need for ECOWAS early intervention; and if necessary, the application of sanctions for failure to implement domestic regulatory measures to give effect to treaty obligations and ECOWAS standards and values.

In the case of free and fair elections, what is required to be implemented at the domestic level is specifically articulated in section II of the Protocol on Good Governance. Regular complaints across Member States however suggest that the inadequacies of the electoral systems usually become an issue only post-election. Governments can therefore afford to ignore pressure for election reforms because there is no accountability mechanism in place to enforce compliance with pre-elections safeguards! A robust audit system which issues periodic reports on country compliance and readiness to deliver transparent elections could compel action.

Election observer missions could also be premised on a rating of the pre-election safeguards for each country. Where such pre-election safeguards fail to score a required threshold, no election mission ought to be fielded; for otherwise, it would have the effect of rubber-stamping elections whose outcome were known to be flawed beforehand. Attention and resources should be equally balanced between ensuring that countries actually have in place transparent elections infrastructures that meet treaty requirements and on election monitoring/supervision of the conduct of the election. At the latter stage it is way too late to prevent malpractices and avert their potential destabilising consequences. Other initiatives could include: harmonisation of electoral laws and processes to enable the development

of uniform capacity both at sub-regional and across member states which could be deployed or shared as appropriate.

6.2 Prevention

A core objective of regulation is prevention. It is desirable that the ECOWAS accountability mechanism prioritises prevention over sanctions. Attention should be given to the strengthening of systems in place at ECOWAS level to monitor and prevent the erosion of constitutional convergence principles. Early warning signals (which are always present) of democratic downturns in any Member State and which require early intervention to resolve should be proactively addressed in order to arrest further deterioration.

6.3 Sanctions

The ECOWAS sanctions regime should also focus on prevention; so that where early warning signals of the existence of factors which could lead to constitutional crisis exist and proactive intervention does not work, these sanctions could be applied. It is submitted that in order to have a deterring effect the sanctions regime should broaden its focus. As framed, the ECOWAS sanctions regime is wholly focused on the Member State. This, more often than not, translates into collective punishment of the innocent public. In order to have a deterrent effect, sanctions must aim to prevent the opportunistic and predatory seizing of power by the military with particular focus on the perpetrators.

A fundamental principle of the rule of law is that only a court of competent jurisdiction can absolve a person accused of committing a crime. It therefore ought not to be possible for a coupist to transform himself into legitimacy by becoming a civilian. This ought to be prohibited and an international support system promoted to ensure that coupists are unable to leave their country without being at risk of arrest and trial in any ECOWAS jurisdiction. The overthrow or attempt to overthrow a legitimate government should also be a bar to seeking political office or participating in elections. In this regard, consideration should be given to the sub-regional criminalisation of coup d'etats as a crime against the Community having regard to treaty obligations. A more supranational approach is recommended against unconstitutional military interventions.

6.4 Enforcement

Enforcement should be approached from the broader perspective of giving effect to treaty obligations in their totality. In this connection, enforcement mechanisms should include the curbing of emerging trends that have the effect of undermining constitutional democracy. For instance, it is against good governance principles and certainly a conflict of interest for any sitting president to seek to amend the constitution or the laws **while in office** to extend his or her own term of office. This should be regarded as contrary to the “strict adherence to democratic principles” and therefore a violation of treaty obligations and should be unequivocally condemned and sanctioned.

A robust enforcement system should also include a mutual assistance mechanism at international level to secure support for supranational accountability and apprehension of coupists and their prosecution whether or not they are in power. The public must be encouraged and empowered to play a more active role in holding their governments accountable. It should be possible for any ECOWAS citizen or entity to bring any ECOWAS government to account before the Court to enforce a treaty obligation which touches on democratic values not only fundamental human rights. For instance, currently voters have no recourse for governments failures to implement election safeguards except to national courts, which can be particularly vulnerable to manipulation due to substandard constitutional protection.⁴⁹⁷ Wider public involvement requires more stakeholder buy-in into ECOWAS as a project designed to better their lives.

⁴⁹⁷Under Section of the Gambian Constitution, the services of a judge may be terminated by the President.

**THE OBLIGATION OF MEMBER STATES TO
GUARANTEE FREE, FAIR AND TRANSPARENT ELECTIONS
AS A CONFLICT PREVENTION MECHANISM
BY
AMOS O ENABULELE, PHD**

PROFESSOR OF PUBLIC INTERNATIONAL LAW, UNIVERSITY OF BENIN, NIGERIA

1. Introduction

A cursory look at the 1975 foundation Treaty of Economic Community of West African States (ECOWAS) would reveal the nature of governance in, and across, the region at its inception. At the signing of the Treaty, at least six of the founding fifteen (15) States were under military rule,⁴⁹⁸ while the others were only under a semblance of democratic rule that cannot be said to have delivered good governance or transition by free, fair and transparent elections. The marked repressiveness of the governments – military or civilian – left very little room for differentiating between the States governed by military rule and those governed by civilians, who often were sit-tight leaders, who spared nothing in their bid to perpetuate power.⁴⁹⁹ These were civilian rule but not democratic rule.

Instructively, as at the time the Reversed Treaty was signed, ECOWAS had not made substantial progress towards democracy as several Member States were still under military rule. On the other hand, those not under outright military rule were only labouring under a form of civilian rule with a semblance of democracy, as elections remained largely characterized by lack of freedom of choice with political ancestors as leaders. In fact, as at 1993, such leaders as Dr. Siaka Stevens of Sierra Leone, Felix Houphouet-Boigny, President of Ivory Coast, Sir Dawda Jawara President of the Republic of the Gambia and General Gnassingbe Eyadema of Togo had been in office for over twenty years with poverty, massive human rights abuses and corruption to show for it in some cases. These, no doubt, were allurements for widespread dissatisfaction of the populace in the government and disenchantment with civilian rule.

⁴⁹⁸Lt Mathieu Kerekou (Benin); General Ignatius Kutu Acheampong (Ghana); Lt. Col. Seyni Kountche (Niger); General Yakubu Gowon, (Nigeria); Moussa Traoré, (Mali); A. Sangoule Lamizana (Upper Volta, now Burkina Faso); General Gnassingbe Eyadema (Togo)

⁴⁹⁹Léopold Senghor, President of Senegal (1960 until he voluntarily retired in 1980); Dr. Siaka Stevens, President of Sierra Leone, President (1971-1985), when he stepped down for his anointed candidate; Moktar Ould Daddah was the President of Mauritania (a founding member of ECOWAS that pulled out in December, 2000) (from 1960 to 1978) until he was deposed in a coup; Dr William R. Tolbert, JR President of Liberia (1971 but was assassinated in a coup in 1980); Mr. Felix Houphouet-Boigny, President of Ivory Coast (1960 until death in 1993, having been continuously elected unopposed); Sir Dawda Jawara President of the Republic of Gambia, from 1970 to 1994 when he was toppled in a coup; Ahmed Sékou Touré, President of Guinea (1958 until his death in 1984); General Gnassingbe Eyadema (Togo) became President on 14 April, 1967 by a coup d'état and remained in office by all means (elected in 1979 and 1985 in a one party election) for 38 years; Moussa Traoré, (President of Mali, 1968 to 1991, when he was overthrown in a coup following a protest; Mr. Luiz Cabral President of Guinea-Bissau from 1973 to 1980 until overthrown in a coup.

Though set up as a purely regional economic community without a mention of regional security⁵⁰⁰ in its 1975 Treaty, it did not take very long for ECOWAS to realise that its objectives would perennially be a pipe dream unless it takes more interest in matters of regional security, democracy and good governance, beyond its avowed stance of non-interference that prevailed at inception.⁵⁰¹ The non-interference policy, it must be said, was the natural consequence of article 2(7) of the Charter of the United Nations, since no State is entitled to assume a contrary obligation to those of the Charter.⁵⁰² ECOWAS consolidated this principle in the 1978 Protocol on Non-Aggression.⁵⁰³ This was further reaffirmed in the 1981 Protocol Relating to Mutual Assistance in Defence, which provided in its article 18(2) that “Community forces shall not intervene if the conflict remains purely internal”.

At the close of the 1975 regime, it had become clear to ECOWAS that some level of interference and intervention in the internal affairs of Member States might be warranted by circumstances. Consequently, the consent of Member States to such eventuality was enacted into article 58 of the 1993 Revised Treaty. This was followed by the adoption of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, 1999 (the 1999 Protocol) to which the Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (the 2001 Protocol), is supplementary.⁵⁰⁴ The emergence of the 2001 Protocol, with an expanded mandate on democracy and good governance, consolidated the promotion of democracy, as a core value of the ECOWAS as provided for in article 4(j) of the 1993 Revised Treaty.

From experience, perhaps, the Authority of the Heads of State and Government (AHSF) appears to have concluded that the 2001 Protocol as presently enacted is incapable of bringing about the desired change. Consequently, the Protocol is being reviewed on the instruction of the AHSF “in order to ensure democracy, peace and stability in our region”.⁵⁰⁵

⁵⁰⁰Cf article 58 of the Revised Treaty, 1993

⁵⁰¹See Yakubu Gowon, A Thesis Submitted for the Degree of PhD at the University of Warwick, (February, 1984) available at <http://go.warwick.ac.uk/wrap/4397> (accessed on 03/03/23), pp. 250-260

⁵⁰²Article 103 of the Charter

⁵⁰³Adopted in Dakar on 22 April, 1978

⁵⁰⁴Article 46 of the 2001 Protocol

⁵⁰⁵Extraordinary Session of AHSF, 16 September, 2021; Extraordinary Session of the AHSF, 18 February, 2023

The paper revolves around the efforts of ECOWAS to promote peace and security through the guarantee of democracy and good governance in the Community through the letters and practice of the 2001 Protocol as the ECOWAS architectural framework for the promotion and consolidation of democracy and good governance within the Community. For a fuller discussion of the topic, the paper takes a keen interest in other relevant Treaties and even the laws of Member States. The paper proceeds in nine parts. Part ii contains an overview of the 2001 Protocol; Part iii highlights the convergence principles; Part iv discusses the parameters for free and fair elections under the 2001 Protocol; Part v identifies and discusses the factors responsible for undermining free, fair and transparent elections; Part vi examines election monitoring and ECOWAS assistance to member States; Part vii discusses factors responsible for the subversion of constitutional democratic order; Part viii looks into the means of holding ECOWAS member States responsible for their treaty obligation; Part ix deals with sanctions regime for unconstitutional change of government; and Part x is the conclusion.

2. An Overview of the 2001 Protocol

I would preface this discussion with an observation that the provisions of the 2001 Protocol replaced and rendered null and void, all the provisions of the Protocol relating to Mutual Assistance in Defence, 1981, and the Protocol on Non-Aggression, 1978, which are incompatible with those of the 2001 Protocol.⁵⁰⁶ This would mean that the 1999 and 2001 Protocols are superior to any other Protocol in all matters relating to conflict prevention management, resolution, peace-keeping; and security, democracy and good governance.

A proper understanding of the purpose of this Protocol and the gaps it was intended to fill compels a brief examination of the connection of the Protocol with the sources mentioned in its Preamble. These are the ECOWAS Revised Treaty, 1993, the 1999 Protocol, the Universal Declaration of Human Rights, the African Charter on Human and Peoples Rights and the Convention on the Elimination of all forms of Discrimination Against Women and other international human rights instruments.

⁵⁰⁶Article 53 of 1999 Protocol.

The discussion of the Revised Treaty and each of the other instruments mentioned in the preamble needs not delay us here, as they are, where necessary, incorporated into the body of this paper. It suffices state however that the sources highlight the strong connection of the 2001 Protocol to the fundamental objectives of the Community enunciated in the Revised Treaty and the intricate connection of its purpose to human rights.

Nevertheless, it is fitting to make some remarks about the 1999 Protocol (to which the 2001 Protocol is supplementary. Though the 1999 Protocol did not commit towards intervention for democracy purposes, it promised the “promotion and consolidation of a democratic government as well as democratic institutions in each Member State”.⁵⁰⁷ The Protocol underscores a key essential of ECOWAS' movement into regional security space in recognition of the overarching importance of political stability and the security of lives and property to the success of the aims of the Community in the interest and benefit of the people. Accordingly, article 2(b) of the 1999 Protocol states that the Protocol is aimed towards, *inter alia*, the “promotion and reinforcement of the free movement of persons, the right of residence and establishment ...”.

What appears to be a mere statement of principle in 1999 took a more concrete shape through the operations of the 2001 Protocol. The Protocol divides into three Chapters. Chapter one further divides into sections I-VIII. Section 1 (article 1) states that the Protocol clarified the principles set out in article 2 of the 1999 Protocol; it also deals with the constitutional convergence principles of the ECOWAS; section II (articles 2 to 10) deals with principles governing elections; section III (articles 11 to 18) deals with election monitoring; section IV (articles 19 to 24) outlines the role of the armed forces, the police and the security forces in a democracy; section V (articles 25 to 28), deals with poverty alleviation and promotion of social dialogue; section VI (articles 29 to 31), outlines education, culture and religion; section VII (articles 32-39), reinforces the rule of law, human rights and good governance; section VIII (articles 40 to 43), deals with the welfare of women, children and youths. Chapter 2 contains the modalities for implementation and sanctions; and chapter 3 contains general provisions – amendments, withdrawal, entry into force and depositary authority.

⁵⁰⁷Article 2(c) of the 1999 Protocol.

3. Clarification and Convergence Principles

It is not common to find treaties that open with the need to clarify its precursor, as did the 2001 Protocol. Thus, Chapter I of the 2001 Protocol states that its provisions “complement and clarify the principles set out in Article 2 of the Protocol of 10 December 1999”. By article 2, Member States to the 1999 Protocol reaffirmed their commitment to the principles contained in the UN Charter and the Organization of African Unity Charter (now the Constitutive Act of the African Union) as well as the Universal Declaration of Human Rights and the African Charter on Human and People's Rights. Member States particularly committed themselves to the fundamental principles: (a) that economic and social development and the security of peoples and States are inextricably linked; (b) promotion and reinforcement of the free movement of persons, the right of residence and establishment which contribute to the reinforcement of good neighbourliness; (c) promotion and consolidation of a democratic government as well as democratic institutions in each member State; (d) protection of fundamental human rights and freedoms and the rules of international humanitarian laws; (e) equality of sovereign States; and (f) territorial integrity and political independence of Member States.

An apparent shortcoming was the failure of the 1999 Protocol to define and elaborate on its article 2 Principles. In complementing and clarifying the principles in the earlier Protocol, article 1 of the 2001 Protocol introduced the “constitutional convergence principles” and identified them as (a) separation of powers; (b) accession to power by free, fair and credible elections; (c) zero tolerance for powers obtained by unconstitutional means; (d) secularism and non-discrimination; (e) apolitical armed forces; (f) rights of political parties and the need for them to be nationalistic in nature; (g) freedom of association and press; etc. These principles were to a large extent elaborated upon in the substantive provisions of the Protocol. When the 1999 Protocol and the 2001 Protocol are compared, the obvious difference between them is that the provisions of 1999 Protocol are mostly procedural in nature while the 2001 Protocol is substantive and relies on the procedural provisions of the former.

It is difficult to speculate on the scope of the provisions without understanding the underpinning normative order, which I take to be articles 4 and 58 of the Revised

Treaty. Article 58 deals with collective regional security to the extent that Member States undertook to co-operate with the Community in establishing and strengthening appropriate mechanisms for the timely prevention and resolution of intra-state and inter-state conflicts, paying particular regard to the need to provide assistance in different peace building and consolidation spheres, including where necessary and at the request of Member States, to provide assistance to Member States for the observation of democratic elections. Article 4 enacts the common standards and core values (fundamental objectives) of the Community. These provisions created the fertile ground for ECOWAS to sow the 1999 and 2001 Protocols.

For context, it is felicitous to reflect on the legal landscape that preceded the 1999 regime, given its reference to pre-existing relevant laws on peace and security. Prior to the 1993 Revised Treaty regime, ECOWAS had ventured in defence of peace and democracy when in fidelity to the Protocol on Non-Aggression, on 30 May, 1990, an ECOWAS summit in Banjul, the Gambia, established a four-member Standing Mediation Committee (SMC)⁵⁰⁸ with a mandate to mediate disputes and conflicts. In August 1990, the SMC in turn established the ECOWAS Cease-fire Monitoring Group (ECOMOG) under the command of a Force Commander appointed by the SMC, specifically in relation to the civil war in Liberia.⁵⁰⁹ ECOMOG was imbued, *inter alia*, with powers to conduct military operations for the purpose of monitoring the ceasefire, as well as restoring law and order to create the necessary conditions for free and fair elections to be held in Liberia. This intervention was notwithstanding the concerns raised over the legal regime underpinning the creation of ECOMOG.

⁵⁰⁸A/DEC.9/5/90 of 30 May 1990, Relating to the Establishment of the Standing Mediation Committee, made pursuant to ECOWAS Protocol on Non-Aggression adopted in Dakar on 22 April, 1978

⁵⁰⁹Article II (2) Decision A/DEC.1/8/90 on the Ceasefire and Establishment of an ECOWAS Ceasefire Monitoring Group for Liberia, approved by the Authority Decision A/DEC.1/11/90 Relating to the approval of the Decisions of the Community Standing Mediation Committee taken During its First Session from 6 to 7 August 1990 held at Banjul (Republic of the Gambia)

Though specifically created to deal with the Liberian question, ECOMOG extended its mandate into Sierra Leone in 1997/1998 and successfully restored President Ahmad Tejan Kabbah to power in 1998.⁵¹⁰ It also intervened in Guinea-Bissau in 1998 in an unsuccessful bid to stop the overthrow of President João Bernardo Vieira.⁵¹¹ These interventions were however at the request of the *de jure* President of the respective Member States – the overthrown and exiled President Kabbah of Sierra Leone and President João Bernardo Vieira of Guinea Bissau.

As the manner of its creation did not reflect a solid legal foundation, ECOMOG's foundational deficiency was sought to be corrected in the 1999 Protocol, which identified it as “the Community's intervention force as defined in article 21 of this Protocol”. It then went on to establish ECOMOG as one of the Supporting Organs of the Institutions of the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security. Article 22 of the Protocol charged ECOMOG with the following missions: (a) observation and monitoring; (b) peace keeping and restoration of peace; (c) humanitarian intervention in support of humanitarian disaster; (d) enforcement of sanctions, including embargo; (e) preventive deployment; (f) peace building, disarmament and demobilisation; (g) policing activities, including the control of fraud and organised crime; (h) any other operations as may be mandated by the Mediation and Security Council. By the 1999 Protocol, ECOWAS could intervene in a Member State in crisis, which was defined to mean a:

Member State experiencing an armed conflict as well as a Member State facing serious and persisting problems or situations of extreme tension which, if left unchecked, could lead to serious humanitarian disaster or threaten peace and security in the subregion or in any Member State affected by the overthrow or attempted overthrow of a democratically elected government. (Emphasis supplied)

⁵¹⁰Jeremy Levitt, “Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone”, 12 Temp. Int'l & Comp. L.J. 333 (1998)

⁵¹¹Felix Lima, “Exploring the Prospect for Peace in West Africa: is ECOMOG the Solution?”, March 2002, online: <https://apps.dtic.mil/sti/pdfs/ADA420441.pdf> accessed on 27 February, 2023

⁵¹²Article 17

By article 25, the intervention Mechanism was to be activated in the event, among others, “of internal conflict that threatens to trigger a humanitarian disaster, or that poses a serious threat to peace and security in the sub-region an overthrow or attempted overthrow of a democratically elected government”.

Generally, this strikes at the unavoidable divergence between any act of intervention or interference in the internal affairs of a State, on one hand, and the rules of general international law prohibiting interference or intervention, on the other. It is thus possible to argue, and very strongly too, when viewed from the prism of the following articles of the UN Charter – article 2(4), prohibiting intervention; article 2(7), prohibiting interference; and article 52, dealing with regional arrangements – that the prohibitions are implicated in the interference or intervention of ECOWAS. However, such argument can prevail only if taken in isolation of the consensual nature of the Revised Treaty, the 1999 and 2001 Protocols and other intervening factors.

The first of these factors is the community nature of ECOWAS; this warrants a determination of whether the intervention or interference is done pursuant to a power Member States have ceded to ECOWAS by treaty. If it is done pursuant to a ceded power, then the legality of such intervention would be determined upon the extent of, and threshold for, the consent thereby given. The thresholds are in the common article 45 of the 1999 and 2001 Protocols – unconstitutional change of government and erosion of governmental power. For instance, there was obvious erosion of the authority of government in Guinea Bissau and Mali when ECOWAS intervened in 2012. In Guinea Bissau, ECOWAS intervened to help the transition and restoration of constitutional government in Guinea Bissau. In Mali, apart from the erosion of government authority, there was actually absence of government in Northern Mali,⁵¹³ where there was prevalence of insurgent activities.

Closely related to this is the inherent right of a *de jure* government to invite ECOWAS to intervene either to defend or restore territorial integrity or for political stability, the ECOMOG intervention in Sierra Leone to restore President Tejan Kabbah to power, for instance. This is not within the prohibited degrees of intervention, as intervention at the behest of the *de jure* government cannot be said

⁵¹³<https://www.dw.com/en/west-african-block-to-deploy-troops-in-mali-guinea-bissau/a-15912843>

The tenuous nature of this right where the *de jure* government is not in effective control of the territory, cannot but call for careful consideration before accepting the invitation in that the practicability of such intervention can best be based on the assumption that the *de facto* government has not gained legitimacy by effectiveness of the revolutionary legal order.⁵¹⁴ If, as has happened severally, a coup successfully created a revolutionary order that underpins a legal order that is by and large effective, the probability of a successful resistance of the intervening forces by the junta forces, especially when such a junta enjoys the support of certain other States and of the people becomes very high.

There have even been cases where ECOWAS intervened at the requests of Presidents-elect, who had not been sworn into office, as we saw in Cote d'Ivoire in 2011, when President-elect Alassane Ouattara of Cote d'Ivoire requested ECOWAS to intervene to remove incumbent Laurent Gbagbo, who refused to leave power, following his defeat in the presidential elections of November, 2010.⁵¹⁵ We also saw it in The Gambia in 2017, when having been sworn in at the Gambian's Embassy in Senegal, ECOWAS troop escorted President Adama Barrow to The Gambia to assume office at a time that a President yet held sway in The Gambia and had lodged a case at the Supreme Court, though his legitimacy had been eroded.⁵¹⁶

Another factor to consider is the possibility of ECOWAS citizens from other Member States being caught in the arena of conflict or egregious rights violation. This had in the past been taken to be sufficient ground for self-defence, though the validity of such exercise of self defence remains to be seen when viewed against the clear provisions of article 51 of the UN Charter.⁵¹⁷ Little wonder that the 1999 Protocol took cognizance of Protocols A/P1/5/79, A/SP2/7/85, A/SP1/7/86, A/SP1/6/88, A/SP2/5/90, relating to the free movement of persons, the right of residence and establishment.

⁵¹⁴Hans Kelsen, *Pure Theory of Law*, 59 (Translation from the Second Revised and enlarged German edition by Max Knight. Berkeley: University of California Press, 1970). See *AG for the Republic v. Mustafa, Madzibamutu v. Lardner Burke* 1969 1 AC 645 and *State v. Dosso* (1958) 2 P.S.C.R. 180, and *Lakanmi v. AG West* 1970, 6 NSCC 146

⁵¹⁵Julie Dube Gagnon, "ECOWAS's Right to Intervene in Cote d'Ivoire to Install Alassane Ouattara as President-Elect" (2013) 3 *Notre Dame J Int'l & Comp L* 51, 52

⁵¹⁶Elkanah Oluwapelumi Babatunde, *ECOWAS and the Maintenance of International Peace and Security: Protecting the Right to Democratic Governance*, 6 *UCLJLJ* 46 (2017).

⁵¹⁷See Tom Ruys "The 'Protection of Nationals' Doctrine Revisited", 13 *Journal of Conflict and Security Law*, (2008), online at <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP129e.pdf>, accessed 06/03/2023

If nothing else, free movement within the Community makes it impossible to expect ECOWAS to be indifferent to agents of political instability within the Community.

Interference or intervention is not without its challenges. It is common knowledge that despite its successes in some cases, there were challenges that have trailed the activities of ECOMOG. There was the disagreement between Member States; there were command and control, operational, and budgetary challenges.⁵¹⁸ There is also the huge problem of the lack of a standing intervention force under the command and control of the AHSF. This leaves intervention at the whims and caprices of the State members that are willing and able to put boots on the ground for the intervention. The participation of willing States naturally boils down to national interest that may not necessarily coincide with community interest. This problem is not limited to ECOWAS; the United Nations suffers the same fate from the lack of a military force at its disposal as required in article 47 of its Charter. However, the AHSF is now seriously considering setting up a regional force whose mandate will include the restoration of constitutional order where it is threatened in the subregion.⁵¹⁹ It is left to be seen how such an arrangement will materialize.

4. Parameters for Free and Fair Elections under the 2001 Protocol

I would make a reflective start with the work of political philosophers to emphasise the place of citizens in the choice of those who govern in a representative democracy, as the distinguishing feature between democracy and any other forms of emergence of leadership. Once we agree that we are no longer in Thomas Hobbes' state of nature and that we have surrendered the power to representatives (not necessarily the best of us, unfortunately) to govern us and have removed all forms of absoluteness from the leader within the conceptual prism of Jean-Jacques Rousseau's social contract theory,⁵²⁰ we must also come to the inevitable conclusion that the distinguishing essentiality of the state of nature and a representative democracy, is the ability, not only to choose our leaders but also to be able regulate their choices or remove them when they exceed their limits.

⁵¹⁸Cyril I. Obi, "Economic Community of West African States on the Ground: Comparing Peacekeeping in Liberia, Sierra Leone, Guinea Bissau, and Côte D'Ivoire", 2(2-3) African Security, 119 (2009)

⁵¹⁹Sixty Second ordinary session of the AHSF of December, 4, 2022, the AHSF

⁵²⁰ <https://www.britannica.com/biography/Jean-Jacques-Rousseau> (accessed on 03/03/23)

The peoples' sovereignty is well recognised in the Constitutions of Member States.⁵²¹ I cite with admiration the example of article 1 of Liberia's Constitution of 1986, which provides:

All power is inherent in the people. All free governments are instituted by their authority and for their benefit and they have the right to alter and reform the same when their safety and happiness so require. In order to ensure democratic government which responds to the wishes of the governed, the people shall have the right at such period, and in such manner as provided for under this Constitution, to cause their public servants to leave office and to fill vacancies by regular elections and appointments.

Past events demonstrate three ways in which governments have arisen and changed in post-independence ECOWAS States – (a) by military coup; (b) succession;⁵²² and (c) through the ballot (credibility notwithstanding). The variety of mode of change of government does not reflect the value the Constitutions of ECOWAS Member States place on the sovereignty of the people as expressed through democratic means with a strong underlying human rights guarantee. The incidents of coups and their frequencies within the Community means that democracy is still at infancy stage in majority of its Member States. If we take Nigeria, for instance, the longest stretch of uninterrupted democratic governance has been the current one that began in 1999. The worst example in this regard is the frequency of undemocratic leadership in Guinea Bissau.⁵²³ The prevalent democratic infancy across Member States has grave implications for free, fair and transparent elections, human rights protection and engenders political instability, which in turn creates an allure for military coup and the consequential disruption of the formation or consolidation of democratic culture.

It is essential to bear in mind that in the sovereignty of each of ECOWAS Member States, as reiterated in article 2(7) of the Charter of the United Nations (to which all the Member States subscribe),

⁵²¹Section 1 of the Ghana's Constitution of 1992 with Amendments through 1996; section 5(2)(a) of the Constitution of Sierra Leone, 1991 (Act No. 6 of 1991); article 25 of Mali's Constitution of 1992; article 3 Senegal's Constitution of 2001 with Amendments through 2016; section 14(1) and (2) of the constitution of the federal republic of Nigeria 1999.

⁵²²There has been occasions where a dying sit tight leader appointed another to take their place, e.g Dr. Siaka Stevens, President of Sierra Leone, President (1971-1985), when he stepped down for his anointed candidate, Major General Joseph Saidu Momoh, who ruled Sierra Leone from 1985 to 1992

⁵²³<https://www.bbc.co.uk/news/world-africa-18110585>

lies its inherent right to conduct its own affairs without interference by other States. Indeed:

no state today would deny the basic principle that the people of a nation have the right, under international law, to decide for themselves what kind of government they want ⁵²⁴

Though the events subsequent to the 1999 Protocol as supplemented by the 2001 Protocol (subscribed to by Member States) show how strongly ECOWAS now views unconstitutional change of government, and how invested it now is in elections in the Member States, the 2001 Protocol can only supplement but never supplant the right of Member States to determine the form of government to adopt as encapsulated in domestic laws. Fortunately, there is convergence between the 2001 Protocol and domestic law in the necessity of free, fair and credible elections, thus minimising the possibility of conflict between the election provisions of the Protocol and domestic laws. Indeed, it is unarguable that: It is felicitous to note that the parameters for free, fair and credible elections set out in the 2001 Protocol covers the field when considered in the light of what makes an election free, fair and credible. To properly situate the provisions of the Protocol, it is essential to first define election.

I agree with the definition that “an election is a decision-making process by which a population [presumably] chooses an individual to hold a formal office”,⁵²⁵ except that what we find in most emerging democracies is that elections are just a mere charade to hoodwink the population into believing they choose their leaders, who are actually “selected” via rigging and other electoral frauds. Nevertheless, elections are a defining characteristic of democracy, and thus form an integral part of the democratization process.⁵²⁶ As election is the only known means of the exercise of the sovereignty that resides in the people to choose and change their leaders, it is a fundamental right that nourishes in the exercise of a choice.⁵²⁷ Like consent, a choice is not made if it is induced, coerced or subverted.

⁵²⁴Oscar Schachter, “International Law: The Right of States to Use Armed Force”, 82 Mich. L. Rev. 1620, 1641 (1984), 1641

⁵²⁵Daniel Chigudu, “A Critical Review on the Determinants of a Free, Fair and Credible Election”, 4(8) International Relations and Diplomacy, 508, 508 (2016)

⁵²⁶Muna Ndulo and Sara Lulo, “Free and Fair Elections, Violence and Conflict” 51 Harvard International Law Journal Online 144, 154 (2010)

⁵²⁷Article 13 (1) African Charter on Human and Peoples' Rights

Though a manipulated exercise of choice is no less a disruption of free will, political choices are often manipulated, except that the citizenry is persuaded by propaganda and lies to be convinced of the choice of a candidate or political party, which they then make with satisfaction. Persuasions are often concealed and delivered in the diabolical toga of lies, or the more dangerous toga of religion and ethnicity. Such persuasion, however morally wrong, insofar as it eventuates in a choice freely made, has no real bearing on the integrity of an election, as often times, those who make the choices believe and defend the premises. It has thus been argued that “the most fundamental principle defining credible elections is that **they must reflect the free expression of the will of the people**”.⁵²⁸

While it is difficult to have a universal aggregation of what constitutes a free, fair and credible election, given that such determination varies according to the maturity of the democratic experience and the consequential democratic culture and context,⁵²⁹ it is difficult to quarrel with the inclusion of the following as factors that underlie free, fair and credible elections: (a) unhindered right to vote by eligible voters; (b) freedom to campaign for all political parties with equal access to the media; (c) secrecy of the ballot; (d) reasonable speed in the counting of ballots; and (e) accountability and openness of the electoral process to the competing parties. This includes an independent electoral commission; transparent voters' register; accuracy in vote counting; timely transmission of results, and impartiality in the management of disputes; (f) an acceptable electoral law; (g) freedom to vie for an elective position; (h) absence of voters' intimidation and suppression; voters' inducement. These reflect the broad principles of transparent, inclusive, accountable, and equitable opportunities to compete in the elections set out by USAID.⁵³⁰

If one takes all of these as the prerequisites for free, fair and credible elections, then one must as of necessity admit the difficulty in an election attaining that standard. The freedom or fairness of an election is a matter of degree; perhaps, we should be speaking on the basis of a spectrum and the minimum standards below which an election should not go.

528USAID <https://www.usaid.gov/democracy/supporting-free-and-fair-elections>

529Mercy Kathambi Kaburu “Free, Fair and Credible? An Assessment of Kenya's 2017 Election” 21(2) Journal of African Elections 44, 47(2022) online at <https://www.eisa.org/pdf/JAE21.1Kaburu.pdf> (accessed 13/02/2023)

530 <https://www.usaid.gov/democracy/supporting-free-and-fair-elections>; Bishop, S & Hoeffler, “Free and fair elections: a new database”, Journal of Peace Research, 47 (2016), cited in Kaburu, *ibid*

If you want to talk about voters' inducement, I dare say that this is present in all democracies in that politicians always induce voters with promises they never even believe they can deliver, if we must give inducement its full meaning beyond its transactional nature of tangibility.

As earlier stated, the 2001 Protocol covers the field in identifying the prerequisites of free, fair and credible election. Section II (articles 2 to 10) of the Protocol, which must again be said not to be the law for the conduct of any election but a complement to the laws of Member States undergirding elections, make provisions for elections. Article(2)(1) prohibits substantial modification to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of political actors; it also requires that all the elections shall be organised on the dates or at periods fixed by the Constitution or the electoral laws.⁵³¹ These are not absolute in that the provisions envisage that modification of law may take place with the consent of majority, not even unanimity, of all political actors. While this flexibility makes sense, it also portends serious danger as it gives the incumbent the faculty to amend the law to his advantage with the consensus of pliable political actors.

In *Omar Jallow Plaintiffs v. Republic of The Gambia*, the ECOWAS Court was of the view that “[t]he right to elections depends to a large extent on compliance with positive obligations of States. The State reserves the right to amend its laws without interference which forms part of its internal affairs”.⁵³² As to whether a law amended within six months of election would be null and void, the ECOWAS Community Court of Justice (ECCtJ) did not directly answer the question but stated that “the substance of the Plaintiffs allegation borders on the internal affairs of the Defendant” and that the Plaintiffs did not prove that “the amendment was unreasonable, discriminatory and unjust or targeted at any Political Party”;⁵³⁴ therefore, that “assuming jurisdiction [to interrogate the law] amounts to examining the internal laws of the Defendant”.⁵³⁵ The court seems to have qualified the duration credential with the non-discrimination credential. If this is to be the case, it would mean that amendments can occur at any time only that it should be non-discriminatory.

⁵³¹Article1(1) and (2)

⁵³²ECW/CCJ/JUD/06/17: Omar Jallow v. Republic of The Gambia Defendant

⁵³³Ibid, p. 11

⁵³⁴Ibid, p. 12-13

⁵³⁵Ibid

As for the shift of election, we have seen instances of shift of election when expedient to do so. For instance, the general election of Nigeria was shifted for six weeks in 2015; for one week in 2019; and the gubernatorial elections for one week in 2023. Though this is not an ideal occurrence, it behooves a National Electoral Commission (NEC) to shift an election when it becomes obvious to the NEC that it cannot conduct the election on the scheduled date without compromising the credibility of the election.

Article 2(3) mandates Member States to take all necessary steps to guarantee equal rights of men and women to vote and be voted for in elections; the right to participate in the formulation and implementation of government policies; and the right to hold public offices and perform public functions at all levels of governance. Article 3 emphasises, *inter alia*, the need for an independent or neutral NEC that enjoys the confidence of all the political actors. It is possible to argue that the use of the word “bodies” in this article is deliberate and extends beyond the NEC to other agencies that play a role in the election, except that the use of the word “organise” seems to discount the strength of that assumption in that it narrows “bodies” down to the body actually organising the election, which would then be the election management body. The purpose would have been better served, in my view, if the word, “participate in the conduct” substitutes “organise” to drag all agencies, such as the security agencies, involved in one way or the other into this article.

Article 3 enacts very important provisions geared towards the independence of NEC, given that it is the NEC that embodies the credibility of the election it conducts. In other words, election reflects the integrity of the NEC that conducted it. As Andrew Graham observes, “the electoral process is one that is governed by public policy and can only succeed with independent oversight of the process that establishes credibility with the population”.⁵³⁶ Independence, no doubt extends to “the financial systems in which they operate”.⁵³⁷ In *APDH v Côte d'Ivoire*, the African Court on Human and Peoples' Rights (ACtHPR) declared that “an electoral body is independent when it has administrative and financial autonomy, and offers sufficient guarantees of its members' independence and impartiality.”⁵³⁸

⁵³⁶Andrew Graham, “Preparing Police Services in Democratic Regimes to Support the Electoral Process: A Survey of Leading Practice” 14 (Ukraine Proj., Sch. of Pol'y Stud., Queens Univ., 2006), available at <http://aceproject.org/ero-en/topics/elections-security/police-forces-in-elections.doc> cited in Ndulo & Lulo, above, note 29, p. 163-164

⁵³⁷Mathias Hounkpe & Ismaila M Fall, *Electoral Commissions in West Africa: Study*, 11 (2nd edition, 2011)

⁵³⁸Application 001/2014, Judgment of 18 Nov, 2016, para 118

In the case, the Applicants argued that a certain law affecting the Electoral Commission in Côte d'Ivoire was not in conformity with the international human rights instruments ratified by Côte d'Ivoire, particularly the African Charter on Democracy, Elections and Governance (ACDEG), 2013 and the 2001 ECOWAS Protocol. The court held that Côte d'Ivoire's was in violation of several international human rights instruments, particularly articles 10(3) of the ACDEG and article 3(2) of the African Charter on Human and Peoples' Rights (ACHPR).⁵³⁹

If the NEC is seen to be biased towards a particular political party or candidate or is seen to be corrupt, that perception is naturally transferred to the election. By the law of its creation and functioning, and by practice and conduct, the NEC should be able to exude the needed integrity to the benefit of the confidence of opposing political actors. This explains, in my view, why article 6 speaks directly to NEC by requiring that the preparation for, conduct of, elections, and the announcement of results be done in a transparent manner.

The important role NECs have to play is further emphasised in article 4, which touches on a very important aspect of the electoral system – the credibility of the voters register – which is the foundation upon which a free and fair election can be erected. A compromised Voters' Register can only produce a compromised election result that would not reflect the will of the people as expressed through their ballot. Article 4 mandates each Member State to “ensure the establishment of a reliable [central] registry of births and deaths”.⁵⁴⁰ It requires voters' lists to be prepared in a transparent and reliable manner, with the collaboration of the political parties and voters who may have access to them whenever the need arises.⁵⁴¹

In a 2010 article, “When the Shepherd Becomes the Wolf: What is wrong with the Independent National Electoral Commission of Nigeria?”⁵⁴² I described the Nigerian NEC as the Shepherd that had become the Wolf. It is hardly possible to see how the Nigerian NEC, for instance, has changed since then. I dare say that the 2023 February 25 Presidential Election in Nigeria is a typical example of the Shepherd Becoming the Wolf, with shameless arrogance too. A wolfish NEC erodes the confidence of the people, breeds apathy towards elections and engenders indifference towards the resultant government midwived by a devious and mistrusted NEC. This in itself isolates the people from the resultant government and makes it impossible for them to own the government, and such a situation has grave implications for the survival of any particular government and democracy in general.

⁵³⁹Ibid, para 151

⁵⁴⁰Article 4

⁵⁴¹Article 5

⁵⁴²Amos O Enabulele “When the Shepherd Becomes the Wolf: What is wrong with the Independent National Electoral Commission of Nigeria?” 3(2) Journal of Politics and Law, 184 (2010)

The role of civil society as a critical actor in the electoral process is emphasised in article 8, which recognises the civil society as a vehicle for educating and enlightening the public on the need for peaceful elections devoid of all acts of violence. Civil societies are sometimes the bridge between the voters and the NEC in confidence building and the integrity of the process. Their ability to attract external funding and external collaboration with organisations and agencies come with a lot of capacity building and the consequential development of electoral processes and robust debates.

Intriguingly, after seeking to lay the foundation for free, fair and credible elections, the Protocol went on to enact in its article 9, without any qualification, that “[t]he party and/or candidate who loses the elections shall concede defeat to the political party and/or candidate finally declared the winner, following the guidelines and within the deadline stipulated by the law”. This is not something that can be enforced by law; you cannot simply tell a candidate who has been cheated in a contest to concede defeat to the one who cheated him/her to win. It is never in the interest of society or of the development of a democratic culture to assume that all will be alright to concede defeat to a candidate in an election that was manipulated to declare the supposed winner.

5. Factors Responsible for Undermining Free, Fair and Transparent Elections

The main factor that undermines free, fair and credible elections in West Africa is the desperation of politicians and their seeming vow never to play by the rules. What you often find is a contest between political actors, not for the actual votes of the people but for how to manipulate the process and subvert the will of the populace for their benefit by inverting all the indices of free, fair and credible elections stated in Part 4 above. This desperation is the core around which all other factors, such as lack of independence and corruption of the NEC and security agents; violence, intimidation, the media and even civil society – revolve. Political desperation is the energy that powers all the vices associated with elections. This desperation is fuelled by the fact that election in our Community is not just a contest for power but a highly transactional contest for wealth.

This directly speaks to the role of money. To be absolutely clear, elections (especially in States operating the presidential system of government) in all parts of the world is a capital intensive venture but the problem with the use of money during elections within our Community is that there is no real regulatory oversight over what political actors spend and their sources. This allows dirty money into the

system that in turn becomes a stranglehold on the government.

The independence of NEC is not just a question of law, as the laws across Member States guarantee the independence of NEC, what really happens is that they are compromised by politicians, especially by those wielding political powers and influence. Apart from institutional partisanship or compromise, there are instances of some unscrupulous officers of the NEC compromising their position. As was argued in ACtHPR in *APDH v Côte d'Ivoire*, tainted members of NECs could tilt the result in favour of their preferred candidate.⁵⁴³

Security agencies, the police especially, and judges may undermine the process. Corrupt security agencies and their arguably inbred indiscipline make it very easy for them to yield themselves to the whims and caprices of politicians in the pre-election and election phases. Besides, as the lead security agency on the day of election, a compromised police force would be selective in the enforcement of the law depending on who is committing the offence. The Police is not only expected to be neutral but also to be well-trained for the job so as voters would feel safe to cast their ballot as insecurity would necessarily lead to voter apathy. The 2001 Protocol spoke to the role of the armed forces, the police and the security forces in article 19(1), which says that the security forces shall be non-partisan and shall remain loyal to the nation. Unfortunately, this provision and provisions of municipal law requiring independence and impartiality are often observed in breach.

On the part of the electorates, it is impossible to ignore the role ignorance, poverty, illiteracy and lack of political education plays in the desecration of elections. Either by themselves or conjunctively, these factors militate against the ability of voters to make informed choices and politicians can easily weaponise ignorance or poverty to their advantage by way of political thuggery and financial or material inducement.

Where the inversion of the indices for free, fair and credible election prevails in a society, it causes a whole lot of damage to the democratic landscape, in that both voters and political players would develop anti-democratic culture within a supposed democracy, thus freezing democracy at the characteristic of civilian government and nothing more.

⁵⁴³Above, note 41, para 138

The voters vote for all the wrong reasons but the power to change their government: some vote for cash, for salt, for oil, for religion or ethnicity because the culture that has developed is that their votes do not count. This in turn creates unaccountable leaders, who also dig into that culture to deliver bad and unresponsive government to the people without regards to their rights. Such a government is sustained by fear and suppression of freedom of expression, it is usually characterised by massive violation of human rights and fundamental freedoms.

6. Election Monitoring and ECOWAS Assistance to Member States

The term “election monitoring” is not defined in the 2001 Protocol, but it has been said to consist of systematic collection of information and an assessment of an electoral process by direct observation on the basis of established methodologies by organisations accredited by the NEC, on their application or invitation by NEC. Election monitoring has become an intrinsic aspect of the structural architecture of the electoral process. At the end of the election, Election Monitors report on their observations on the overall conduct of the election.⁵⁴⁴ Though the report has no normative weight, it may be a strong premise for arguments for or against the credibility of the election, depending on which side it tilts in praise or condemnation of the process. The mandate of Election Monitors is not to announce or dispute the winner but to identify the strength and lapses in the process with a view to making recommendations and sometimes working with the NEC to sustain the strength and deal with the weaknesses in future elections. The problem, however, is that the NEC and of course the interest it served in a flawed election make themselves adversaries of Monitors that report lapses and openly criticize the findings.

In acknowledgement of the importance of a genuine and independent election monitoring, section III of the 2001 Protocol, complementing the provisions of article 42 of the 1999 Protocol, makes extensive provisions for election assistance and monitoring. Thus, ECOWAS may at the request of any Member State provide assistance in the conduct of any election⁵⁴⁵

⁵⁴⁴Muna Ndulo, “The United Nations and the Monitoring of National Elections”, 23 Cornell L. Forum 13, 13-15 (1996),

⁵⁴⁵Article 12

and may dispatch a monitoring team to the State concerned for the purpose of monitoring the elections.⁵⁴⁶ By article 13, the Executive Secretary (now President of the ECOWAS Commission)⁵⁴⁷ has the faculty to dispatch a fact-finding Mission to the Member State conducting an election, as election approaches. To ensure independence and a non-partisan mission, the leader and the members of the Observer/Supervisory Mission shall be independent persons, who shall not be nationals of the Member State being observed.⁵⁴⁸ Furthermore, members of the Mission shall show restraint and refrain from making any individual statement and any statement shall be made collectively and on behalf of the Mission by the team leader or a spokesperson appointed for this purpose.⁵⁴⁹ The Mission is expected to remain in the country throughout the election period and until the election results are announced and shall also submit to the President of the ECOWAS Commission, a report comprising the Mission's own observations; statements by witnesses; its assessment of the conduct of the elections from the point of view of the national laws governing the elections and the universal principles in electoral matters; its recommendations for the improvement of the conduct of future elections and monitoring Missions.⁵⁵⁰ The Observer/Supervisory Mission's report shall be signed by all Members of the Mission and submitted to the Executive Secretary by the Mission's leader within fifteen (15) days with effect from the date of accomplishment of the Mission, etc.⁵⁵¹

ECOWAS has been quite active in election matters with the use of its pre-election fact-finding mission and the actual election observation. Drawing from the position it took respecting the 2011 Presidential election in The Gambia, ECOWAS may refuse to monitor elections in a Member State, if its pre-election fact-finding reveal evidence suggesting that the government of the day has hijacked the process. In the Gambian case, the mission found evidence of intimidation and government control of the media and thus concluded that a free and fair election would not be possible.⁵⁵²

⁵⁴⁶ Article 12(3)

⁵⁴⁷ By Supplementary Protocol A/SP.1/06/06 Amending the Revised ECOWAS Treaty, substituting new Article 17 and clarifying its mandate.

⁵⁴⁸ By article 14

⁵⁴⁹ Article 15

⁵⁵⁰ 16

⁵⁵¹ Article 17

⁵⁵² <https://www.britannica.com/place/The-Gambia/1994-coup-1996-presidential-election-and-new-constitution>

Just as an election result, the election monitoring report must be credible, truthful but diplomatically crafted and delivered. Where there are irregularities in an election, the report should be able to say so while signposting aggrieved parties to available means of redress. What it must not do is to give credibility to a flawed process⁵⁵³ and urge the aggrieved party to accept the result in good faith. It is not the business of election monitors to ask political actors to accept or reject results, as such would betray the neutrality of the Monitors.

Beyond election monitoring, the ECOWAS Network of Electoral Commissions (ECONEC), which is an umbrella body for NECs in West Africa, has been playing pivotal roles in the involvement of ECOWAS in the electioneering process. ECONEC has been successful in capacity building and assistance through peer support and external funding. It has provided the avenue for logistical assistance to NECs⁵⁵⁴ and provides the opportunity for them to share experiences and learn one from the other.

7. Factors Responsible for the Subversion of Constitutional Democratic Order

I would like to be very practical in discussing this part by drawing from some of the reasons the military gave in the past that sent the people on a frenzy of celebration in the event of a coup. We may begin with the speech given by General Muhammad Buhari for toppling the civilian government of Alhaji Shehu Shagari of Nigeria in the December of 1983. I was old enough at that time, to recall that there were massive celebrations in the streets at the news of the coup. One of the reasons given by the Nigerian Military was the political desperation to capture power; mismanagement of resources and the economy; irresponsible legislature. The putschist were careful to observe that the “last general election was anything but free and fair. The only political parties that could complain of election rigging are those parties that lacked the resources to rig”. Furthermore, that there was corruption, indiscipline; widespread use of arson to cover up fraudulent acts in public institutions; non-payment of workers' salaries and non-availability of drugs in hospitals.⁵⁵⁵

Col Mamady Doumbouya cited rampant corruption, disregard for human rights and economic mismanagement under the 83-year-old President Condé to justify the 5 September, 2021,

⁵⁵³Ndulo, “The United Nations”, above, note 47, p. 15

⁵⁵⁴<https://www.vanguardngr.com/2019/08/econec-vital-for-successful-elections-prof-yakubu/>

⁵⁵⁵<https://www.premiumtimesng.com/features-and-interviews/183847-from-the-archive-buharis-first-speech-as-nigerias-military-head-of-state-in-december-1983.html>, accessed on 25/02/23

coup in Guinea.⁵⁵⁶ The Colonel was further reported to have said: “if the people are crushed by their elites, it is up to the army to give the people their freedom” and that “[t]he duty of a soldier is to save the country. We will no longer entrust politics to one man. We will entrust it to the people”.⁵⁵⁷ The amendment of the Constitution to create room for President Alpha Conde to restart his time and contest for yet two terms of five years after previously completing two terms of five years (the constitutional maximum before the amendment of the Constitution in 2015) from 2010 to 2020, provided a fertile ground for public resentment towards the regime; that, in turn, opened up an opportunity for the military to intervene. Also, the February, 2010, Colonel Karimou coup in Niger was precipitated by the mounting political discontent and worsening economic conditions that began in 2009, when President Mamadou Tandja used a referendum to extend his tenure for three years.⁵⁵⁸ We may also refer to the events that led to the overthrow of President João Bernardo Viera, who having ruled Guinea Bissau since taking power in a 1980 coup, was elected President in the country's first multiparty elections in 1994 until he was overthrown in 1999. Interestingly, President João Bernardo returned to power in 2005 only to be killed in a coup in 2009.⁵⁵⁹

Another major factor is the shrinking of the political space by sit tight Presidents, whose hold on power cannot be sustained but for eliminating opposing and any opposing voices. It has, for example, been observed that the Yahya Jammeh's 1994 coup that toppled the Dawda Jawara's government was remotely connected to the election of 1992. Also, the statement released by ECOWAS AHSG on 18 August, 2020, expressly acknowledged the role the social-political crisis triggered by the parliamentary election of March/April, 2020, played in the Malian coup of 18 August, 2020.⁵⁶⁰

Drawing from these examples, we can say that it is the desperation to capture power, the shrinking of the political space, the lack of good governance and democratic culture (etc.,) that the military opportunistically latches onto to topple civilian governments. Where the politicians allow desperation for power, corruption and bad governance to become the order of the day to the discontent of the people, the people would start yearning for a change.

⁵⁵⁶<https://www.bbc.co.uk/news/world-africa-58461971>

⁵⁵⁷ <https://www.premiumtimesng.com/news/headlines/483438-why-we-ousted-president-alpha-conde-in-guinea-coup-leader.html>

⁵⁵⁸ <https://www.reuters.com/article/niger-tandja-idUSKBN28436D/>

⁵⁵⁹<https://www.theguardian.com/world/2009/mar/04/nino-vieira-obituary>

⁵⁶⁰Statement by ECOWAS Heads of State and Government on Mali, 20 August, 2020, paragraph 3

The problem really becomes profound when the people are convinced that they will be unable to change the government through the ballot due to manipulations, in their discontent, they will start yearning for a change anyhow even through the military. You would agree with me that the examples cited above have bearings on electoral discontent, which is the real elephant in the room for me, given the vacuum it creates.

It is therefore not difficult to see that credible elections are the best safeguard of political stability and an alternative to violent change of government, since the failure of the electoral process naturally yields the opposite result. As Fischer pointed out:

an electoral process is an alternative to violence as a means of achieving governance. However, when an electoral process is perceived as unfair, unresponsive or corrupt, its political legitimacy is compromised and stakeholders are motivated to go outside the established norms to achieve their political objectives. Electoral conflict and violence become tactics in political competition.⁵⁶¹

It is thus essential that the electoral process is preserved from breakdown to avert the consequential result of violent overthrow. Public perception and opinion are critical to its sustenance and otherwise, so that we cannot overemphasise the fundamental role public opinion plays in legitimising election outcomes. Accordingly:

elections that are flawed or perceived to be flawed impede rather than enhance the process of democratisation. The public, in this case the voters, are instrumental in legitimising election results, particularly if elections are closely contested and losers accept the outcome as representing the will of the people.⁵⁶²

Another very pungent reason for the subversion of democratic government is the failure of the electoral body and the judiciary to fairly and transparently deal with genuine post-election grievances, especially where the people believe that a NEC that has gone rogue fraudulently declared the winner. The judiciary is ordinarily supposed to be the sanitizer of the system,

⁵⁶¹Jeff Fischer, "Electoral Conflict and Violence", 12 Elections Today 6, 6 (2004) cited in Ndulo & Lulo, above, note 29, p 157

⁵⁶²Barkan, JD, "Kenya's 2013 Elections: Technology Is Not Democracy", 24(3) Journal of Democracy, 156-165. (2013), cited in Kaburu, above note 42, p. 53-54

and buffers between electoral grievances and violence in that when parties resort to the court, with the hope that justice would be done, it becomes a calming mechanism for those who are aggrieved and would have taken to the streets. Unfortunately, we have heard claims of instances where the judiciary failed to stand tall in election matters. I am sure each individual country has its own experience. In some countries, what we have is a situation where the judiciary “selects” the winner. This is not and can never be democracy. Despite its importance to the electoral system, the 2001 Protocol did not substantively address the role of the judiciary in the electoral process beyond stating in article 7 of the 2001 Protocol that Member States should make adequate arrangements to hear and dispose of all petitions relating to the conduct of elections and announcement of results.

It is however of utmost importance to recognise that the politicians often make the judiciary a scapegoat and blame it for the manipulations of political actors and the NEC. As it is the constitutional role of the judiciary to adjudicate on election disputes, it cannot run away from it, but what it can do is to resist being used by desperate politicians as President Laurent Gbagbo did with the Constitutional Council in 2020 leading to the claim that Gbagbo influenced either the personnel or the deliberations of the Constitutional Council.⁵⁶³ Similarly, Jammeh of The Gambia attempted to use the judicial process, even the ECtJ, to subvert the popular will of the people in an election in which he earlier conceded defeat.⁵⁶⁴

Article 10 enjoins holders of power at all levels to refrain from acts of intimidation or harassment against defeated candidates or their supporters. Though this provision appears to be remotely important to the subject of our discussion, it is actually very germane and would resonate with Nigerians when contextualised. It is on record that when General Muhammadu Buhari was asked about inclusiveness after he won the 2015 Nigerian Presidential Election, he pointed the interviewer to the election result and stated categorically that he would focus more on developing the areas that gave him 95% votes over those that gave him 5% votes.⁵⁶⁵

⁵⁶³Frederick Cowell, “The Impact of the ECOWAS Protocol on Good Governance and Democracy”, 19 Afr. J. Int'l & Comp. L. 331, 335 (2011)

⁵⁶⁴Elkanah Oluwapelumi Babatunde, “ECOWAS and the Maintenance of International Peace and Security: Protecting the Right to Democratic Governance”, 6 UCLJLJ 46 (2017).

⁵⁶⁵<https://www.youtube.com/watch?v=Fitp1jdQKZk>;

On this pledge of his, observers have demonstrated with verifiable evidence that the Buhari government pursued the policy of exclusion in its policies, and to that extent many of his policies and actions, even when genuinely done, were viewed in that light. This kind of exclusionary government policy cannot but alienate a section of the population that may be ethnically and religiously different from the preferred and favourably treated zone, which would naturally be the zone and religion to which the president belongs. This, also, was in clear violation of the 2001 Protocol.

It is however impossible to discount the role good governance plays in the prevention of forceful overthrow of governments. A civilian government that fails to invest in the people and better their lives, creates a gap between the people and the government that could be exploited by anti-democratic forces. As we all know, nature abhors a vacuum! ECOWAS indeed took the essentiality of good government into consideration in the 2001 Protocol. Accordingly, sections V to VIII are dedicated to indices of good government in the area of poverty alleviation; promotion of social dialogue; education, culture and religion; human rights and good governance; and the rights of women, children and the youth. Importantly, section VII reaffirmed the fundamental principles in articles 4(g) and (j) of the Revised Treaty, 1993, by providing for the rule of law, human rights and good governance. It reaffirmed the agreement of the Member States that good governance and press freedom are essential for preserving social justice, preventing conflict, guaranteeing political stability and peace and for strengthening democracy. Importantly, I cannot but relate with article 33 where Member States recognised that the rule of law goes beyond the promulgation of good laws that are in conformity with the provisions on human rights, to a good judicial system, a good system of administration, and good management of the State apparatus. This provision speaks to justice and that is critical to democracy. In fact, the entire provisions amplify the constitutional convergence principles in article 2 of the Protocol; these are veritable catalyst for the stimulation of good governance and democratic culture.

⁵⁶⁶<https://www.vanguardngr.com/2020/07/balanced-or-lopsided-the-truth-about-buharis-appointments/>
Article ³² of the ²⁰⁰¹ Protocol

8. Holding Member States Responsible for their Treaty Obligation

If there is any matter that must remain worrisome and at the front burner within the ECOWAS legal regime, it is that of the attitude of Member States to their Community obligations. I am sure not many of us would disagree that this has not been great. We find ourselves in the midst of numerous ECOWAS laws that do not seem to mean more than their paper existence to Member States, thus creating the unfortunate situation of the isolation of nationals of Member States from ECOWAS laws. The failure of Member States to honour their obligations has continually given vent to the question of holding Member States responsible for their treaty obligations.

When considering States responsible for international obligations, the first thing to consider is: who has the right to invoke the breach in question. This would in turn depend on the entity to whom the obligation is owed. Three (perhaps four) entities may be named: (a) the international community as a whole; ⁵⁶⁸(b) states; and (c) individuals. The fourth entity is international institutions.

(a) Obligation owed the International Community

As for who can invoke the obligation owed to the international community, I would stay with the International Court of Justice (ICJ) in the *Barcelona Traction case*, where it declared:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.⁵⁶⁹

It follows that all States have *locus standi* to enforce such obligations as, “the outlawing of acts of aggression, and of genocide,

⁵⁶⁸Barcelona Traction, Light and Power Company Ltd (New Application: 1962) (Belgium v Spain), (Second Phase), ICJ Rep 1970, 3

⁵⁶⁹Ibid, p.32, para 33

as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.⁵⁷⁰ It is thus possible to state that that certain treaty obligations of ECOWAS Member States, such as those arising from the African Charter on Human and Peoples' Right and the 2001 Protocol, which are very strong on the protection of individuals do reflect the customary law that has emerged for the protection of individuals and could be invoked even by non ECOWAS States as obligation *erga omnes* in deserving cases.

(b) Obligations owed States *Inter Se*

The enforcement of obligation by States could be by collective or individual action. Obligations owed to States arise from consent to treaties in that treaties are binding only on those that have consented and such consent is undergirded by the promise of each of the parties to honour the treaty in good faith. Accordingly, treaties usually contain compromissory (or jurisdictional) clauses that obligate the parties to submit any dispute arising therefrom to a judicial or arbitral tribunal having jurisdiction. Some treaties have even gone further to create a tribunal to which such disputes may be compulsorily or optionally submitted, the United Nations Convention on the Law of the Sea, 1982, for instance. We may also refer to the ECOWAS Revised Treaty, read together with article 10(a) of the Protocol of the ECtJ. By these articles, a Member State is entitled to invoke the jurisdiction of the Court against another Member State that is not abiding by its Treaty obligations. The State may decide to seise any other international court or tribunal, such as the ICJ, having jurisdiction, especially in cases where the obligation coincides with wider international law obligations. Matters arising from the UNCLOS or the UN Charter may be better submitted to the ITLOS or the ICJ, as the case may be. We are however yet to see any such exercise of right by any ECOWAS Member State respecting Community Law. The point needs however be made that, except for treaties that reflect, incorporate or has metamorphosed into customary international law, third party States cannot invoke a breach against a party to a treaty, who is violating the treaty. ⁵⁷¹Beyond judicial action, States may take collective action to enforce an international obligation common to them.

⁵⁷⁰ibid, p. 32, para 34

⁵⁷¹North Sea Continental Shelf Cases, (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), ICJ Rep 1969, 3

(c) Individuals

Generally, individuals have no international law right to hold their State or a third State responsible for their international obligation by way of the mechanism of international law. The age long principle, affirmed in the *Jurisdiction of the Courts of Danzig*,⁵⁷² and also encompassed in the rule of diplomatic protection cases, allows a State to bring an action against another State for and on behalf of its nationals.

There are however specific instances where individuals are given powers to enforce international obligation against a State. Examples are article 10(d) of the Protocol of the ECtJ and articles 3 and 5(3) of the Protocol of the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights. With regard to the ECtJ Protocol, the right of individuals to hold a State responsible for treaty obligation is limited to human rights cases. What that means, therefore, is that the only way individuals can hold Member States responsible for any of their treaty obligations under the ECOWAS legal regime, is when the Treaty falls within the realm of human rights.

With regard to the right to vote and democracy, it is possible to argue that individuals could bring an action before the ECtJ to enforce the obligation of a State. This assertion draws strength from *Sir Derek K. Jawara v The Gambia*,⁵⁷³ where the African Commission on Human and Peoples' Rights declared that the fact that the military took power peacefully, did not absolve it from the violation of the rights of people to choose their political leaders through the ballot box. The Commission therefore declared the military coup as a grave violation of the right of The Gambians to freely choose their government as entrenched in article 20(1) of the ACHPR.⁵⁷⁴ Credence for this argument rests also on the ACtHPR's decision in *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire*, where the court held that ACDEG and the 2001 Protocol are human rights instruments. In the ACtHPR's opinion:

in determining whether a convention is a human rights instrument, it is necessary to refer in particular to the purposes of such Convention [as] reflected either by an express enunciation of the subjective rights of individuals or groups of individuals, or by a prescription mandatory on states parties for the consequent enjoyment of the said rights.⁵⁷⁵

⁵⁷²Advisory Opinion, Series B, No. 15 (1928)

⁵⁷³Communications 147/95 and 149/95

⁵⁷⁴Ibid, para 73

Accordingly, the Court was of the firm view that the ACHPR (under article 13) and the ICCPR (under article 26) to which the respondent is a party contain provisions directly conferring the rights allegedly violated, and that State parties to the ACDEG as well as to the ECOWAS 2001 Protocol are obliged to establish independent and impartial national electoral organs and facilitate the exercise and enjoyment of the rights enshrined under those articles. It further held that the ACDEG and the 2001 Protocol are human rights instruments in that they provide the mechanism to realize the enjoyment of rights and freedoms enshrined in other instruments, notably the ACHPR and the ICCPR.⁵⁷⁶ In fact, the confluence of human rights and democratic rights is obvious in article 21(3) of the Universal Declaration of Human rights, 1946, and article 13(1) ACHPR, incorporated by reference into article 2 of the 1999 Protocol. Both provisions protect individual rights to participate in the governance of their State either directly or through a freely chosen representative in periodic elections.

Without a doubt, the reasoning and decision of the ACtHPR on this point are unassailable. It is hoped that the ECtJ would be persuaded by the Judgment of the ACtHPR in *APDH v Côte d'Ivoire*, to hold, when seised on the rights contained in the 2001 Protocol, that the Protocol meets the threshold as a human rights instrument and thus sufficient basis for the engagement of the court's jurisdiction. This would allow the Court to play a vital role in the entrenchment of democratic culture by being the vehicle for instilling the constitutional convergence principles into the practice of Member States. The constitutional convergence principles is far more important than the provisions dealing with enforcement in that the best proactive measure to take is to ensure that the policies of Member States are converging in practice at the level required by Community law. The attainment of the convergence principles by Member States is the best guarantee against bad governance; the whole problems associated with elections; and the consequential military coup or civil unrest we have seen up and down our Community.

⁵⁷⁵APDH v Côte d'Ivoire, above note 41, para 57

⁵⁷⁶Ibid, para 63 and 65

(c) Enforcement through Organs of International Organisation

A special consideration applies to States that have organised themselves into an integrated community (ECOWAS, for instance). The practice is for such States to grant *locus standi* to the executive organ of the Community to take action against a State that is failing in its obligations. Article 10(b) of the Protocol of the ECOWAS Court⁵⁷⁷ is an example. This is also where the Article 2(3) of the 2012 Supplementary Act A/SP. 13/02/12 on Sanctions against Member States that Fail to Honor their Obligations to ECOWAS falls. Section 3(1) of the Act provides “Member State or their leaders that fail to honour their obligations to the Community shall be liable to judicial and political sanctions”.

Chapter VII of the UN Charter speaks very well to this as regards the use of force on the authorisation of the United Nations Security Council. As regards ECOWAS, such collective action locates in article 58 of the Revised Treaty as seemingly implemented by 1999 Protocol as supplemented by the 2001 Protocol. On the obligation to ensure that States guarantee democracy and good governance, article 6 of the 1999 Protocol and the common article 45 of the 1999 and 2001 Protocols locate the power to enforce the provisions by way of sanctions on the authority of the AHSG. The AHSG has been very active in the exercise of its powers under the Protocols with their prompt response to unconstitutional change of government by prompt extra-ordinary summits to condemn the occurrence and apply sanctions.

9. Sanctions Regime for Unconstitutional Change of Government

The ECOWAS sanctions regime for unconstitutional change of government is established by Chapter V of the 1999 Protocol and Chapter II of the 2001 Protocol read together.⁵⁷⁸

The sanctions regime of the 2001 Protocol is activated “in the event that democracy is abruptly brought to an end by any means or where there is massive violation of Human Rights in a Member State”.⁵⁷⁹ When any or both of these occur, ECOWAS may impose sanctions on the State concerned.

⁵⁷⁷Protocol (A/P.1/7/91), as amended

⁵⁷⁸Article 44 of the 2001 Protocol

⁵⁷⁹Ibid

The AHSF may impose the following sanctions:

- (a) Refusal to support the candidates presented by the Member State concerned for elective posts in international organisations;
- (b) Refusal to organise ECOWAS meetings in the Member State concerned;
- (c) Suspension of the Member State concerned from all ECOWAS decision making bodies. During the period of the suspension the Member State concerned shall be obliged to pay its dues for the period;
- (d) During the period of suspension, ECOWAS shall continue to monitor, encourage and support the efforts being made by the suspended Member State to return to normalcy and constitutional order; On the recommendation of the Mediation and Security Council, a decision may be taken at the appropriate time to proceed as stipulated in article 45 of the 1999 Protocol.⁵⁸⁰

From the above, there are four sanctions that may be imposed; it is not clear whether the sanctions are arranged in order of severity though it is safe to speculate that they are. The 2nd and the 3rd are necessarily cumulative in that it invariably follows from the mere fact of suspension that ECOWAS would not host a meeting in the suspended State, thus making the second a consequence of the third. There has however been occasions where the AHSF imposed the sanctions stipulated in (a) and (b) above (article 45 paragraph 2, first and second bullet) of the 2001 Protocol without necessarily suspending the State. This was what the AHSF did with Niger in its extraordinary summit of 17, October, 2009.

It thus seems to me, upon a careful comparison of Chapter V of the 1999 Protocol and Chapter II of the 2001 Protocol, that the latter deemphasised the provisions relating to the activation of military action by consigning it to a last resort method and spelling non-military actions that could be taken as a prelude to military action. For the avoidance of doubt, the 2001 Protocol made the provisions of article 45 of the 1999 Protocol,

⁵⁸⁰*Ibid*

⁵⁸¹See article 45(4) of the 2001 Protocol

a last resort approach by providing, without mentioning military force, that its activation is contingent upon the absence, or the serious erosion, of “government authority”. This, in my view, is a higher threshold than that prescribed in the 1999 Protocol.

We have seen the activation of the sanctions regime of the 2001 Protocol in several instances of unconstitutional change, the most recent examples being Mali, Burkina Faso and Guinea. When on August 18, 2020, the military overthrew President Keïta in Mali, the AHSG promptly imposed sanctions on Mali on the same day and imposed further sanctions on 9 January 2022. The AHSG suspended Mali from all decision making organs of the Community; closed the land and air borders between ECOWAS Member States and Mali; suspended all commercial and financial transactions between ECOWAS Member States and Mali; froze the assets of Mali domiciled in the Central Banks and Commercial Banks of all ECOWAS Member States; froze the assets of public and parastatal enterprises of Mali domiciled in commercial banks of all ECOWAS Member States; suspended all financial assistance and transactions in favour of Mali by ECOWAS Financial Institutions; and recalled for consultations by ECOWAS Member States of their Ambassadors accredited to Mali.⁵⁸² The AHSG also responded to the 24 January, 2022, coup that toppled President Roch Marc Christian Kaboré of Burkina Faso by suspending the State from all decision making organs of ECOWAS but no sanctions were imposed on the coup plotters.⁵⁸³ The AHSG did the same for Guinea, following the September 5, 2021, coup that overthrew President Alpha Conde. The AHSG convened a virtual extraordinary session on September 8, 2021, during which it suspended Guinea from all ECOWAS governing bodies with immediate effect and impose sanctions on members of the Junta and their family members. Further sanctions were imposed on Guinea in the Extraordinary Summit of 22nd September, 2022. These were the recall for consultations by ECOWAS Member States of their ambassadors accredited to the Republic of Guinea; suspension of all financial assistance and transactions in favour of Guinea by the ECOWAS Financial Institutions, particularly EBID; targeted sanctions imposed on certain individuals and groups, including members of the other Transitional Institutions; freeze of financial assets; and Travel ban

⁵⁸²Statement by ECOWAS Heads of State and Government on Mali, 20 August, 2020, paragraph 13 <https://www.dw.com/en/ecowas-criticized-over-west-african-coups/a-61685721>

⁵⁸³Extraordinary Summit of the ECOWAS Authority of Heads of State and Government on the Situation in Burkina Faso, Mali and Guinea, 3rd February, 2022; Extraordinary Summit of the ECOWAS Authority of Heads of State and Government on the Situation in Mali, Guinea and Burkina Faso, 25th March 2022

The sanctions on Mali and Burkina Faso were partially lifted at the Sixty-First Ordinary Session of the AHSG of 03 July 2022, upon the presentation of a transition timetable for a duration of 24 months by each of them. It lifted all other sanctions on them except their suspension from the ECOWAS decision-making bodies. It also retained the sanctions on individuals and groups in Mali. It however retained the only sanction on Guinea for failure to agree transition timetable and threatened to impose targeted economic and financial sanctions. At the last Extraordinary Session of the AHSG of 18 February, 2023, the AHSG decided to maintain these sanctions on all the three countries and to impose travel ban on members of the government and senior officials of the three Member States.

It is not only with respect to coups that the AHSG has imposed sanctions; there are instances where it had taken action against civilian governments that are attempting to sustain power by unconstitutional means. In its Extraordinary Summit of 17 October, 2009, in response to the Referendum of 4 August, 2009, and the circumstances of its organization as against the letter and spirit of the Constitution of Niger and a violation of the 2001 Protocol, the AHSG imposed the sanctions stipulated under Article 45(2) of the 2001 Protocol. ECOWAS also intervened to remove incumbent Laurent Gbagbo, who refused to leave power, following his defeat in the presidential elections of November 2010.⁵⁸⁴ ECOWAS also intervened in The Gambia in 2017, at the request of the President elect (Adama Barrow), after he was sworn in at the Gambian Embassy in Senegal. ECOWAS troop escorted Barrow into The Gambia to assume office, following the refusal of Yahya Jammeh to hand over power after initially conceding defeat⁵⁸⁵

It is my view that these interference and interventions fall under the threshold of the erosion of government authority under the sanctions provisions of the 1999 and 2001 protocols.

Two problems immediately arise from the manner the AHSG dealt with these States. The first is the inconsistent application of the sanctions regime. We found nowhere that the harsh sanctions imposed on Mali were imposed on the other two States and beyond that, the sanction imposed on Guinea was way milder than those imposed on the other two States.

⁵⁸⁴Gagnon, above, note 18, p. 52

⁵⁸⁵Elkanah Oluwapelumi Babatunde, "ECOWAS and the Maintenance of International Peace and Security: Protecting the Right to Democratic Governance", 6 UCLJLJ 46 (2017); <https://www.dw.com/en/west-african-block-to-deploy-troops-in-mali-guinea-bissau/a-15912843>

As for Burkina Faso, ECOWAS only condemned the coup, but imposed no sanctions on the coup plotters as it did in with Mali and Guinea.⁵⁸⁶

The other problem is that of shifting deadlines. For instance, at the inception of the respective coup, the AHSG decreed a mandatory return to constitutional rule within a specific time (usually within six months), but this is never respected by the Juntas. You even find situations where they renege on an agreed timetable with the AHSG but nothing happens. We saw this play out for Mali, Guinea and Burkina Faso.⁵⁸⁷ For the sake of time and space, if we take Guinea, for instance, you would find that at the inception of the coup,⁵⁸⁸ the AHSG demanded an immediate return to civilian rule;⁵⁸⁹ but soon moved from 'immediate' to 'six months'.⁵⁹⁰ The AHSG insisted on the six months deadline at the Sixtieth Ordinary Session of 12 December, 2021, even when no concrete progress had been made by the Junta in that regard. The Junta still took no concrete steps despite the threat of additional sanctions from 1 January, 2022. After all the tough talking and sanctions, the AHSG only ended up agreeing a timetable, which the junta proposes at their own pace, and hardly ever abide by. You only need to fastforward to 18 February 2023 Extraordinary Summit to see that ECOWAS is still struggling to get the Guinean Junta to stay on course an agreed timetable over a year after the initial six months deadline elapsed.

This does not instil fear on would-be putschist nor does it hasten the exit of putschist from power. It would be good to see a situation where the AHSG demonstrates that noncompliance with deadlines, especially agreed timetables, would come with serious consequences.

10. Conclusion

It is not in doubt that ECOWAS has a robust legal regime around the promotion of democracy and good governance. To demonstrate the contours of the regime, I have traversed the Revised Treaty, the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, 1999, and the Protocol on Democracy and Good Governance.

⁵⁸⁶<https://www.dw.com/en/ecowas-criticized-over-west-african-coups/a-61685721>

⁵⁸⁷3rd Extraordinary Summit of the ECOWAS Authority of Heads of State and Government on the Situation in Mali and Guinea, 17 November, 2021

⁵⁸⁸Extraordinary Summit of AHSG of 25 March, 2022

⁵⁸⁹Extraordinary Session on September 8, 2021

⁵⁹⁰Extraordinary Session of 16 September, 2021

I discussed the relevant aspects of the Treaty and Protocols alongside the practice of ECOWAS relating to the topic being discussed. I focused on some key aspects of the laws working through the essentialities of good governance and the protection of human rights to the sustenance of democracy. I highlighted instances of sanctions on Member States and relevant individuals for undemocratic change of government as well as some instances (albeit few) of sanctions for civilian governments sustained by unconstitutional means.

In concluding, I would like to stress that the most important aspect of the 2001 Protocol that should actually be the preoccupation of the AHSG is the constitutional convergence principles, which obligate Member States to maintain certain common minimum standards in very crucial aspects of national life. It is disheartening to note that after over two decades of agreeing to these common standards, there is still no demonstration in practice of constitutional convergence of the identified principles among Member States. In making this remark, I acknowledge that the Member States may have achieved convergence in principles but whom does theory benefits (as we all know) if it is not replicated in practice? There are still huge concerns over lack of independence of the judiciary; human rights violations, compromised elections, violation of press freedom; etc., up and down the community. Nevertheless, the AHSG has almost exclusively focused its attention on addressing unconstitutional change of government through series of ordinary and extraordinary summits and not on enforcing norms promoting good governance.⁵⁹¹ Whereas what the AHSG should focus on is the commitment of Member States to the implementation of the constitutional convergence principles, since it can correctly be argued that the lack of commitment of Member States to the principles is responsible for political crises and the consequential coup d'état that continues to feature within the Community.

It is my view that the achievement of the convergence principles would be far more effective than the sanctions regime for unconstitutional change of government and government sustained by unconstitutional means. It is my hope that the AHSG would take steps to focus more on the attainment of the convergence principles, rather than wait for the next coup and then start rushing to impose sanctions and manage transition.

⁵⁹¹Cowell, above, note 66, p. 335

Staying focused on the implementation of the constitutional convergence principles would correctly position the AHSB to apprehend actions and inactions that beckon constitutional crisis, such as the sustenance of tenure by unconstitutional means and coup d'état before they escalate. It is my hope that the ongoing review of the 2001 Protocol would include the sustenance of tenure by unconstitutional means in the sanctions regime.

In any event, the ECOWAS Commission must be up and doing in its obligations to enforce ECOWAS laws against Member States in violation of their obligation through the instrumentality of the ECtJ. It is arguable that individuals can even invoke the jurisdiction of the ECtJ to enforce the convergence principles against erring States. Happily, the ACtHPR has shown the way in holding that the 2001 Protocol is a human rights instrument, it is thus my hope that the ECtJ would follow suit to affirm the rights of individuals to sue on the basis of the Protocol. When this happens, the court would have the opportunity to examine the Member States implementation of the constitutional convergence principles and hold them to account should the actions or inactions of Member States undermine the constitutional convergence principles threshold. The focus should be on building domestic institutions, given that there is very little ECOWAS can do absent strong institution and political culture domestically.

It is my hope, also, that the ongoing review of the 2001 Protocol would take a critical look into the current sanctions regime in the 1999 and 2001 Protocols with a view to determining their effectiveness, given that effective sanctions are vital for the promotion of the democratic norms contained in the Protocol.⁵⁹² The AHSB should focus more on targeted sanctions against the individuals involved in the unconstitutional conducts rather than general sanctions that affect the entire populace with a risk of humanitarian crisis.

⁵⁹²Cowell, above, note 66, p. 333-334

SUB-THEME 5

**THE ROLE OF NATIONAL COURTS OF MEMBER STATES
AND THE ECOWAS COURT OF JUSTICE IN UPHOLDING
HUMAN RIGHTS, RULE OF LAW AND CONSTITUTIONAL
DEMOCRACY**

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**BY
JANET R. SALLAH-NJIE**

COMMISSIONER, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
SPECIAL RAPPORTEUR ON THE RIGHTS OF WOMEN IN AFRICA

Introduction

The importance of institution-building for the promotion, protection, and upholding of human rights, rule of law and constitutional democracy, cannot be overemphasized. In the wake of global, regional and national transformations, African countries have striven to develop political, economic, cultural, and judicial institutions that stand the test of time, and that respond to the rights of citizens, as enshrined in the national legal frameworks and international instruments. The goal has been to build institutions that will be effective, resulting in the implementation of government policies to meet the demands of citizens. However, effectiveness has not always been the outcome, and civil and political instability that has beset many countries on the continent has seen manifestations of the failure of such institutions. Significant challenges in governance in African countries have meant that the State has been unable to provide justice or to even run functional judicial systems, owing mostly to social and political decay and instability.

It cannot be over emphasized that good governance entails the working social contract within States, addressing poverty, discrimination, and enhancing participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive societies which are governed by the rule of law.

The Gambia provides a sterling example of a State that has experienced decay and instability, with a very negative impact on judicial independence and observance of the rule of law and good governance. The judicial system in The Gambia suffered from neglect, and a severe lack of resources and infrastructure during former President Yahya Jammeh's regime. This consequently resulted to a de-prioritisation of its importance coupled with the government's undermining of the judicial independence and rule of law.⁵⁹³ For example, in March ²⁰¹⁴, the former President made a statement suggesting that “there is nowhere in the world where the Judiciary is independent”.⁵⁹⁴ His regime saw the arrest and detention of judges as well as unfettered interference in the decision of the courts especially in cases involving opposition leaders.

⁵⁹³International Bar Association, *Under Pressure: A Report on the Rule of Law in the Gambia* (International Bar Association, London, 2006), pp. 5-6.

⁵⁹⁴. Justice Info, “Gambia: How Jammeh weaponised the law.”, 8th April 2021. Available here: <https://www.justiceinfo.net/en/75825-gambia-how-jammeh-weaponized-the-law.html>.

The Gambia return to democracy after 22 years of authoritarian rule, marked a turning point. In 2016 a new dispensation was ushered in, and this historic development presented a new blueprint for a transition from an authoritarian regime to democratic governance, based on the rule of law. This new dispensation also provided and still continues to provide an opportune occasion to take stock of the systematic assaults on the judiciary and to chart a new way forward.⁵⁹⁵ The transition has seen ongoing reform in the judiciary, with the ultimate aim of guaranteed independence in all its operations. This has so far led to promotion of access to justice, which is a significant part of the discourse on upholding human rights, rule of law and constitutional democracy in Africa.

The experience in The Gambia may not be very different to developments in the other countries in the subregion, whereby lack of judicial independence can create an enabling environment for gross human rights violation, thus undermining the rule of law, due process and good governance.

Human rights

This year will mark 75 years since the adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations. The adoption of the UDHR eventually led to the proliferation of numerous human rights instruments at the global, regional, subregional and national levels.

A number of independent States, emerging from colonialism had Bill of Rights in their Constitutions, and the constitutional protection of human rights in the world has equally increased. The strong movement of decolonization and attainment of independence had contributed to the incredible number of States that are members of the UN. The impressive rise and development of public international law has led to many new tools of protection in the field of human rights, constitutionalism and the rule of law. This gave rise to a number of global, regional, and subregional human right mechanisms charged with responsibility for the protection and promotion of human rights and good democratic governance; to complement the protection mandate of national courts. The African Commission on Human and Peoples' Rights (the Commission) and the ECOWAS Court, are examples of such regional and subregional mechanisms, entrusted with the mandate to complement national courts to uphold and protect human rights, the rule of law and good governance.

⁵⁹⁵Satang Nabaneh, Adem Abebe and Gaye Sowe, *The Gambia in Transition: Towards a new Constitutional Order* (2021).

However, such protections can only be effectively realised if the legal and institutional mechanisms, at the national, regional, and sub regional levels are able to effectively collaborate and fulfill their complementary role of guaranteeing the rights and freedoms of its citizens, and hold both State and non-State actors accountable when those rights are infringed upon. This would involve mutual recognition of the mandate, establishing instruments, and jurisprudence emanating from these human rights mechanisms. Thus, judicial dialogue is an imperative for the realisation of mandate of all mechanisms responsible for the protection and upholding of human rights, rule of law and constitutional democracy.

1. The Sources of ECOWAS Law and their Applicability in National Courts

The main objective of the Economic Community of West African States (ECOWAS) is to promote cooperation and integration in the sub-region leading to the establishment of an economic union in West Africa. In line with that aim, ECOWAS adopted its fundamental principles wherein it guarantees its peoples under Article 4(g) of the Revised Treaty “The recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights”.⁵⁹⁶

The Community Court of Justice established under Article 15 of the Revised Treaty of ECOWAS, is the sole judicial organ of the community with the role of ensuring the observance of law and justice in the interpretation and application of the Treaty and protocols of ECOWAS. The first Protocol of the court was adopted in 1991, but the court came into operation in 2001 with the appointment and swearing in of the first set of judges.

The Revised Treaty constitutes the ECOWAS legal system, a fact which ordinarily should make it directly applicable and of direct effect in National Courts. Unfortunately, this is not the case because, by reason of article 5(2) of the Revised Treaty, its applicability depends on the manner in which it is incorporated into states' national legislations:

⁵⁹⁶Article 4(g) of the ECOWAS Revised Treaty.

“each Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty”.⁵⁹⁷ This means that it is the constitutional measures, applicable for incorporation in each Member State, that will determine the direct applicability and effect of the Revised Treaty. Countries like The Gambia, Nigeria, Ghana, and Sierra Leone are generally regarded as dualist States. International law, including treaties, do not have a force of law within their territory unless it has been promulgated in national legislation. Without such national legislation, a treaty will not have the force of law in the country.

Assuming the Revised ECOWAS Treaty is domesticated, it is also important to determine the status of the treaty. Does domestication make the Revised Treaty superior or inferior to national laws or national Constitutions? The answer appears to be that the domesticated Revised ECOWAS Treaty may not be superior to the law and Constitution of dualist States. In the Nigerian case of *Abacha v. Fawehinmi (Abacha)*,⁵⁹⁸ the status of the African Charter on Human and Peoples' Rights (the African Charter), was examined by the Nigerian Supreme Court, in which the court held that the Nigerian Constitution is superior to the African Charter but that the Charter is superior to municipal legislation.⁵⁹⁹ This case has great significance for application of international and regional human rights instruments that Nigeria is party to. This is also a welcomed development for the application of the relevant provisions of the Revised Treaty relating to upholding human rights and rule of law.

An example in this regard is the practice of the Ghanaian Supreme Court to apply the African Charter even when it has not been domesticated. In *New Patriotic Party v. Inspector General*

⁵⁹⁷Article 5(2) Ibid.

⁵⁹⁸*General Sani Abacha & Others v. Chief Gani Fawehinmi* [2004] 4 SCN] 401.

⁵⁹⁹Ibid.

of Police⁶⁰⁰ it was held that “Ghana is signatory to this African Charter and Member States of the Organisation of African Unity and parties to the Charter are expected to recognise the rights and duties enshrined in the Charter....I do not think that the fact that Ghana has not passed specific legislation to give effect to the Charter means that the Charter cannot be relied upon”.⁶⁰¹

Similarly, in the celebrated judgment of the Supreme Court of The Gambia, delivered by the Honourable Chief Justice Jallow, in the case of *The State Vs Yankouba Touray*,⁶⁰² it was held that “Unincorporated treaties may not however be totally irrelevant to the domestic legal order. They may particularly those relating to human rights, referred to as aid to interpretation of the local law, to fill gaps and clear ambiguities in such law..... Unincorporated treaties may also create a legitimate expectation on the part of beneficiaries or even pass into the realm of customary international law”.

In expounding on the status of unincorporated treaties, his lordship the Chief Justice accorded the African Charter a special place within the body of human rights law, vis a vis its relevance and application in The Gambia. “...this Court finds that the African (Banjul) Charter on Human and Peoples Rights, the negotiation and adoption of which was spearheaded by The Gambia, Africa's premier human rights instrument which was officially named the Banjul Charter in recognition of the role played by The Gambia in its elaboration, an instrument ratified by the government and legislature of The Gambia, and with The Gambia hosting the Commission created and mandated by the Charter to investigate human rights violations within and by the states parties cannot, despite not having been incorporated into Gambia law, be regarded as totally irrelevant to The Gambia legal system. Given its content and its pride of place to The Gambia as aforesaid this court, as with their Lordships of the Privy Council and the Supreme Court of Nigeria, holds that the ratification of the African (Banjul) Charter on Human and Peoples Right by The Gambia creates a legitimate expectation amongst people in The Gambia that the Gambia State will respect its provisions. Thus, this court has a duty to interpret and apply Gambian Law in a manner that does not undermine that legitimate expectation, but to interpret our laws in a manner consistent with the obligations of The Gambia under the Charter and of decisions of judicial or quasi-judicial bodies established by the Charter”.

⁶⁰⁰[1992-93] 2 G B R 586 - 628

⁶⁰¹Ibid.

⁶⁰²Unreported judgement of the Supreme Court of The Gambia 19th March 2021,

It is clear that, Common Law jurisdictions, within the ECOWAS Community, have also recognised the fact that States cannot deliberately enact laws in contravention of their international obligations and undertakings. Drawing on this fact, the Revised Treaty and its provision relating to the upholding of human rights, rule of law and constitutional democracy will certainly qualify as capable of influencing domestic legislation and the decisions of National Courts. The readiness of National Courts to uphold and promote human rights encapsulated in regional and subregional human rights instruments, as binding authority, in the absence of domestication, will greatly enhance the status of human rights in the continent. From the established jurisprudence, judicial officers, are obliged to take into consideration and draw inspiration from international human rights norms in the interpretation of laws and adjudication on matters relating to human rights, rule of law and constitutional democracy.

On the other hand, French speaking countries in the ECOWAS zone tend to follow the monist theory based on the civil law system. This is even though in some instances, they may appear to be dualist in practice, to the extent that, in some circumstances, some level of legislative activity (including the revision of the constitution) is required before a treaty takes effect. However, generally, international law becomes part of the national laws of States, once instruments are duly ratified. For example, Senegal and Benin have expressed provisions in their constitution providing for the superiority of ratified treaties, over national laws.⁶⁰³

⁶⁰³Article 147 of the Constitution of the Republic of Benin provides that treaties or agreements lawfully ratified shall have, upon their publication, an authority superior to that of national law, without prejudice to each agreement or treaty in its application by the other party. ALSO, Similarly, Article 98 of the Senegalese Constitution of 2001 provides that treaties or agreements duly ratified shall, upon their publication, have an authority superior to that of national law, subject, in respect of each treaty and agreement, to its application by the other party.

Irrespective of the applicable legal system in the ECOWAS subregion, it is clear that upholding human rights good governance and constitutional democracy is a critical goal for countries in the subregion; and one of the key instruments for achieving this goal is law. The Revised ECOWAS Treaty is the primary legal mechanisms used to regulate the conduct of the Community, and to promote rule of law, constitutional democracy, peace and security, within the subregion. Therefore, the oversight and interpretative role and function of the ECOWAS Court is critical to ensuring that countries comply with their treaty obligations and that the goals of the treaty are achieved. By adjudicating over complaints from citizens of the Community, the Court helps to protect and uphold human rights, rule of law and constitutional democracy, and thus fostering stability and security within the subregion.

2. Importance of Judicial Dialogue between the ECOWAS Court of Justice and National Court in upholding human rights and rule of law.

Courts do not exist in isolation. As they work to interpret laws or give content to the rights enumerated in constitutions and international law, they often refer to the analysis of other courts in similar situations. In common law jurisdictions, the lower court is typically bound to apply the established law to the new case.⁶⁰⁴ Occasionally, courts may treat the opinions of supranational bodies with similar deference.⁶⁰⁵ Even when courts are not compelled to follow precedent, they may look to the analysis of sister courts outside their jurisdiction, including regional bodies such as the ECOWAS Court. These vertical and horizontal relationships between courts results in an understanding that when they issue opinions, they are communicating with one another.⁶⁰⁶

⁶⁰⁴AWB Simpson 'Common law in P Cane & J Conaghan (eds) *The new Oxford companion to law* (2008)

⁶⁰⁵See eg the notion of Conventionality Control as interpreted in several Latin American countries. P González-Domínguez *The doctrine of conventionality control: Between uniformity and legal pluralism in the inter-American human rights system* (2018).

⁶⁰⁶AM Slaughter *A new world order* (2004) 75-79.

Such communication is judicial dialogue: the phenomenon of borrowing and transplanting [of judicial reasoning] from the international to the national, the national to the international, from one national jurisdiction to another national jurisdiction.⁶⁰⁷ Judge Eduardo Ferrer Mac-Gregor of the Inter-American Court of Human Rights describes the concept of judicial dialogue as 'emerg[ing] from the practice of the courts and tribunals themselves' and encourages his fellow jurist to engage more openly in the practice as well as initiate a conversation about its utility.⁶⁰⁸

There are several reasons why a court might participate in judicial dialogue. Historical legacies may shape the structure of a particular legal system, making it more inclined to engage with other systems. Limited resources in a particular jurisdiction might make the efficiency of judicial dialogue advantageous. A nascent court might incorporate foreign jurisprudence in order to provide its jurisprudence with more heft, thereby buttressing its own legitimacy. In some cases, international commitments may even require reference to international or foreign jurisprudence. In addition to these pragmatic reasons for judicial dialogue, there are at least two substantive reasons to promote judicial dialogues. First, it accelerates the development of jurisprudence by borrowing external precedent.⁶⁰⁹ In a nascent democracy, or one undergoing a transition, accelerating this development strengthens the courts.⁶¹⁰ Second, judicial dialogue places a legal system within the larger community of international law. It strengthens the human rights norms shared among the international system within a domestic context and enables the country to contribute to the development of international law.

Whereas national Courts should be the first port of call for private individuals and juristic persons seeking justice in the form of rights protection, dispute resolution, or other kinds of legal matters, with the rise in the number of regional and international tribunals, it has become possible, and in many cases desirable, for natural and juristic persons to settle their disputes or seek the protection of their rights in such tribunals.

⁶⁰⁷C McCrudden 'A common law of human rights? Transnational judicial conversations on constitutional rights' (2000) 20 *Oxford Journal of Legal Studies* 499 at 501.

⁶⁰⁸ED Elliot 'The evolutionary tradition in jurisprudence' (1985) 85 *Columbia Law Review* 38. Who argues that 'Law is a scavenger. It grows by feeding on ideas from outside, not by inventing new ones of its own'.

⁶⁰⁹Ibid.

⁶¹⁰See E Gonzalez-Ocantos 'Communicative entrepreneurs: The case of the Inter-American Court of Human Rights' dialogue with national judges' (2018) 62 *International Studies Quarterly* 737.

This has meant that international law and international institutions have had to intervene in the determination of rights and duties that were previously within the exclusive domain of national law and institutions. This may raise questions about when or whether the sovereignty of a State has been violated or whether a regional or international institution has interfered in the domestic affairs of a State, in violation of Article 2(7) of the UN Charter. Therefore, it is important to examine the relationship and the importance of judicial dialogue between the regional or international tribunals, in this case the ECOWAS Court of Justice, the African Commission, as well as the national courts, in upholding human rights and rule of law.

2.1 *Judicial dialogue Between the African Commission and the ECOWAS.*

Article 4(g) of the Revised Treaty of ECOWAS affirms and declares the adherence of ECOWAS Member States to the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'. Thus, the ECOWAS Court has relied on the jurisprudence of the Commission in all public interest litigation such as those which enable NGOs to file complaints against human rights violations,⁶¹¹ including economic, social and cultural rights violations. This has been done without the need for any specific mandate from the people affected. For example, in *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) vs President of the Federal Republic of Nigeria & Ors*,⁶¹² the ECOWAS Court relied on the decision of the Commission in *SERAC vs Nigeria* and stated:⁶¹³

Taking into account the need to reinforce the access to justice for the protection of human and people rights in the African context, the Court holds that an NGO duly constituted according to national law of any ECOWAS Member State, and enjoying observer status before ECOWAS institutions, can file complaints against human rights violation in case that the victim is not just a single individual, but a large group of individuals or even entire communities.

⁶¹¹ <https://www.corteidh.or.cr/tablas/r26994.pdf>

⁶¹² Suit No. ECW/CCJ/APP/08/09 (20 December 2010).

⁶¹³ Communication 155/96, *supra*. note 63, para. 49.

The jurisprudence of the Commission on economic, social and cultural rights for instance has had an impact at the sub-regional level in Africa, as reflected in the decisions of African sub-regional institutions giving prominence to the justiciability of economic, social and cultural rights. For instance, in *Socio-Economic Rights and Accountability Project (SERAP) V. Federal Republic of Nigeria and Universal Basic Education Commission*,⁶¹⁴ the plaintiff claimed before the ECOWAS Court a violation of the right to education under Article 17 of the African Charter due to alleged lack of adequate implementation of Nigeria's Compulsory and Basic Education Act and the Child's Rights Act, 2004.

The ECOWAS Court considered whether it has the jurisdiction to adjudicate a claim involving an alleged violation of the right to education under Article 17 of the Charter. Relying on Article 9(4) of the 2005 Supplementary Protocol establishing the ECOWAS Court, which grants it jurisdiction to determine human rights violations in ECOWAS Member States and Article 4(g) of the Revised Treaty of ECOWAS, the Court held that 'it is well established that the rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this Court'.⁶¹⁵ The Court dismissed the government's contention that education is 'a mere directive policy of the government and not a legal entitlement of the citizens', concluding that the contention of the government that 'the right to education is not justiciable as it falls within the directive principles of state policy cannot hold'.⁶¹⁶ The decision is in line with the jurisprudence of the African Commission which establishes that all rights under the African Charter including ESC rights are justiciable.

In essence, the ECOWAS Court also complements the protective mandate of the Commission in promoting and protecting the human rights of individuals, using the existing human rights framework within the African Union and the ECOWAS region.

⁶¹⁴Suit No. ECW/CCJ/APP/0808 (27 October 2009)

⁶¹⁵Suit No. ECW/CCJ/APP/0808, *supra* note 93, para. 20.

⁶¹⁶*Ibid*

2.2 *Jurisdictional Relations between the ECOWAS Community Court of Justice and National Courts*

There is no rule on the exhaustion of local remedies in the Protocols relating to the ECOWAS Court. Nevertheless, the Court has had to entertain matters that call into question its relationship with Members States' courts where such actions have previously been heard in national courts or remain pending before them.

From the provisions of Article 10(d) of the 2005 Supplementary Protocol on the ECOWAS Court, the two statutory restrictions to the admissibility of the actions before the Court are the submission of anonymous applications and the pendency of the same matter before another international Court. These are the treaty-based jurisdiction-regulating rules; in addition, the Court has also made declaration on the (positive) determinants of its jurisdiction. In *Manneh v. The Gambia*, the Court confirmed the rule governing its jurisdiction as laid down in *Alhaji Hammani Tidjani v. Nigeria and 4 Others* thus, ... the combined effect of article 9(4) of the Protocol of the Court, as amended, article 4(g) of the Revised Treaty and....the African Charter on Human and Peoples' Rights is that the plaintiff must invoke the Court's jurisdiction by (i) establishing that there is a right recognised by...the African Charter on Human and Peoples' Rights; (ii) that this right has been violated by the defendant; (iii) that there is no action pending before another international court in respect of the alleged breach of his right; and (iv) that there was no previously laid down law that led to the alleged breach of the abuse of his rights.

⁶¹⁷*Chief Ebrima Manneh v The Republic of The Gambia.*

Suit No. ECW/CCJ/APP/04/07, judgment ECW/CCJ/JUD/03/08, 5 June 2008

From the above, it is clear that the jurisdiction of the Court will not be restricted by judicial or other proceedings pending in national courts or institutions of Member States. In fact, the court has stated on several occasions that the determination of its jurisdiction is limited to its statutes. In *Registered Trustees of Socio-Economic Rights & Accountability Project (SERAP) v. Federal Republic of Nigeria & Another*, the Court noted that:

It is a well established principle of law that jurisdiction is a creature of statute. The statute that spells out the jurisdiction of this Court is the Supplementary Protocol on the Court of Justice, specifically Article 9 thereof. For this Court to have subject-matter jurisdiction over the suit as instituted by the plaintiff, the subject matter of the suit must fall within the confines of Article 9 of the Supplementary Protocol to the Court. . . The Court has jurisdiction over human rights enshrined in the African Charter and the fact that these rights are domesticated in the municipal law of the Federal Republic of Nigeria cannot oust the jurisdiction of the Court. . . This Court clearly has subject matter jurisdiction over human rights violations in so far as these are recognized by the African Charter on Human and Peoples' Rights, which is adopted by Article 4(g) of the Revised Treaty of ECOWAS.

3. ECOWAS's Commitment to protecting Human Rights.

Since the expansion of its jurisdiction in 2005, the ECOWAS Court has issued several judgments on the merit, the large majority of which concern human rights.⁶¹⁸ Many of these decisions are legally and politically consequential. In a well-publicised early case, ECOWAS judges found Niger liable for condoning a customary practice of female slavery.⁶¹⁹ More recently, the Court issued a pathbreaking judgment against Nigeria for failing to regulate multinational oil companies that polluted the Niger Delta.⁶²⁰ Other high-profile decisions have barred the domestic prosecution of former Chadian President Hissein Habre as contrary to the non-retroactivity of criminal law; ordered the restoration of funds embezzled from a program to provide free basic education to children; granted NGOs standing to challenge violations of economic and social rights; and awarded damages to individuals arbitrarily detained by police and security officials.⁶²¹

⁶¹⁸Muyiwas Adigun, *Enforcing ECOWAS Judgments in Nigeria through the common law rule on the enforcement of foreign judgments*, 6 June 2019. Available here: <https://www.tandfonline.com/doi/abs/10.1080/17441048.2019.1599770?journalCode=rpil20>.

⁶¹⁹*Hadijatou Mani Koroua v. Niger*

⁶²⁰ <https://www.amnesty.org/en/latest/news/2012/12/nigeria-ground-breaking-judgment-calls-punishing-oil-companies-over-pollution/>.

⁶²¹ <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal>.

It is less clear, however, whether these decisions have improved respect for human rights in the subregion. The President of the Court has lamented the non-implementation of decisions of the Court by Member States. He expressed that 70 percent of the court judgements are not implemented. This is true of most regional and subregional human rights mechanisms in the continent.

Skeptics of the Court's expansion into human rights have suggested that the 2005 Protocol was an insincere commitment to ECOWAS Member States.⁶²² They have intimated that, West African leaders agreed to the Protocol not out of a desire to remedy human rights violations in the region, but rather because they expected that the ECOWAS Court, whatever its powers on papers, would have little influence on national laws or practice.⁶²³

The ECOWAS Court's expansion into human rights is not unique. In the 1970s, the European Court of Justice made a similar shift, albeit for different reasons, as did (more recently) the courts associated with two other subregional economic communities in Africa—the East African Court of Justice and the Tribunal of the Southern African Development Community.⁶²⁴ Unlike the situation of the ECOWAS Court, however, these expansions occurred via judicial law making. In Europe, member states later ratified the ECJ's jurisprudential advances, most recently when they adopted the Lisbon Treaty that made the EU Charter of Fundamental Rights legally binding. The consequences of the bold judicial assertions of human rights competence by the EACJ and SADC Tribunal are still unfolding, but early evidence indicates that both courts have faced substantial opposition from governments.

To be sure, the challenge of eliciting compliance with the ECOWAS Court's judgments remains formidable. But this problem must be put in perspective. The European Court of Human Rights and the Inter-American Court of Human Rights took decades to establish their authority, whereas subregional tribunals in Africa are still in their infancy. In sum, although the ECOWAS Court is still a young regional tribunal with enormous challenges, the Court has been able to exercise its human rights authority, arguably emerging stronger for having weathered those trails.

⁶²²*Ibid.*

⁶²³See for instance, H Smith-Cannoy, *Insincere Commitments: Human Rights Treaties, Abusive States, and Citizen Activism* (2012), Georgetown University Press, 262 A variant of this argument asserts that West African leaders adopted the 2005 Protocol to signal to international organizations, foreign donors, or domestic interest groups a seemingly real but, in fact, temporary or disingenuous commitment to human rights or to other goals desired by those actors. For a critique of the claim that human rights treaty ratifications are “costless signals,”

Also see Ryan Goodman and Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171, 179 (2003).

⁶²⁴*Ibid.*

4. Conclusion

The national courts of Member States and the ECOWAS Court of Justice play a crucial role in upholding human rights, the rule of law, and constitutional democracy in the ECOWAS subregion. The national courts of Member States are the first line of defence in protecting human rights and upholding the rule of law. They have the responsibility to interpret and apply national laws in accordance with the principles of the ECOWAS Treaty and the African Charter. They also have the power to strike down any law or action that is inconsistent with these principles. In this way, national courts can provide an effective remedy for violations of human rights and ensure that the rule of law is upheld.

The ECOWAS Court of Justice also plays a critical role in protecting human rights and promoting constitutional democracy in the region. It is the final arbiter of disputes arising from the interpretation and application of the ECOWAS Treaty, and it has the power to hear cases brought by individuals, organizations, or Member States. The Court has jurisdiction over matters relating to human rights, trade, investment, and other areas of cooperation within the ECOWAS region. Its decisions are binding on Member States and can have a significant impact on the development of regional law and policy.

One of the most significant contributions of the ECOWAS Court of Justice has been its role in promoting constitutional democracy in the region. The Court has been called upon to adjudicate disputes arising from elections and other political processes in member states. Its decisions have helped to reinforce important principles such as the right to a fair trial, the importance of free and fair elections, and the need for an independent judiciary. In this way, the Court has played a critical role in promoting democratic governance and protecting the human rights of citizens in the region.

In conclusion, both the national courts of Member States and the ECOWAS Court of Justice are crucial to upholding human rights, the rule of law, and constitutional democracy within the community. Here are some ways that their roles can be enhanced:

1. Strengthening the independence of national courts: National courts must be independent of political influence to uphold human rights, the rule of law, and constitutional democracy. This can be achieved by

ensuring that judges are appointed on merit, have security of tenure, and are free from external influence. Additionally, it is important to ensure that national courts have adequate resources to effectively carry out their duties.

2. Enhancing the capacity of national courts: National courts must have the necessary legal knowledge, expertise, and resources to adjudicate cases related to human rights, the rule of law, and constitutional democracy. Training programs and technical assistance can help build the capacity of national courts in this regard.
3. Strengthening the jurisdiction of the ECOWAS Court of Justice: The ECOWAS Court of Justice has the authority to hear cases related to human rights, the rule of law, and constitutional democracy in the community.
4. Strengthening the enforcement powers of the ECOWAS Court of Justice: The ECOWAS Court of Justice has the power to make binding decisions on member states, but its enforcement powers are limited. To enhance its role in upholding human rights, the rule of law, and constitutional democracy, the enforcement powers of the ECOWAS Court of Justice could be strengthened. For example, member states could be required to comply with its decisions and the court could be given the power to impose sanctions for non-compliance.

**THE ROLE OF NATIONAL COURTS OF MEMBER STATES
AND THE ECOWAS COURT OF JUSTICE IN UPHOLDING
HUMAN RIGHTS, RULE OF LAW AND
CONSTITUTIONAL DEMOCRACY**

BY

N'DRAMAN KABLAN FIDELE AMILCAR

JUDGE AT THE COURT OF FIRST INSTANCE OF ABIDJAN, COTE D'IVOIRE

Introduction

On 6 July 1991, the Conference of Ministers of Justice, signed in Abuja, the Protocol A/P1/7/91 establishing a Community Court of Justice. The Seat of the Court is in Abuja, Nigeria, but it can transform itself into a mobile court, which can move to sit outside the walls of the Court if necessary. It is made up of independent judges, appointed by the Conference of Heads of State and Government of the Community from a list of judges proposed by each Member State. The first judges of the Court were appointed on 30 January 2001, but the Court only became operational on 22 August 2002. The mission of the Community Court of Justice is 'to ensure respect for the law and principles of equity in the interpretation and application of the Treaty and Protocols and annexed Conventions' and to be 'entrusted with the responsibility of settling any dispute which may be submitted to it in accordance with the provisions of the paragraph 2 of Article 76 of the Revised Treaty and any disputes which may arise between the Member States and the institutions of the Community'.

The Court of Justice is a unique institution in that it is an international, 'judicial' and administrative Court, as well as a 'Supreme Court' responsible for ensuring the consistency, validity and uniform interpretation of Community law, and is subject to rules of organisation and jurisdiction which illustrate this uniqueness. In addition, the ECOWAS Revised Treaty promotes the Community judicial system to the point of appearing as a real judicial power. This evolution was undoubtedly written into the Court's DNA. Indeed, it should be remembered that institutions are always the product of a specific historical context which forms their main characteristics.

1. Role of National Courts of Member States and The ECOWAS Court of Justice in Respect of Human Rights and Constitutional Democracy

Community or international human rights courts exercise a judicial authority marked by the seal of subsidiarity. This subsidiarity implies that national courts are the primary actors in the protection and defence of human rights and public freedoms. The protection of human rights is an obligation common to all States and their respect implies several rights: the right of access to justice, an impartial court, respect of the adversarial principle and a fair trial, freedom of defence, effective exercise of legal remedies, right to have one's case tried within a reasonable time, equality before the law and equal protection of the law.

In order to fully and effectively fulfil its role as the primary protector of human rights and public freedoms, two major general principles of law have been placed at the disposal of the national court:

⁶²⁵See the case of Awa N'doye v. State of Senegal

i. The control of the conventionality of laws: What is the control of conventionality in concreto?

It is agreed that the national court may disregard a domestic law provision if its application would disproportionately infringe a fundamental right guaranteed by human rights treaties concluded by the State. The national court cannot abrogate the law contrary to international treaties. It can only exclude this law from the dispute before it. This control applies to treaties where the State undertakes to take internal legislative measures to comply with its international commitments. This control does not apply to conventions which are of direct effect when they create rights which individuals may rely on and when, having regard to the expressed intention of the parties and the general scheme of the treaty invoked, as well as to its content and terms, they do not have the exclusive purpose of governing relations between States and do not require the intervention of any supplementary act in order to produce effects in respect of individuals.

ii. The national margin of appreciation:

This concept was established by the European Court of Human Rights, especially in the landmark case of *Handyside v. United Kingdom*⁶²⁶ wherein the ECHR recognised that '*By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them*'.

The margin is thus one of the consequences and one of the manifestations of the principle of subsidiarity which wants the States to be in the front line to enforce the fundamental rights guaranteed by international conventions.

2. Role of The ECOWAS Court of Justice in The Regional Protection of Human Rights and Respect for The Rule of Law and Constitutional Democracy in the Community

Independent, ensuring respect for the law, as much as it is itself subject to it, Community justice seems to us to be endowed with the attributes of solid legitimacy. From this point of view,

⁶²⁶(1979–80) 1 EHRR 737

it performs a directly democratic function with a view to safeguarding the principles of a union based on the rule of law, the substance of which it has, moreover, helped to define, against the deviant behaviour of the other institutions and the Member States. In so doing, the ECOWAS Court of Justice is at the heart of an internal mechanism by virtue of which the free exercise by political power of its prerogatives must be balanced by the prospect of judicial censure in the event of illegality.

The ECOWAS Court of Justice, for a long time, through numerous judgments had adopted the principle of indifference to law in its benchmark standards. In a judgment of 9 May 2011,⁶²⁷ the Court held that '(...) *as concretely spelt out in the new Article 9 of The Protocol Relating To The Court As Amended By The Supplementary Protocol A/SP.1/01/O5 of 19th January 2005, shall not be interpreted as implying the exercise of control over the constitutionality or legality of the instruments adopted by the national authorities of the Member States*'.⁶²⁸ In the case of *Karim Meissa Wade V. Republic of Senegal* of 19 July 2013,⁶²⁹ the Court declared that:

In general terms, the Republic of Senegal asserts that the Honourable Court must declare that it lacks the jurisdiction to sit on all the requests altogether, as brought by the Applicant, since examining the case will eventually mean that the Court overstepped the bounds of its jurisdiction, interfering in the legislative and judicial matters of the Republic of Senegal.

For a long time attached to a strictly curative conception (finding a violation of rights and possible granting of financial compensation based on the principle of *restitutio in integrum*), the ECOWAS Court of Justice has very recently converted to the culture of control of the electoral process and the control of the exercise of public freedoms.

⁶²⁷General List No. ECW/CCJ/APP/07/09; Judgment No. ECW/CCJ/JUD/05/11

⁶²⁸(2011) CCJELR para.24, p.113).

⁶²⁹General List: No. ECW/CCJ/APP/09/13, Judgment No. ECW/CCJ/JUD/19/13 para. 61.

Increasingly, national law is becoming the barometer of violations of human rights and democratic and constitutional principles in the jurisprudence of the ECOWAS Court of Justice.

Indeed, when national law confers a right or violates it, and this is the subject of a debate before the ECOWAS Court of Justice, it is inevitable that the Community Court will consider the conformity of this text with the standards applicable before the Court.

In the case of *Congrès pour la Démocratie et le Progrès (CDP) v. Burkina Faso*,⁶³⁰ the Court ruled that 'the Electoral Code of Burkina Faso, as amended by law n°005-2015/CNT of 07 April 2015', is a violation of the right of free participation in elections and it '*Orders Burkina Faso therefore to remove all the hindrances to the participation in elections, resulting from the said amendment*'.

In the case of L'UNION SOCIALE LIBERALE (USL) AGAINST THE REPUBLIC OF SENEGAL, the Court decided that '*the rights of political parties and citizens of Senegal who cannot stand for election because of the amendment to the Electoral Code by Law No.2018-22 of 4 February 2018, must be respected, by the abolition of the sponsorship system, which constitutes, on one hand, a real obstacle to the freedom and secrecy of the exercise of the right to vote, and, 36 on the other hand*'. More recently, the Court of Justice ordered the Republic of Senegal '*to repeal Order No.007580/MINT/SP dated 20 July 2011 and take all immediate effective measures to ensure restoration of the right of freedom of expression of the Senegalese people*'.⁶³¹ Moreover, while claiming not to cross the boundary that separates it from the legislator or the constituent, the Court inevitably reaches the limits of creation when it orders, for example, a Member State to modify its electoral legislation because it violates the Protocol on Democracy and Good Governance.

As we can see, the ECOWAS Court of Justice has become a real actor in the control of the constitutional and democratic rules of the Member States.

⁶³⁰Judgement of 13 July 2015

⁶³¹La Ligue Sénégalaise des Droits Humains & Amnesty International Sénégal v. L'état du Sénégal Application No.: ECW/CCJ/APP/37/20 Judgment No.: ECW/CCJ/JUD/22

However, this practice raises questions, and sometimes sharp criticism, as it is a mechanism that was not foreseen when the Protocol A/P1/7/91 establishing a Court of Justice of the Community was drawn up.

Will the ECOWAS Court of Justice not be criticised for pursuing an overly intrusive jurisprudential policy? Too expansive?

3. The Law as an Instrument for Maintaining Regional Peace and Security: Function of Supervision and Control of Treaties

The ECOWAS Court of Justice has several means to control and supervise treaties. They include: **The advisory function:** apart from litigation, the Court has advisory powers. In this capacity, the Court issues legal opinions on questions requiring the interpretation or application of the provisions of the Treaty and the Protocols thereto at the request of the Conference, Council of Ministers, any Member State, Commission and any institution of the Community (Article 76(2) of the Treaty). It should be noted that the jurisdiction of the Court of Justice in matters of interpretation or application of Community rules is marked by the seal of subsidiarity. Article 76(1) of the Treaty establishes the principle of consensual interpretation between the parties. (Practice of post interpretation agreements)

Action to review the legality of Community Acts: The Court of Justice reviews the legality of Acts adopted by the competent Community institutions. This action for assessment of legality, which in reality is an "action for annulment", is largely open to the Member States, Council of Ministers and the President of the Commission.

The preliminary ruling: The application of Community law is first and foremost the work of the national courts. If 'the Court of first instance is also the Court of defence', limits are imposed when the defences raise a question falling within the exclusive jurisdiction of another Court. The preliminary question is thus identified and the preliminary ruling procedure is set in motion. The preliminary ruling jurisdiction of the Court of justice is a condition for the unity of Community law.

Action for failure to fulfil obligations: It makes it possible to monitor the activities of the Member States, the authors of the Treaty wisely considered that, despite their reciprocal commitments, Member States might, in certain areas, show little or no willingness to submit to obligations which are nevertheless imposed on them under Community laws. The action for

failure to fulfil obligations is based on Article 9(1) (d) of the Supplementary Protocol on the ECOWAS Court of Justice, which provides that *'The Court has competence to adjudicate on any dispute relating to the following (...) the failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS'*.

4. Strengthening the Roles of the National Courts of Member States and The ECOWAS Court of Justice in the Peace and Security Architecture of the Community

The ECOWAS Court of Justice must become a privileged intermediary of national jurisdictions in the framework of cooperation but also confrontation. The national human rights law of ECOWAS Member States must be subject to interpretation authority of the ECOWAS Court of Justice. The jurisprudence of the ECOWAS Court of Justice has become a source of inspiration for many jurisdictions in the Community. This extra muros influence in the national jurisdictions of the countries that have designated agents to execute the Court's judgments. Implicitly, the national courts refer to the jurisprudence of the Court without, however, pursuing a policy of systematic alignment. Such a situation can only be beneficial to ensure that the Court fulfils its mission of protecting human rights in the ECOWAS region.

5. Conclusion

Like all human endeavours, the action of the ECOWAS Court of Justice is not free from backlash. The effectiveness of the ECOWAS Court of Justice is confronted with a major problem which is the non-execution of its decisions by the States which themselves consented to the establishment of the Court to submit to its decisions.

It is up to us, the participants and all other rights organisations, to disseminate the Court's judgments effectively and to encourage all decision-makers in States Parties to execute them. Let us remember that no one is immune to human rights violations. And given the weakness and inadequacy of local human rights protection instruments, the Court of Justice remains the most effective and most independent to punish violations of human rights and public freedoms in the ECOWAS region.

**ARE COURTS FACILITATORS OR PROTECTORS OR PRETENDERS?
RECONCEPTUALISING THE ROLE OF COURTS IN
THE PROMOTION AND PROTECTION OF CONSTITUTIONAL
DEMOCRACY IN WEST AFRICA
BY
SOLOMON T. EBOBRAH**

PROFESSOR OF LAW AND DIRECTOR, INSTITUTE FOR NIGER DELTA
STUDIES AT THE NIGER DELTA UNIVERSITY, NIGERIA

Introduction

Notwithstanding its arguably clear economic integration-oriented origins, the Economic Community of West African States (ECOWAS⁶³²) has become a major player in the political life of its Member States. The transition (or some would say spill-over) into the political zone may well have been prompted by the unstable political situation that prevailed in West Africa during the 1990s, leading the ECOWAS authorities to acknowledge in 1999, that '*the proliferation of conflicts ... constitute a threat to the peace and security in the African continent, and undermines our efforts to improve the living standards of our peoples*'.⁶³³ Since then, ECOWAS has managed to project itself as an organisation that favours constitutional democracy as the preferred form of government for its Member States. In fact, any honest observer would agree that the organisation has made some progress as demonstrated by the fact that the political character of the regimes in the States that make up ECOWAS today is radically different from those that founded the organisation in the mid-1970s.⁶³⁴ There are far fewer military juntas and one-Party States, just as there is (at least theoretically) far more respect for human rights and the rule of law in the region.

In fact, in today's ECOWAS, the democratic credentials of Member States matter so much that full ECOWAS Summits are convened to deliberate on the political situation in Member States facing threats to constitutional governments.⁶³⁵ As the focus of the organisation has increasingly spilled-over into the political sphere, but not necessarily totally because of that shift, the ECOWAS Community Court of Justice (ECCJ) – the principal legal organ of the ECOWAS has equally found itself getting more and more involved, not in economic-type adjudication directly driving economic integration, but in more political areas such as judicial protection of human rights. Indeed, as the theme of the present conference suggests, there appears to be even greater expectation that the ECOWAS Court, possibly leading the national courts of Member States, should play an even more significant role in advancing, not just human rights, but respect for the rule of law and constitutional democracy within ECOWAS Member States.

⁶³²On the concept of spill-over as it applies to regional integration, see generally, Haas, E.B. (1958) *The uniting of Europe. political, social, and economic forces 1950–1957*, Stanford: Stanford University Press. Also see P C. Schmitter 'Ernst B. Haas and the legacy of neofunctionalism', (2005) 12 (2) *Journal of European Public Policy*, 255-272 for an eloquent analysis of Haas' work.

⁶³³See para 11 of the ECOWAS 1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. Emphasis mine.

⁶³⁴No less than seven (7) of the signatories to the 1975 founding ECOWAS Treaty were part of a ruling military junta. See the original ECOWAS Treaty.

⁶³⁵In this regard, note the 4 June 2022 communique of the Extraordinary Summit of the ECOWAS Authority of Heads of State and Government on the situation in Mali, Guinea and Burkina Faso.

But what does this mean for the Court itself and its judicial partners in the Member States? Has sovereignty lost its value as the currency of international law in West Africa and is it now the legitimate place of international organisations like ECOWAS to dictate the political character of governments in their Member States?

Writing around 1992, long before constitutional democracy had any clear foothold as a preferred form of government in West Africa, the American scholar, Thomas M. Franck had claimed that there was an 'emerging right to democratic governance'.⁶³⁶ Franck conceptualised 'democratic entitlement' in terms of an understanding that 'governments derive their "just powers" from the consent of the governed'.⁶³⁷ Two aspects of Franck's discussion are germane for the present discourse. First, based on his analysis of the United States' Declaration of Independence, Franck postulated that there is such a thing as 'the legitimating power of the community of nations'. He claimed that 'increasingly, governments recognize that their legitimacy depends on meeting a normative expectation of the community of states'.⁶³⁸ For us, that raises the question whether ECOWAS is such a Community of States with a normative expectation to which governments of ECOWAS Member States governments desirous of legitimacy, look up and endeavour to meet. The other ambit of Franck's work germane for this contribution is his prediction that 'democracy ... is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes'.⁶³⁹ If this prediction is correct (as it now appears to be), does the legal – adjudication process qualify as one of such 'collective international processes' by which the democratic entitlement is to be promoted and protected? In other words, is the ECOWAS Court entitled to claim a place as one of such international processes and if so, what role can it play?

While Franck's treatise can be interpreted as tentative recognition that contemporary international law allows for international organs such as the ECOWAS Court (and its national judicial partners) to play a more positive and active role in the promotion and protection of constitutional democracy,⁶⁴⁰ there are voices that call for caution in the cultivation of expectations attached to such a role. For instance, the American Jurist, Justice Hand famously observed that "Liberty lies in the hearts of men and women.

⁶³⁶TM Franck, 'The emerging right to democratic governance', (1992) 86 (1) *American Journal of International Law*, 46 -91

⁶³⁷Franck, (n 46).

⁶³⁸As above.

⁶³⁹As above.

⁶⁴⁰As a result of space limitations, I use constitutional democracy as an abbreviation for human rights, the rule of law and constitutional democracy

When it dies there, no Constitution, no law, no Court can save it'.⁶⁴¹ Taking Justice Hand's caution to heart, Widner, in the context of post conflict transition and democratisation in Africa, acknowledged the existence of a possible 'role of the courts in sustaining a spirit of liberty and tolerance in societies', yet reasoned that '[b]ecause the language of the rule of law is now so much in vogue, observers too often tend to assume that courts can easily promote peace and democratic change in post conflict regimes without looking closely at the grounds for such optimism'.⁶⁴²

Against the foregoing background, in this contribution, I ask (and try to answer empirically) what, if any, roles are envisaged under the ECOWAS framework for courts – national and subregional – as far as the promotion and protection of human rights, and the promotion or preservation of the rule of law and constitutional democracy is concerned. From a normative perspective, I also subtly ask whether courts can and should perform such envisaged roles, only some of those roles or different roles altogether. Mostly using the ECOWAS Court as a model (both for itself and its national judicial partners in the Member States), I implicitly ask a number of other questions including whether we are assuming wrongly that courts can easily protect human rights, promote and protect constitutional democracy or deter unconstitutional changes of government in West Africa. In the face of the evidence available to us, are the courts realistically expected to be defenders and protectors or just facilitators of constitutional democracy? If so, how would (or should) courts go about their business of promoting and protecting constitutional democracy and all that comes with it? Do the courts provide deterrence or incentives or both when they act to promote or protect constitutional democracy? Or do the courts empower citizens by court decisions and leave the rest to someone or something else? From a different angle, do courts risk delegitimising themselves when they oppose certain regime changes that ordinarily qualify as unconstitutional changes of government and therefore, are an affront to constitutional democracy? In short, are the courts protectors or just facilitators? Or are the courts even pretenders?

⁶⁴¹'The spirit of liberty', Speech by Judge Learned Hand, 1944, <https://www.thefire.org/research-learn/spirit-liberty-speech-judge-learned-hand-1944> (accessed 6 March, 2023)

⁶⁴²J Widner, 'Courts and democracy in post-conflict transitions: a social scientist's perspective on the African case', (2001) 95 *AJIL*, 64 at 64.

I address these issues in three substantive parts. In the next section, I outline in summary form, the normative expectation that currently exists in the ECOWAS framework for constitutional democracy, the rule of law and human rights. This is followed by a section that briefly examines the nature and causes of the challenge to constitutional democracy in the region. In section 4, I then interrogate the role that courts are expected to play in the preservation of constitutional democracy and examine if, and how such a role has been played. I end with a conclusion in which I summarise and reiterate my main points.

1. The ECOWAS Framework and Expectation for Constitutional Democracy and Respect for Human Rights

Not many would challenge a claim that constitutional democracy is currently a normative expectation for governments in the Member States of ECOWAS. However, the binding character of this expectation has arguably only incrementally solidified and become clearer since it first appeared in the ECOWAS framework. In fact, Franck may once again be correct in his suggestion that a distinction exists between 'the 'democratic entitlement' as a moral prescription in political philosophy', and the entitlement as a binding legal obligation incumbent on States on the basis of some aspect of international law.⁶⁴³ This part of my contribution traces the maturing transformation of the 'democratic entitlement' in the main instruments of the ECOWAS Community relevant for an appreciation of the normative expectation in the region.

Although, bits and pieces of a resolve to migrate ECOWAS from an all-comers affair into an organisation with preference for members with good democratic credentials may be found in earlier legislative and policy documents of the Community, it is in a 1991 Declaration that the organisation arguably first made its boldest shift towards endorsement of constitutional democracy.⁶⁴⁴ In the 1991 ECOWAS Declaration of Political Principles, ECOWAS Heads of State and Government linked 'the objectives of promoting better relations' among themselves to:

⁶⁴³See Franck, (n 6) 47. For him, the legally binding nature of the entitlement is probably based in part on culture and in part on the collective interpretation of treaties.

⁶⁴⁴See Declaration A/DCL.1/7/91 of Political Principles of the Economic Community of West African States

ensuring a stable and secure political environment in which our people can live in freedom under the law and in true and lasting peace, free from any threat to or attempt against their security, in which we can pursue a speedy and effective realisation of the objectives of ECOWAS.⁶⁴⁵

The ECOWAS authorities proceeded further to express a determination to:
concert our efforts to promote democracy in the subregion on the basis of political pluralism and respect for fundamental human rights as embodied in universally recognised international instruments on human rights and in the African Charter on Human and Peoples Rights.⁶⁴⁶

Effectively, the authorities acknowledged the link between political stability and the pursuit of organisational goals, and narrowed political stability down to the enthronelement of democratic regimes operating in an environment where human rights are recognised and protected. Based on these, the authorities declared full adherence to a number of principles that would 'enhance the prospects of advancing our economic cooperation and integration in a political environment of peace, security and stability'.

Significantly, ECOWAS States pledged that they,
will respect human rights and fundamental freedoms in all their plenitude including in particular, freedom of thought, conscience, association, religion or belief for all our peoples without distinction as to race, sex, language or creed.⁶⁴⁷

Then they pledged to:
promote and encourage the full enjoyment by all our peoples of their fundamental human rights, especially their political, economic, social, cultural and other rights inherent in the dignity of the human person and essential to his free and progressive development.⁶⁴⁸

⁶⁴⁵Para 4 of the 1991 ECOWAS Declaration of Political Principles.

⁶⁴⁶Para 5 of the 1991 ECOWAS Declaration of Political Principles

⁶⁴⁷Principle 4 of the 1991 ECOWAS Declaration

⁶⁴⁸Principle 5 of the 1991 ECOWAS Declaration

Having committed to the protection of rights, ECOWAS States then declared their belief 'in the liberty of the individual and in his inalienable right to participate by means of free and democratic processes in the framing of the society in which he lives' and promised to,

strive to encourage and promote in each (of) our countries, political pluralism and those representative institutions and guarantees for personal safety and freedom under the law that are our common heritage.⁶⁴⁵

Notwithstanding the robustness of the commitments made under the 1991 Declaration, it is instructive that it remained a mere Declaration with apparently no intention to bind. Therefore, no real obligation on States nor mechanisms for implementation are detectable. It is also noteworthy that no courts were assigned any roles, especially not the ECOWAS Court which came into being that same year with the adoption of its initial Protocol. Despite these observations, the 1991 Declaration clearly set ECOWAS on the path towards enthronement of constitutional democracy as a preferred Community value for the governance of Member State.

The bindingness of the normative expectation would rise somewhat, with the adoption of the 1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.⁶⁵⁰ In the preamble to that instrument, ECOWAS leaders reaffirmed their understanding of the link between conflict as a threat to peace and security, and the economic integration efforts of the organisation. On the basis of that understanding, they expressed consciousness of the relevance of good governance and the rule of law for peace and conflict prevention.⁶⁵¹ It is then instructive that in their definition of what a Member State in crisis means, the drafters/ECOWAS legislators took the position that 'any Member State affected by the overthrow or attempted overthrow of a democratically elected government' qualified as a State requiring the intervention of the mechanism.⁶⁵² It is upon this foundation that the ECOWAS Member States went on to affirm their commitment to respect for human rights as contained in both the Universal Declaration of Human Rights

⁶⁴⁹Principle 6 of the 1991 ECOWAS Declaration

⁶⁵⁰1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security

⁶⁵¹Paras 7 and 9 of the 1999 ECOWAS Conflict Prevention Mechanism

⁶⁵²See the Definition section in the 1999 Protocol.

(UDHR) and the African Charter on Human and Peoples' Rights (African Charter).⁶⁵³ It would thus be noticed that whereas the expressions of commitment to respect for human rights, the rule of law and good governance were nonchalant and vague under the 1991 Declaration, under the 1999 Protocol, those expressions was beginning to be tied to concrete and binding international human rights instruments. It is then not surprising that ECOWAS led the governments of its Member States to commit to the 'promotion and consolidation of a democratic government as well as democratic institutions in each Member State',⁶⁵⁴ and the 'protection of fundamental human rights and freedoms and the rules of international humanitarian laws'.⁶⁵⁵

While the commitment may have firmed up comparatively, Chapter IV of the 1999 Protocol which deals with the Mechanism's Early Warning System excluded any mention of judicial organs in the list of operating organs so that in effect, a conclusion can be drawn that the ECOWAS Authorities may not have envisaged that either the ECOWAS Court or its national judicial partners would be put to use in the implementation of the 1999 Protocol. Leaving open the question: how did ECOWAS intend to hold its Member States to account to the commitments collectively made to respect human rights, the rule of law and constitutional democracy?

One option out of the quagmire may well be to see the commitments as 'moral prescriptions in political philosophy'⁶⁵⁶ left to the conscience and discretion of the affected States without more. However, it remained significant that in stipulating the conditions that may trigger application of the mechanism, the ECOWAS authorities agreed that 'events of serious and massive violation of human rights and the rule of law',⁶⁵⁷ as well as 'the event of an overthrow or attempted overthrow of a democratically elected government' were clear candidates for action. While the overthrow of an elected government is clear enough not to require judicial pronouncement, the question of 'serious and massive violations of human rights' was not something commonly left to political discretion as it was a matter normally within the ambit of judicial inquiry. Was this then a subtle invitation for the courts to be involved?

⁶⁵³Principle 2 in the 1999 ECOWAS Protocol on the Mechanism for Conflict Prevention

⁶⁵⁴Para (c), Principle 2

⁶⁵⁵Para (d), Principle 2

⁶⁵⁶See Franck, (n 5).

⁶⁵⁷This language here is very similar to article 58 of the African Charter

If any doubts remained about the organisation's preference for liberal regimes with solid constitutional democratic credentials as Members, such doubts were arguably put to rest when the ECOWAS authorities adopted the 2001 Supplementary Protocol of Democracy and Good Governance (Supplementary Protocol on Democracy).⁶⁵⁸ In its preamble, the 2001 Supplementary Protocol on Democracy conceded that to become really effective, the Protocol of 10 December 1999 needed to be complemented through the incorporation of provisions concerning issues such as prevention of internal crises, democracy and good governance, the rule of law and human rights.⁶⁵⁹ The drafters and ECOWAS legislators then went into great lengths to commit Member States to far reaching declarations of adherence to internationally accepted values and principles. Bearing in mind, that the Supplementary Protocol is a binding Treaty which attracts or imposes concrete legal obligations on State Parties, the provisions of the Supplementary Protocol have to be taken quite seriously.

Right from its section on Constitutional Convergence Principles, the 2001 Supplementary Protocol on Democracy is applied to convey very categorical normative demands on ECOWAS Member States. This is even more significant considering that unlike some other international organisations, the ECOWAS does not include such values as preconditions for membership.⁶⁶⁰ The 2001 Supplementary Protocol first announces that 'every accession to power must be through free, fair and transparent elections'.⁶⁶¹ This is followed by expressions of zero tolerance for unconstitutional takeover of power and a statement of preference for popular participation in decision making and strict adherence to democratic principles.⁶⁶² A number of other progressive liberal principles are included in the section,⁶⁶³ setting the right tone for the legal obligations that follow.

⁶⁵⁸Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security

⁶⁵⁹Para 11 of the 2001 Supplementary Protocol on Democracy

⁶⁶⁰See for instance, the East African Community and the European Union.

⁶⁶¹Art I (b) of the 2001 Supplementary Protocol on Democracy

⁶⁶²Art 1 (b)(c) of the 2001 Supplementary Protocol on Democracy.

⁶⁶³e) The armed forces must be apolitical and must be under the command of a legally constituted political authority, no serving member of the armed forces may seek to run for elective political office
g) The State and all its institutions belong to all the citizens; therefore none of their decisions and actions shall involve any form of discrimination ...
h) The rights set out in the African Charter on Human and Peoples' Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights. In the absence of a court of special jurisdiction, the present Supplementary Protocol shall be regarded as giving the necessary powers to common and civil law judicial bodies.

In its substantive articles, the 2001 Supplementary Protocol on Democracy contains state obligations to promote respect for human rights especially rights of a political nature or expressive of political freedom, the rule of law and constitutional democracy. However, nearly all (if not all) obligations are couched as State obligations rather than as rights accruing to individuals and citizens, thereby raising questions of enforcement triggers.⁶⁶⁴

Style of formulation notwithstanding, the 2001 Supplementary Protocol prescribes that Member States must prepare national voters' lists in 'a transparent and reliable manner' that does not exclude political parties.⁶⁶⁵ Relevant for judicial actors, the Supplementary Protocol requires that 'adequate arrangements' be put in place for the hearing and disposal of election related petitions,⁶⁶⁶ while ECOWAS Member States must 'recognise that the rule of law involves not only the promulgation of good laws that are in conformity with the provisions on human rights, but also a good judicial system, a good system of administration and good management of the State apparatus'.⁶⁶⁷ Equally important is the commitment that 'each Member State shall work towards ensuring pluralism of the information sector and the development of the media'.⁶⁶⁸ This bit on the media resonates with obligation in the 1993 revised Treaty regarding the press.⁶⁶⁹

While the provisions outlined above demonstrate the kind of evolution towards a regional commitment that should be sufficient to trigger a legitimate sense of expectation of a democratic entitlement, at least at the ECOWAS level, it is in the enforcement and sanction envisaging provisions that the clearest case of transformation from a normative or moral prescription into the realm of legal obligation can be found. First, both Member States and ECOWAS as a body undertook to 'adopt at national and regional levels, practical modalities for the enforcement of the rule of law, human rights, justice and good governance'.⁶⁷⁰

- j) The freedom of association and the right to meet and organise peaceful demonstrations shall also be guaranteed.
- k) The freedom of the press shall be guaranteed.

⁶⁶⁴If the jurisprudence of the African Court of Human and Peoples Rights is anything to go by, the formulation does not in any way reduce the normative force of the Supplementary Protocol.

⁶⁶⁵Art 5 of the 2001 Supplementary Protocol on Democracy

⁶⁶⁶Art 7 of the 2001 Supplementary Protocol on Democracy.

⁶⁶⁷Art 32 and 33 of the 2001 Supplementary Protocol on Democracy.

⁶⁶⁸Art 37 of the 2001 Supplementary Protocol on Democracy.

⁶⁶⁹See art 66 of the 1993 revised ECOWAS Treaty which inter alia require states to freedom of access for professionals of the communication industry and for information sources

⁶⁷⁰Art 34 of the 2001 Supplementary Protocol on Democracy.

This invites an interpretation that favours the involvement of not just national courts of Member States, but the ECOWAS Court itself. Then came a commitment (notice the use of the word 'shall') to transform the Court – erstwhile a strictly inter-state court – 'so as to give the Court the power to hear, *inter alia*, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed'.⁶⁷¹ Arguably, this stands as one of the strongest indication within the ECOWAS framework that subsequent actions, including the adoption of the 2005 Supplementary Protocol of the ECOWAS Court, that led to the Court's active involvement in the political sphere were premeditated and not accidental. What remained unclear was whether the reference to 'violations of human rights' was to be read robustly to include respect for the rule of law, the pursuit of good governance and the promotion and preservation of constitutional democracy. As I hope to show shortly, the ECCJ's approach to its work (with good reason in my view) has been to read all of these values as a composite, even if only instrumentally for the creation of conducive and politically stable national environments for the realisation of integration. Lastly, in this regard, the ECOWAS authorities resolved and committed themselves to an enforcement regime (at least on paper), stating that:

In the event that democracy is abruptly brought to an end by any means or where there is massive violation of human rights in a Member State, ECOWAS may impose sanctions on the State concerned.⁶⁷²

As demonstrated by the wordings of parts of the ECOWAS Conflict Prevention Framework⁶⁷³ subsequently adopted by the organisation, ECOWAS leaders profess a recognition that the mechanism invites 'tensions between sovereignty and supranationality, and between regime security and human security'. In view of this recognition, ECOWAS leaders went on to express the hope, or perhaps desire, that such tensions 'shall be progressively resolved in favour of supranationality and human security respectively'.⁶⁷⁴

⁶⁷¹ Art 39 of the 2001 Supplementary Protocol on Democracy.

⁶⁷² Art 45 of the 2001 Supplementary Protocol on Democracy.

⁶⁷³ Regulation MSC/REG.1/01/08, ECOWAS Conflict Prevention Framework

⁶⁷⁴ Sec II, Para 4 of the ECOWAS Conflict Prevention Framework.

In other words, sovereignty had to be, and was sacrificed on the alter of the budding ECOWAS supranational regime, just as human security is expected to take precedence over regime security (which was a major operational principle of most African international organisations in the post-independence era). At least, this was in theory, the agreement that Member States reached on the platform of ECOWAS, thereby giving ECOWAS institutions room for action that could ordinarily be perceived as intrusive of state sovereignty.⁶⁷⁵

A lot more of these statements and expressions of commitment to universal values can be found in a number of other instruments available in the ECOWAS framework. However, in my view, those laid out above already paint a picture that a veritable democratic entitlement exists and is a legitimate expectation that citizens and residents of West Africa can hold on to. To a lesser degree, it can also be postulated that Member States envisage some roles for the ECOWAS Court and its national judicial partners in the enforcement of human rights at the very least. If there were any doubts, the 2005 Protocol of the ECCJ together with the very robust case-law of the Court suffice to address such doubts. But does this extend to a role in the promotion and preservation of constitutional democracy? And if so, what exactly would amount to a violation of the entitlement to constitutional democracy or what amounts to an overthrow of the constitutional order?

Some would argue that a thorough examination of the policy and legislative framework of the ECOWAS should throw up what fidelity to constitutional democracy means within the framework. However, the African Union's Charter on Democracy, Elections and Governance (ACDEG)⁶⁷⁶ which is applicable in the stables of ECOWAS provides the most comprehensive definition of constitutional democracy and what amounts to an overthrow of constitutional order.⁶⁷⁷ In its article 23, the ACDEG spells out five 'means of accessing or maintaining power' as constituting unconstitutional change of government: i) any putsch or coup d'état against a democratically elected government; ii) any intervention by mercenaries to replace a democratically elected government; iii) any replacement of a democratically elected government by armed dissidents or rebels; iv) any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or v)

⁶⁷⁵Even a casual examination of the cases before the ECOWAS Court would show that in spite of this position, it is very common for Member States challenged before the Court to invoke sovereignty as a favourite defence in matters involving them.

⁶⁷⁶ACDEG adopted 30 Jan 2007 and entered into force on 15 Feb 2012.

⁶⁷⁷Apart from the fact that ECOWAS Member States are parties to the ACDEG by virtue of their membership of the AU, the ECOWAS Court has often applied the instrument in its case law.

any amendment or revision of the constitution or legal instruments which is an infringement on the principles of democratic change of government.

Together with the expectation that their human rights will be protected by the courts, citizens and residents of West Africa should legitimately expect that any violation of the entitlement to constitutional democracy in any of the five forms above, should be prevented by the courts, or should they? Perhaps, instead of entering into that debate, it might be more useful to point out, as Doorenspleet has noted in a global perspective in relation to other bodies,⁶⁷⁸ that the AU's formulation 'measures democracy in terms of stability and procedure' instead of 'people and participation'.⁶⁷⁹ In other words, just as globally accepted measurements analysed by Doorenspleet focus on how heads of governments are recruited, the state of fidelity to pre-stated constitutional procedures and on the stability of regimes, the AU ACDEG and indeed, the ECOWAS instruments, focus more on the manner of accession to and retention of power, than on how and whether power is applied responsibly for the benefit of citizens of the Member States. Also neglected, or at least, relegated to near insignificance is the quality of participation that states accord to the populace.⁶⁸⁰ Thus, cumulatively, the peoples of West Africa have or should have a right to expect judicial protection of their human rights, but also adherence to respect for the rule of law and constitutional democracy, not just in terms of the manner of accession or retention of power, but also the quality of participation that is accorded.

2. Nature and Causes of Assault to Constitutional Democracy, Human Rights and the Rule of Law

Despite the formidable normative framework that ECOWAS may have built over the past few decades, constitutional democracy has remained vulnerable in West Africa. Hence, for instance, one commentator observed in 2022 that 'West Africa is now the world epicenter of military coups d'état. Over the last seven decades,

⁶⁷⁸R Doorenspleet, 'Where are the people-centered concepts and measurements of democracy?', (2005) 50 *Government and Opposition*, 469 - 494

⁶⁷⁹Doorenspleet, as above, 471.

⁶⁸⁰Also see Doorenspleet, as above, 473.

the region has seen 69 attempted coups'.⁶⁸¹ Another commentator takes the view that 'in the late twentieth century, the region was commonly known as the “coup belt” as multiple countries experienced violent and undemocratic transfer of power'.⁶⁸² Thus, even without mention of the frequent assault on the human rights of peoples, and on the rule of law, West Africa experiences a definite gap between promise and reality. To properly capture the work that is demanded of the courts when they are invited to play a role in the promotion, protection and preservation of these political values, it is necessary to understand the nature and some of the causes of the challenge.

Beginning with human rights violations, broadly, violations can be classified into two main categories. First, there are violations arising from the acts and or omissions of private, non-state actors who have no active or obvious (or even implicit) relationship with the State. It is common knowledge that under international human rights law, it is still the State that bears international responsibility for such violations mainly for failure to protect the victim.⁶⁸³ In this regard, other than the failure of responsibility to protect, the State does not directly cause the violation and may in some cases even be unable to stop the violations.⁶⁸⁴ In other cases, the failure to stop violations is more a failure of governance than a lack of capacity. While the State may pay compensation for violations that may have occurred, there remains the question of future possible violations. In other words, in situations where it is not the State that is directly responsible for the violation found, even where the State complies with a Court's decision to pay compensation, the State may still not be able to prevent further violations from occurring.

The second category of violations includes those directly caused by the acts and or omissions of the State itself through its agents and officials.

⁶⁸¹T Lowe, 'Bracing against the tide: ECOWAS and recent military coups in West Africa'(2022) The Yale Review of International Studies.

⁶⁸²L Mills, 'The effectiveness of ECOWAS in mitigating coups in West Africa', (April 2022) <https://ipisnst.org/wp-content/uploads/2022/04-leonie-mills-effectiveness-of-ECOWAS-in-mitigating-coups-in-west-africa> (accessed 15 March, 2023)

⁶⁸³Generally, see the *African Commission's decision in Social and Economic Rights Action Centre (SERAC) and Anor v Nigeria*, (2001) AHRLR 60 (ACHPR 2001) paras 44 – 48 where the Court explains the nature of the duty to protect.

⁶⁸⁴Violations of environmental rights and similar violations occurring in the oil and other extractive industries such as those in the *SERAC v Nigeria Communication, as above*, before the African Commission on Human and Peoples' Rights is a case in point.

This category may further be divided into those in which no State interest (read as interest of politically exposed persons, up to the head of government) is involved on the one hand, and those involving high political (or State interests). In this latter category would be cases of political repression and restriction of the rights of opposition and civil society figures and institutions. At a very simplistic level, common sense would suggest that corrective measures, including assurances of non-repetition are more likely in cases without high political interest than in the cases with high political interest. My point is to highlight the challenges that confront the courts when harder cases with tons of high political interest are raised. Put starkly, is the political culture in the region robust enough to warrant expectations of compliance with judicial decisions that declare violations in such politically explosive cases? A similar concern probably triggered Widner's observation (in a different context) that 'the capacity of courts to intervene depends on other actors' outside the control of the courts.⁶⁸⁵ It is thus important, that stakeholders bear in mind the contextual limitations of West Africa's courts as far as effectiveness in playing the human rights protecting role is concerned. Compliance, implementation, and enforcement are matters completely outside the control of the courts and may depend on the nature of the political interest involved. While this is not to endorse State actions that limit the effectiveness of the courts, it remains important reminders to avoid placing the courts in positions of extreme 'anxiety of influence'.⁶⁸⁶

In relation to the promotion, protection and preservation of constitutional democracy, it is important to distinguish between violations (or assault to democracy) by persons already in government (retention of power) and those by persons seeking to gain unlawful access to power.⁶⁸⁷ In the second category, the actors not already in government can hardly accept the normative obligation that ECOWAS and other international law instruments impose on their State. This presents what Graber conceptualises as a 'dead hand' problem.⁶⁸⁸ Apparently, a dead hand situation arises when actors are required or expected to be bound by precepts laid in pre-commitments made by other actors rather than the best judgments of current actors.⁶⁸⁹ While international law normally employs the fiction of subsisting State obligation to deal with this challenge by insisting that the

⁶⁸⁵Widner, (n 11) 72

⁶⁸⁶Apologies to Harold Bloom, (1973).

⁶⁸⁷Items iv) and v) in art 23 of ACDEG versus items i) to iii) of the same article 23, ACDEG.

⁶⁸⁸Generally see MA Graber, *A new introduction to American constitutionalism*, (2013) Oxford: Oxford University Press, 42.

⁶⁸⁹As above

pre-commitments legally made by a functional government binds all actors (present and future) in that State, the reality remains that actors seeking to acquire power do not generally consider themselves so bound either by national constitutional provisions prohibiting unconstitutional changes of government, or international obligations prohibiting same. This would mean that expectations of internalisation of normative principles by States,⁶⁹⁰ can apply realistically more to persons currently in government rather than those seeking unlawful accession to power. One way to deal with this reality is to ignore it (as is currently done) and hold on to the legal fiction that the State has violated its obligations under the ECOWAS (and possibly international law) framework. But that leaves the courts with the enormous challenge of what to do. The easier (even if still tough) cases are those involving actors still in government, who may well be held to the obligations on the State voluntarily taken on by themselves or their predecessors in office.

It would then have become obvious by now that assaults on the entitlement to constitutional democracy may well be the result of non-internalisation of norms by the relevant actors within Member States.⁶⁹¹ Disagreements on the legitimacy of elections are another potential or possible cause of violations of the right to constitutional democracy.⁶⁹² A failure of governance within national territories can also be a cause of assault on the right to constitutional democracy. In the same vein, restrictions on political participation or rights relevant to political participation can give rise to violations. As the Venice Commission (in the context of Europe) has stressed,

the holding of democratic elections and hence, the very existence of democracy are impossible without respect for human rights, particularly the freedom of expression and of the press and the freedom of assembly and association for political purposes, including the creation of political parties.⁶⁹³

These and other causes of violations are the matters that the ECOWAS Court and its national judicial partners may be forced to confront if they are to play an effective role in promoting,

⁶⁹⁰See for instance, L Maluleke, 'Coups in West Africa – a critical analysis of African Union and ECOWAS responses', (Mar 2022), available at <https://gga.org/coups-in-west-africa-a-critical-analysis-of-au-and-ecowas-responses/>

⁶⁹¹Maluleke, as above.

⁶⁹²Widner, (n 11) 70.

⁶⁹³Cited in the European Court of Human Rights' Registry Background Paper, (Nov 2022) 'Judges preserving democracy through the protection of human rights', prepared for a 2023 Judicial Seminar.

protecting and preserving the values of interest. In the next section, I briefly try to address what the courts can do and what they have done up till now.

3. The Courts as Guarantors of Constitutional Democracy and Human Rights in West Africa?

(What Can the Courts do? What have the Courts done?)

Possibly based on the formulations in the documents of interest, but also based on practical realities, it is the political and security organs and mechanisms of ECOWAS that have played the most visible roles in terms of reacting to assaults on the right to constitutional democracy through unconstitutional change. Thus, commentators refer to mediation and other diplomatic measures often culminating in sanctions as the spectrum of response that emanates from ECOWAS to such assaults on democracy. In fact, for one commentator, the ECOWAS response has appeared to be 'overtly legalistic'.⁶⁹⁴ In other words, while the ECOWAS Court has been extremely active in the field of human rights protection, the connection to the preservation and or promotion of the right to constitutional democracy remains somewhat underappreciated. So, what can the Court and its national judicial partners do as far as playing a broader role in the preservation and promotion of constitutional democracy is concerned?

The most obvious answer is that courts (as independent institutions) and judges (as individuals) can be 'fundamental guardians of democracy' by progressive and responsible protection of human rights at both the national and regional levels.⁶⁹⁵ In this regard, the courts' attitude to the expansion of access to potential litigants, including alleged victims and others acting in the public interest is crucial. Courts' approach to technicalities both in terms of procedure and substantive framing of rights can also be a fundamental factor in their ability to promote and preserve constitutional democracy through the protection of human rights. Courts could also have a huge role in 'building trust in the national governance processes',⁶⁹⁶ by ensuring that their interpretation of assaults on democracy exceed questions of access and or retention of power, to include the monitoring of the exercise of governmental powers by sitting governments.

⁶⁹⁴U Engel, 'The African Union and mediation in cases of unconstitutional changes of government, 2007 – 2011

⁶⁹⁵Also see the ECHR Background Paper, (n 62).

⁶⁹⁶See also Widner, (n11) 72

The courts must provide the signals that political actors need to keep within acceptable boundaries of action. Further, whether courts adopt restrictive or liberal approaches in the interpretation of constitutional or treaty-based rights would be significant to the level of trust that citizens have in the rule of law and constitutional democracy regimes within ECOWAS Member States. With these (non-exhaustive) roles in mind, what have the courts, particularly the ECOWAS Court done? I outline the role the ECCJ has played through a few cases recently decided by the Court.

In the case of *La Ligue Senegalaise des Droits Humaines & Amnesty International, Senegal v Republic of Senegal*,⁶⁹⁷ the Court was faced with a challenge to Senegal's ban of political demonstrations in parts of the city of Dakar. Rising up to the State's challenge to its jurisdiction based on the capacity of the Applicants to access the Courts, *inter alia*, in *actio popularis*, the Court declared that 'NGOs and public spirited individuals can institute actions on behalf of a group of victims usually from a community or class of people based on common public interest to claim the violation of their human rights'.⁶⁹⁸ Apart from upholding its currently liberal approach to access, the Court also played a constructive role in asserting that:

any law which affects not only the right of the Senegalese people to freedom of expression including the right to demonstrate on political matters, but also on their rights to assemble freely and to free movement is clearly an issue of public interest.⁶⁹⁹

Even more significant was the Court's pronouncement of the crucial link between certain rights and democracy. According to the ECOWAS Court, 'Freedom of expression is a fundamental right that is necessary in a democratic society, crucial to its progress and a key element of the civil society'.⁷⁰⁰ The Court went further to caution that 'reference of threat to national security, simpliciter, is not a magic wand to deflect an allegation of the violation of human rights'.

⁶⁹⁷Unreported, App. No ECW/CCJ/APP/37/20; Judg No: ECW/CCJ/JUD/22/22

⁶⁹⁸Para 59, as above.

⁶⁹⁹Para 66 of the *La Ligue* case.

⁷⁰⁰Para 90 of the *La Ligue* case.

⁷⁰¹Para 101.

Hence, in this one case, the Court both demonstrated a positive approach to access in its procedure, a recognition of the importance of human rights protection to constitutional democracy and a signal to States that rights cannot always be sacrificed on the altar of the concept of national security.

The case of *Chief Ambrose Albert Owuru & Another v The Federal Republic of Nigeria*,⁷⁰² is another case where the ECCJ's credentials as a guarantor of human rights was brought into question. In reaction to an objection to its jurisdiction on that the grounds that the action was 'founded on electoral matters' and the Court was being invited to sit on appeal against a decision of the Supreme Court of Nigeria,⁷⁰³ the ECCJ boldly ruled that it had unfettered jurisdiction to hear even cases that 'strike cords with decisions and judgments rendered by a national court of the Member State involved in the case'.⁷⁰⁴ The signal that the Court sends out in this kind of decision is significant as it removes the veil of protection that States claim when they characterise certain claims as exclusively political or seek to pitch the Court against its national judicial partners.

In *Abdullahi and Others v Federal Republic of Nigeria*,⁷⁰⁵ the Court was confronted with a request to pronounce on a bill pending before the national parliament, which bill sought to criminalise hate speeches. Significantly, the Court reaffirmed its abandonment of a restrictive approach to potential violations. The ECCJ thus asserted that it had,

established an exceptional principle that the application will succeed in cases where the Court is strongly convinced that imminent violations could occur or where there are reasonable and convincing indices for the probability of the realisation of actions that are likely to violate human rights.⁷⁰⁶

Again, the Court positions as a facilitator of democracy by expanding the scope of protection it offers.

⁷⁰²Unreported, App. No: ECW/CCJ/APP/45/19; Judg No: ECW/CCJ/JUD/01/22

⁷⁰³Para 42

⁷⁰⁴Para 45.

⁷⁰⁵Unreported App. No ECW/CCJ.APP/30/19; Judg No. ECW/CCJ/JUD/18/22

⁷⁰⁶Para 46 of the *Abdullahi* case.

4. Conclusion

Courts, such as the ECOWAS Court and its national judicial partners, clearly have a role to play in protecting human rights and by extension preserving constitutional democracy even if this role is not so explicit in the normative framework of ECOWAS. As this contribution has tried to show, playing such a role is no easy task for judicial institutions even as the nature of violations mean that the courts cannot guarantee that their interventions will actually lead to positive results.

Indeed, the caution that too much faith should not be placed in law and the courts, or at least no quick results should be expected, is a valid caution. Yet courts remain veritable guarantors of our right to constitutional democracy and must continue to play highly demanding roles under very unfavourable conditions. Stakeholders must therefore provide support by standing by these courts as a bulwark against political actors, even in the face of apparent non-compliance with the decisions of the courts.

**THE ROLE OF NATIONAL COURTS OF MEMBER STATES AND
THE ECOWAS COURT OF JUSTICE IN UPHOLDING HUMAN
RIGHTS, RULE OF LAW AND CONSTITUTIONAL DEMOCRACY**
BY
RAYMOND A. ATUGUBA

DEAN AND PROFESSOR OF GENERAL JURISPRUDENCE,
UNIVERSITY OF GHANA SCHOOL OF LAW

ROADMAP

☐ **CONTEXT**

- ❖ Democratic reversals and coup d'états; and
- ❖ Impending elections in the sub region, this and next year.

☐ **THE ROLE OF NATIONAL COURTS IN UPHOLDING DEMOCRACY**

☐ **THE ROLE OF THE ECOWAS COURT IN UPHOLDING DEMOCRACY**

☐ **SOME CRITICAL ISSUES WE SHOULD WATCH GOING FORWARD**

☐ **CONCLUSION**

CONTEXT

☐ **THERE ARE DEMOCRATIC REVERSALS GLOBALLY**

❖ **United States:**

- Donald Trump's America
 - ✓ Culminating in the Coup d'état in January 2017
- Congress/Parliament that is unable to address core social issues:
 - ✓ Debt, Gun Control, Social Spending
- A lopsided Supreme Court, giving strange, political judgments.
- Toxic Populism

❖ **Europe:**

- UK's Leadership Crises in 2022, 3 Prime Ministers in a few weeks.
- Russia-Ukraine war.

➤ **Asia:**

- ❖ China's Expansionism; Fair or Foul, flirtations with Russia, Africa, etc.

☐ **IN AFRICA, THERE IS AN OUTRIGHT RESURGENCE OF COUP D'ETATS, INCLUDING IN WEST AFRICA**

- ❖ At the beginning of this Century, 100% of all ECOWAS countries were under democratic constitutional rule.
- ❖ Things have changed; for the worse.
- ❖ The global trend of democratic reversals is affecting us.

- **2010 Attempted Coups**
 1. Niger
 2. Guinea Bissau
 3. Madagascar
- **2011 Attempted Coups**
 1. Congo
 2. Niger
 3. Guinea Bissau
- **2012 Attempted Coups**
 1. Cote d'Ivoire
 2. Malawi
 3. Sudan
- **2012 Successful Coups**
 1. Mali
- **2013 Attempted Coups**
 1. Benin
 2. Eritrea
 3. DR Congo
 4. Comoros
 5. Chad
 6. Libya (2 attempts)
- **2013 Successful Coups**
 1. Egypt
 2. Central African Republic
- **2014 Attempted Coups**
 1. 1 attempt in Lesotho
 2. 1 in the Gambia
 3. 2 in Libya
- **2015 Attempted Coups**
 1. Burundi
 2. Burkina Faso

- **2016 Attempted Coups**
 1. Burkina Faso
 2. Libya
 3. Gambia
- **2017 Attempted Coups**
 1. Equatorial Guinea
- **2017 Successful Coups**
 1. Zimbabwe
- **2019 Attempted Coups**
 1. Gabon
 2. Ethiopia
- **2019 Successful Coups**
 1. Sudan
- **2020 Attempted Coups**
 1. Central African Republic
- **2020 Successful coups**
 1. Mali
- **2021 Attempted Coups**
 1. Niger
- **2021 Successful coups**
 1. Mali
 2. Guinea
 3. Sudan
 4. Tunisia

The self-coup in Tunisia occurred on 25 July 2021, after Tunisian President Kais Saied dismissed Prime Minister Hichem Mechichi, and suspended the activities of the Assembly of the Representatives of the People by invoking emergency powers from Article 80 of the Tunisian Constitution.

- **2022 Attempted Coups**
 1. Attempt in DR Congo
 2. Attempt in Guinea Bissau
- **2022 Successful Coups**
 1. Burkina Faso
- **2023**

❑ **COUPS IN ECOWAS COUNTRIES:**

- ❖ The Majority of all Attempted and Successful Coups d'état in Africa in the last 13 years have been in ECOWAS Countries.
- ❖ The coups in Mali, Guinea and Burkina Faso have been very disturbing.
- ❖ The attempted coups in Niger and Guinea Bissau have also been disturbing.

❑ **ELECTIONS AND IMPENDING ELECTIONS IN THE SUB REGION, THIS AND NEXT YEAR**

- ❖ The last Contextual issue I would like to address are the elections in ECOWAS countries, this and next year.
- ❖ Almost all the ECOWAS heavyweights have elections this year and next year.
 - Nigeria, February 2023
 - Sierra Leone, June 2023
 - Senegal, February 2024
 - Ghana, December 2024.
- ❖ If these countries, together with Ivory Coast are unstable, ECOWAS is gone.
- ❖ And these elections would determine the level of stability of ECOWAS countries.

THE ROLE OF NATIONAL COURTS IN UPHOLDING DEMOCRACY

- ❑ The Legal Infrastructure (laws, institutions, personnel, etc) in West Africa for the resolution of electoral disputes are among the best in the world.
- ❑ **In West Africa, we have at a TECHNICAL LEVEL, very COMPETENT ELECTION:**
 - ❖ Laws,
 - ❖ Judges,
 - ❖ Courts,
 - ❖ Lawyers, for the resolution of election disputes.

- ☐ **This has happened successfully in all Anglophone West African countries in the last 13 years, with quite excellent results.**
- **GAMBIA**
- **2021 ELECTION PETITION**
- **GHANA**
- **2012 ELECTION PETITION CASE**
- **GHANA**
- **2020 ELECTION PETITION CASE**

Other Election Disputes

- **LIBERIA**
- **2017 ELECTION PETITION**
- **NIGERIA**
- **2019 ELECTION PETITION CASE**
- **SIERRA LEONE**
- **2018 ELECTION PETITION CASE**

NIGERIAN ELECTORAL DISPUTES, 2023

- ☐ High turnout and generally peaceful voting.
- ☐ Reports of vote buying, voter intimidation, attacks on polling units in certain areas, and unpunctual electoral officials.
- ☐ Some Reports of outright fraud.
- ☐ Independent National Electoral Commission officials failed to upload polling unit results to the INEC result viewing portal as previously assured.
- ☐ As State results started to be announced on 26th February at the national collation centre in Abuja, opposition emerged as results data had still not been fully uploaded prior to their announcement in accordance with the law.
- ☐ These circumstances along with statements critical of INEC from observers and civil society groups led the Abubakar, Obi, and Kwankwaso campaigns to question and then officially reject the announced election results by 28th February.
- ☐ All three main opposition campaigns, in addition to some civil society groups and former President Olusegun Obasanjo, called on the commission to rerun the election due to fraud and violence.

ABUJA, March 8 (Reuters) - A Nigerian judge on Wednesday refused a request by one opposition candidate who lost last month's presidential election to stop the electoral body from reconfiguring a voting system for state elections on Saturday.

Opposition challenger Peter Obi of the Labour Party said a reconfiguration will destroy the evidence for his case after he lost the presidential election to the candidate of the ruling All Progressives Congress (APC) party, Bola Tinubu.

The Independent National Electoral Commission (INEC) asked the court for an order to reconfigure its Bimodal Voter Accreditation System (BVAS) that uses fingerprints and facial recognition which was previously used for the presidential vote for governorship election on March 11.

Obi and Atiku Abubakar of the People's Democratic Party have said the result of the presidential election was fraudulent and vowed to challenge it in court.”

<https://www.reuters.com/world/africa/nigerian-court-rejects-bid-stop-reconfiguration-voting-system-governorship-polls-2023-03-08/>

THE 2020 TOGOLESE ELECTION

- ❑ The Presidential Election was held on 22nd February 2020, with seven candidates slated to run.
- ❑ Gnassingbé Eyadema was again standing for the Union for the Republic (UNIR), the ruling political party in Togo.
- ❑ Among his strongest challengers were Jean-Pierre Fabre, again representing the L'Alliance Nationale pour le Changement (ANC), a social democratic party in Togo, and Agbeyome Kodjo, a former prime minister who had the backing of a new coalition of opposition parties.
- ❑ Gnassingbé was declared the winner with more than 70 percent of the vote; he was followed by Kodjo, who won about 19 percent.
- ❑ Citing allegations of electoral fraud, Kodjo contested the results with the Constitutional Court, but the court upheld Gnassingbé's victory.
- ❑ <https://www.britannica.com/place/Togo/Early-years-and-coups>

THE ROLE OF THE ECOWAS COURT IN UPHOLDING DEMOCRACY

- ❑ The ECOWAS Court has heard many cases involving elections and democratic transitions.
- ❑ The Court has handled these cases admirably well.

WADE V REPUBLIC OF SENEGAL (2013) CCJELR 231

- ❑ Karim Meissa Wade, a Senegalese national, brought an action before the ECOWAS court for an order compelling the Republic of Senegal to place his name on the electoral roll to be able to contest for presidency as is his right by law.

- ❑ After a consideration of the facts and weighing it with the applicable law, the court in Abuja, Nigeria, held that it had jurisdiction to hear the matter but the application was ill founded, hence it was dismissed.
 - ❑ The court reasoned that Karim Meissa Wade had once been sentenced to a custodial prison term of six (6) months for illicit wealth and to a fine.
 - ❑ Per the Electoral laws of Senegal, *persons sentenced to non-custodial prison terms or to custodial prison terms exceeding one (1) month, with the option of a fine, for any of the following offences – theft, fraud, abuse of trust, drug trafficking, embezzlement and corruption in public office, bribery, undue influence peddling, counterfeiting, and in general terms, any offence liable to imprisonment for a term not less than five (5) years shall not be registered on the electoral roll.*
 - ❑ The case was accordingly dismissed.
 - ❑ The ECOWAS Court of Justice had already held in its judgment of 13 July 2015 on *CDP v. Burkina Faso*, that a state may impose restrictions on access to suffrage.
- <https://ihrda.uwazi.io/api/files/152473261811>

OBINNA UMEH & 6 ORS V FEDERAL REPUBLIC OF NIGERIA ECW/CCJ/APP/48/18

- ❑ The plaintiffs brought an action against the Defendants on the restriction of the right of a citizen to take part in a government of his country, by imposition of political parties as the only platform for aspiration to elective offices, and the total ban of independent candidacy.
- ❑ The plaintiffs sought the court to compel Defendant to bring its municipal laws, including its Constitution, in conformity with the rights enshrined under Article 13 of the African Charter on Human and Peoples' Rights, Article 21 of the Universal Declaration on Human Rights, and Article 25 of the Covenant on Civil and Political Rights, as to allow independent candidature for all its elective positions.
- ❑ The court reasoned that the defendant's electoral legal regime does not stifle or restrict the right of the Plaintiffs to participate directly or indirectly in the elections of the country.

- ❑ The drawback clause in Article 13 of the African Charter amply puts the national authorities in the best position to enact local laws in accordance with the Charter to address peculiar circumstances.
- ❑ The proper exercise of that mandate does not amount to violation of their obligations as signatories to the African Charter.
- ❑ The Court therefore held that the Defendant is not in breach of its community obligations as enshrined in the African Charter.
- ❑ The plaintiffs' claim was entirely dismissed.
- ❑ <https://africanlii.org/ecowas/judgment/ecowas-community-court-justice/2020/10>

UGOKWE V. NIGERIA/ECW/CCJ/JUD/03/05

- ❑ Jerry Ugokwe had been declared the winner of the election as a Member the House of Representatives of Idemili North, South Federal Constituency of Nigeria by the Independent National Electoral Commission.
- ❑ A Nigerian Elections Tribunal reversed the commission, finding that Ugokwe was ineligible to run for the seat.
- ❑ The Nigerian Federal Appeals Court—the final court of review for all election disputes in Nigeria—upheld Ugokwe's disqualification.
- ❑ Dissatisfied with this outcome, Ugokwe filed a complaint with the ECOWAS Court alleging a violation of his right to a fair hearing.
- ❑ Ugokwe asked the Court to issue a special interim order to prevent the Nigerian government from invalidating his election victory or from seating his opponent.
- ❑ President Donli issued the interim order barring the legislature from swearing in Okeke while Ugokwe's complaint was pending.
- ❑ Nigeria promptly sought to dismiss the suit for lack of jurisdiction, accusing Ugokwe of “forum shopping with courts.”
- ❑ President Donli responded by renewing the interim order prior to leaving for a recess.
- ❑ These were audacious acts, but Donli publicly defended them as necessary, temporary measures to preserve the existence of a justiciable controversy until the judges could review Ugokwe's allegations.
- ❑ Notwithstanding concerns over the orders' validity, Nigerian officials complied with the Court's interim directive.
- ❑ The Attorney General and Minister of Justice issued a request to the Speaker

of the House of Representatives “not to swear [Okeke] in until the case is fully settled by the [ECOWAS Court].”

- ❑ The request created a political uproar that spilled onto the front pages of the country's newspapers.
 - ❑ Politicians, judges, and lawyers focused on a provision of the Nigerian Constitution that designates election disputes as exclusively domestic matters.
 - ❑ They argued that this clause deprived the ECOWAS Court of jurisdiction to hear the election disputes.
 - ❑ After returning from a month-long recess, the judges dramatically reversed course and dismissed the suit.
 - ❑ They reasoned that “no provision of any international agreement, whether general or specific, gives the Court powers to adjudicate on electoral issues or matters arising thereof.”
- They also asserted that the ECOWAS Court “is not a Court of Appeal or a Court of cassation” over domestic courts.
- ❑ The judges thus declared themselves without authority to intervene “against the execution of the Judgment already made by the Federal Appeal Court of the Member State of Nigeria.”
 - ❑ The judges did not explain the about-face from the preliminary order, but the categorical nature of the decision suggests that they wanted to send a clear message that they would not intervene in future election disputes.
 - ❑ <https://ihrda.uwazi.io/ar/entity/cvcro182pf4zqv6587z4mwjyvi?page=2&raw=true>

KHALIFA ABABACAR SALL & 6 ORS V. SENEGAL ECW/CCJ/APP/01/18

- ❑ On 3rd January 2019, ECOWAS court dismissed the case brought to them by a former mayor of Dakar and then presidential aspirant, Khalifa Ababacar Sall, against Senegal over the alleged violation of his human rights.
- ❑ This was due to his disqualification from participating in the elections held on 24th February 2019.
- ❑ His counsel alleged that the amended Electoral Law deprived him of his right to vote, which resulted in his inability to run for public office.
- ❑ Counsel for the defendant argued that the plaintiff did not meet the criteria for qualification as a voter which meant he was not a qualified voter and in effect could not run for public office.
- ❑ His disqualification had nothing to do with the newly amended laws.

- ❑ The presiding judge, Honourable Justice Dupe Atoki, agreed that the newly amended laws had no part to play in the plaintiff's disqualification and as such he could not blame the country for it.

THE CASE OF THE 259 GUINEANS VERSUS THE REPUBLIC OF GUINEA

- ❑ 259 Guineans, who are residents in Senegal, brought a case against the Republic of Guinea for allegedly excluding them from the country's last election held on 18th October 2020.
- ❑ The group is demanding the country pay each of them 5,000,000 CFA francs as compensation for the harm the exclusion has caused them.
- ❑ The exclusion to them was not only an obstruction of their right to have a say in which political direction their country took...
- ❑ But also made them victims of discrimination as Guineans in other countries were allowed to register.
- ❑ The first hearing was on 13th February 2023 and Justice Edward Amoako Asante the presiding judge over the case scheduled the judgement for 17th May 2023.
- ❑ <http://www.courtecowas.org/2023/02/14/judgment-fixed-for-may-17-in-case-brought-by-some-guineans-over-their-exclusion-from-participation-in-the-countrys-elections/>
- ❑ [SUMMARY OF JUDGMENT TO BE ADDED WHEN DELIVERED]

CONGRÈS POUR LA DÉMOCRATIE ET LE PROGRÈS (CDP) V. BURKINA FASO ECW/CCJ/APP/19/15

- ❑ On 21st May 2015, a group of political parties and Burkina Be citizens lodged an application for an expedited procedure in the case of the newly adopted law by the Burkina Faso Council of Transition.
- ❑ Their complaint was that the law violated their rights to freely participate in elections.
- ❑ Violent demonstrations took place on the 30th and 31st of October 2014, resulting in deaths and the destruction of public and private property, leading to the President of Burkina Faso stepping down, which then threw the country into a state of civil unrest.
- ❑ The Council of Transition was then set up to bring back a sense of stability and order.
- ❑ The amended laws the Council brought into force had a provision in one of

the articles which stated that all persons who had supported anti-constitutional change, which eventually led to the uprising, were ineligible, meaning they could not vote or be voted for as they could not run for elections.

- ❑ The ECOWAS Court ordered Burkina Faso to remove that provision and all hindrances to free participation in elections.
- ❑ <https://ihrda.uwazi.io/api/files/1581002862302lqs9p1tk2s.pdf>

RADDHO V. REPUBLIC OF SENEGAL ECW/CCJ/APP/03/12

- ❑ RADDHO, a non-governmental organization based in Dakar Senegal lodged a complaint against the Republic of Senegal to the ECOWAS Community Court of Justice on 17th February 2012.
- ❑ In their suit, they urged the court to suspend the upcoming election, investigate the officers who used live ammunitions and abuse tactics against protestors and condemn the use of violence against journalists by ordering the Senegalese government to look into it.
- ❑ Unfortunately, RADDHO could not appear before the court to present its case due to financial constraints and other underlying factors. The case had to be adjourned to a later date. During this period, the said election which was the crux of this case took place. The main question before the court was to determine if the case is now moot.
- ❑ The ECOWAS Court ruled that there was no need to give a ruling
- ❑ The reason for the ruling was that the application had now become devoid of purpose.
- ❑ <https://ihrda.uwazi.io/en/entity/9quncahui0e?page=10>

AFRICAN COURT OF HUMAN AND PEOPLES RIGHT

ACTIONS POUR LA PROTECTION DES DROITS DE L'HOMME V

COTE D'IVOIRE (001/ 2014) [2016] AFCHPR 29; (18 NOVEMBER 2016)

- ❑ The Applicant brought an action before the African court, praying the court to rule that the Law No. 2014-335 of 18 June 2014 on the Independent Electoral Commission of the Respondent state is not in conformity with the African Charter on Democracy.
- ❑ Applicant also sought an Order directed at the Republic of Cote D'Ivoire to review the said law in light of its international commitments.
- ❑ The said law was said to limit the impartiality and independence of the electoral body of the Respondent State.

- ❑ The court on a majority of nine votes for and one against, held that the Respondent State has violated its obligation to protect the right to equal protection of the law guaranteed by Article 10(3) of the African Charter on Democracy, Article 3 (2) of the African Charter on Human and Peoples' Rights and Article 26 of the International Covenant on Civil and Political Rights.
- ❑ The court made further orders for the Respondent state to amend the said law to make it compliant to the international instruments to which it is a party.
- ❑ <https://africanlii.org/afu/judgment/african-court/2016/29>

CRITICAL ISSUES GOING FORWARD

- ❑ **THE 2001 ECOWAS PROTOCOL ON DEMOCRACY AND GOOD GOVERNANCE:**
 - ❖ Article 1, every accession to power must be made through FREE, FAIR AND TRANSPARENT elections.
 - ❖ Does this mean that if the elections are not free, fair and transparent the government may be toppled by a coup d'état?
 - ❖ Who determines whether an election is free, fair and transparent?
- ❑ **OVER JUDICIALISATION OF ELECTION DISPUTES:**
 - ❖ It is good to have removed, impartial, judges to decide election disputes.
 - ❖ Theoretically insulated from the influence of politicians and bent on upholding the rule of law to the highest standards and in the interest of democracy, the judiciary could be the last hope for the integrity of electoral democracy.
 - ❖ However, it has implications for our democracy, as unelected and “unaccountable” judges determine the elections, who rules the country and, therefore, the destinies of our Nations.
 - ❖ Again, there are desperate politicians seeking to exploit litigation processes to clinch electoral victories.
 - ❖ There is also incentive now for politicians to desperately invest in judiciaries with a view to Election Day.
 - ❖ Also, advancing electoral justice and political legitimacy now depends on upright, incorruptible, and brave judges, who are hard to find

❑ **LIMITED FULL DOMESTICATION OF ECOWAS LAWS ON DEMOCRACY, RULE OF LAW AND ELECTIONS IN MEMBER STATES:**

- ❖ If the fine ECOWAS laws on the above were fully domesticated in Member States, life will be easier for all of us.
- ❖ And our democracies will flourish.
- ❖ But this is not the case.

❑ **LIMITED ENFORCEMENT OF DECISIONS OF THE ECOWAS COURT:**

- ❖ A firmer mandate is needed for the court to declare unconstitutional and undemocratic changes of government as void and of no effect.
- ❖ We also need a clear system of enforcement of all judgments of the ECOWAS Court.
- ❖ This is essential for maintaining the dignity of the ECOWAS Court.
- ❖ Sadly, the ECOWAS Court currently operates, in large measure, as a toothless bulldogs.
- ❖ Although they have judicial powers, the absence of clear enforcement powers renders them *brutum fulmen*.
- ❖ See the case of **HIS EXCELLENCY VICE PRESIDENT ALHAJI SAM SUMANA V. REPUBLIC OF SIERRA LEONE**
ECW/CCJ/APP/38/16/ENF.
 - ❖ The applicant sought, but failed to secure sanctions against Sierra Leone in this case.
 - ❖ Sam Sumana took the Government of Sierra Leone to court for “enforcement” of a judgment he obtained against the Government of Sierra Leone...
 - ❖ And also sought for an imposition of sanctions against the government.
 - ❖ The ECOWAS Court rejected his application.
 - ❖ When I argued this case in the ECOWAS Court, I knew we will lose...
 - ❖ But I still did, in the hope that I will prick the conscience of current or future judges.

❑ **DETERMINING ELECTORAL DISPUTES, IS NOT THE SAME AS RESOLVING THEM:**

- ❖ **Productive Management of Electoral Disputes, yes.**
- ❖ **Resolving Electoral Disputes, No.**

☐ **UNDERLYING FACTORS:**

- ❖ It is all well and good to meet and talk about election disputes...
- ❖ But will we get there?
- ❖ There are some matters that may not allow us to even get to elections and their aftermath, not to mention election disputes.
- ❖ There must be
 - Political stability
 - Constitutional democratic order
 - Free, fair and transparent elections
 - Laws and Mechanisms for Independent adjudication of electoral disputes before we can talk about resolution of electoral disputes.
- ❖ What are these matters?

8 factors are in play here:

1. Coups d'état

- ☐ Over 200 coups and attempted coups in Africa since 1960.
- ☐ Close to half of all Coups d'état occurred in the West African Sub Region.
- ☐ The very recent spate of coups are also preponderantly in West Africa.
- ☐ Unless these coups end, we cannot talk about election disputes.

2. Violent Extremism and Terrorism

- ☐ Nigeria
- ☐ Burkina Faso
- ☐ Togo
- ☐ Benin
- ☐ Ghana

3. Underlying issues that create violent extremism

1. Injustice
2. Marginalization
3. Poverty
4. Limited constitutionalism
5. Poor Governance

4. Interests

- ☐ US and EU and AU and ECOWAS (and surrogates) interests determining governmental transitions.

5. The Vote and The Election

- ☐ Flowing from above, the increasing gulf, schism, between the Vote and the Election:
 - ❖ Planting Yam, harvesting Cassava
 - ❖ US Election 2000
 - ❖ US Election 2016
 - ❖ Several African Countries
- ☐ When the 2 are discordant, you can DECIDE election disputes, but you cannot RESOLVE them.

6. New ICTs/New Media

- ☐ New ICTs/New Media and the Transparency and Accountability they implicate, making it more difficult to conceal the Vote.
- ☐ This makes the difference between the Vote and the Election more palpable, and populations more restless.

7. The absence of credible democracies & precedents to learn from:

a. US and UK.

- ☐ US Elections 2000, 2016 and 2020.
- ☐ The Trump Factor
- ☐ UK Leadership Crises
- ☐ **The Boris Johnson Factor**

b. The Russia-Ukraine-EU-US war.

- ☐ The message that peaceful resolution of disputes is no longer cool.
- ☐ Western advocacy of democracy and the international Rule of Law has been heavily discredited.
- ☐ We are on our own.
- ☐ We are now our own standard.
- ☐ So, meetings like this, to set standards, become more necessary.

8. Absence of Trustworthy Institutions

- ☐ Absence of trustworthy institutions, in
 - ❖ **Deed, and in**

❖ **Outlook.**

to ensure proper resolution of electoral disputes, that West Africans **ACCEPT**, even if they **DISAGREE**.

- ❑ We need to work to improve the legal infrastructure, institutions and the personnel for the resolution of electoral disputes.
- ❑ We need to Ensure trustworthy institutions/courts, in
 - **Deed**, and in
 - **Outlook**, to ensure proper resolution of electoral disputes.
- ❑ This is Because the Legitimacy of the Courts and their decisions relate directly to the **READINESS** and **WILLINGNESS**, of people to accept their decisions²

CONCLUSION

- ❑ The Legal and Institutional structures and infrastructure and the personnel in West Africa for the resolution of electoral disputes are among the best in the world.
- ❑ However, there are some critical matters to watch...
- ❑ And some pre-requisites to work at...
- ❑ To assure the sustenance of stable and prosperous Nation States in West Africa.

SUB-THEME 6

THE ENABLING LEGAL ENVIRONMENT FOR ECOWAS: ECOWAS COMMUNITY LAW IN PERSPECTIVE

**THE ENABLING LEGAL ENVIRONMENT FOR ECOWAS:
ECOWAS COMMUNITY LAW IN PERSPECTIVE**

BY

F.C. NWOKE

PROFESSOR OF INTERNATIONAL AND JURISPRUDENCE,
FACULTY OF LAW, UNIVERSITY OF JOS

Introduction

Law is a central instrument in economic or in regional integration. Usually, regional integration treaties lay the foundations of the community. Thus, a treaty is synonymous with the constitution of the community which sets up the organs of the community. Thus, the constitutive treaty and other laws emanating from it constitute the legal order of the community. A legal order has been defined as an aggregate of the plurality of general and individual norms that govern human behavior, that prescribe in other words, how one ought to behave, that behavior is prescribed in a norm or, what amounts to the same thing in the content of a norm or, what amount to the same thing, is the content of a norm and the concept of the “ought” coincide.⁷⁰⁷

States have long been engaged in the trade of goods, services, and capital. Various reasons can be put forward for interstate trade such as the benefits gained from access to materials and services of other states, increased investment opportunities, creation of job opportunities and increased product variety and competition. Interstate trade must be regulated, and this can be done through either the multilateral trading system or through regional integration initiatives.

From the inception, one of the constitutional challenges of regional integration is how to manage the limitation of national judicial sovereignty of Member States to ensure that community law is recognized as superior to national law and is accordingly applied and interpreted by national courts at the instance of community citizens. This challenge arises from the national ordering of legal systems and the fact that states are the primary parties to agreements in which they limit their sovereignty in favour of the success of the Community.

Integration enables regions to focus on issues that are not only relevant to their stage of development but also encourage trade and other economic activities between neighbours. Basically, there four main types of regional economic integrations. They are:

- (i) Free Trade Area: apparently the most basic form of economic cooperation. It encapsulates the removal of all barriers to trade between Member States. It also enables to independently determine their trade policies and practices with non-member states.

⁷⁰⁷Hans Keben, The Concept of Legal Order 9Translated by Stanley L.

- (i) Custom Union: this is an economic arrangement which provides for economic cooperation envisaged in a Free Trade Zone. However, the difference here is that members agree to treat trade with other member countries in a similar manner.
- (ii) Common Market: this type of arrangement for the creation of an economically integrated market among Member States. Accordingly, this is achieved through the removal of trade barriers; restrict labour and capital between member states of the arrangement. It also envisages the adoption of a non-member States as is obtainable in a Custom Union. The major advantage of this type of union is that it benefits workers of Member States because they no longer require Visas or work permit to work in any Member State of the Common Market. A typical example is the Common Market for Eastern and Southern Africa (COMESA).

1. The Concept of Legal Order

In analysing the functioning of Regional Economic Communities (RECs), it is important to understand that since RECs have law-making and enforcement powers, they constitute legal systems. At the same time, the states that become members of RECs also have legal systems of their own and develop laws that are applicable within their jurisdictions. As a result, there are two of legal systems, namely the community legal system and the national legal systems of Member States, existing concurrently in a Community.

A legal order is an aggregate or a plurality of general and individual norms that govern human behavior, that prescribe, in other words, how one ought to behave. That behavior is prescribed in a norm or, what amounts to the same thing, is the content of a norm means that one ought to behave in a certain way. The concept of the norm and the concept of the "ought" coincide. To prescribe in a norm how one ought to behave is understood here not only as a command but also as a positive permission or an authorisation. If the law is positive law, the norms of a legal order⁷⁰⁸ are "posited" or "created" through human acts.

⁷⁰⁸The means whereby legal norms are distinguished from other norms remains an open question here.

To say that a norm prescribing how one ought to behave is "posited" or "created" through an act is a metaphorical way of saying that the norm is the subjective meaning of the act. Acts through which the norms of a legal order are posited or created comprise legislative acts, acts constituting legally binding custom, judicial acts, administrative acts, and private law transactions, in particular contracts. These acts are characterised here as legal acts, and the individuals authorised by the legal order to perform such acts are characterised as legal officials.

The lack of attention to the role of law in integration process has resulted in a disjunction between community legal systems and the national legal systems of Member States.⁷⁰⁹ The main issue that arises is the status of community law at the national level. RECs develop what is referred to as 'community law'. Community law can be defined as the binding legal instruments of a Regional Economic Community and it is binding on the Member States of that Community. Community law may take the form of treaties, protocols, regulations, decisions, principles, objectives and general undertakings.⁷¹¹ However, due to the disjunction, questions such as "is community law supreme?" and "can individuals rely on community laws at national level?", arise.

2. Sources of ECOWAS Legal Order

2.1 The ECOWAS Treaty

A treaty is an agreement under international law entered into by actors in international law, namely sovereign States, and international organisations. A treaty may also be known as an (international) agreement, protocol, covenant pact, or exchange of letters, among other terms. Indeed, the ECOWAS Treaty has created rights and obligations for the Member States of ECOWAS on the one hand and ECOWAS citizens on the other. For instance, the ECOWAS Protocol relating to the free movement of people and right of residence and establishment creates responsibilities for every Member State and rights for every ECOWAS citizen.

⁷⁰⁹Richard Frimpong Oppong 'Making Regional Economic Community Laws Enforceable in National Legal Systems – Constitutional and Judicial Challenges' (2008) 8 *Monitoring Regional Integration in Southern Africa*.

⁷¹⁰Gerhard Erasmus 'The domestic status of international agreements: has the South African Constitutional Court chartered a new approach and could regional integration benefit?' (2012) 12 *Monitoring Regional Integration in Southern Africa*.

⁷¹¹As above.

Moreover, the "Decisions" of the Authority of ECOWAS and of the "Regulations" of the ECOWAS Council of Ministers have binding force "on the Member States and organisations of the community". These are contained in articles 9(4) and 12(3) of the Revised ECOWAS Treaty (1993).

As regards ECOWAS, two treaties are relevant: the original Treaty signed in Lagos in 1975, and the revised version signed in Cotonou in 1993. Since the Member States of ECOWAS are international legal persons with full power of independent action manifested in their joint enterprise to create a common subject matter of international laws in ECOWAS, it is to be presumed that their activities are intended to be guided by international law. A conclusive proof for that presumption is usually to be found in article 65 of the 1975 ECOWAS Treaty and article 93 of the Revised Treaty, which stipulates that the Treaty should be registered with the UN. This conforms with the provisions of article 102 of the UN Charter which oblige all Member States of the UN to register every treaty and every international agreement entered by them with the UN Secretariat.

2.2 The Protocols

According to O'Connell, a protocol is a supplementary instrument to a treaty or an instrument extending its scope and interpretation.⁷¹² This is truly so with regard to the Protocols annexed to the ECOWAS Treaty. Generally, the Protocols complement the provisions of the Treaty. Examples are the Protocol on the Community Court of Justice¹³¹ and the Protocol on the implementation of the Right of Residence and Establishment.

Amendments to the ECOWAS Treaty are effected by means of protocols, for example, those amending article 4 of the 1975 Treaty, relating to the institution of the community,⁷¹³ and article 53 of the Treaty relating to the budget of the Community.⁷¹⁴ Each Protocol contains a provision stipulating that it forms an integral part of the ECOWAS Treaty. Moreover, each Protocol is expected to be deposited with the Depository Federal government of the Treaty and registered with the OAU and UN in the same manner as the initial Treaty.

⁷¹²O'Connell

⁷¹³Official Journal of ECOWAS, Vol. 19, 1991, 4-11.

⁷¹⁴As above.

2.3 Conventions

Articles 38 of the Statute of the International Court of Justice (applicable to the ECOWAS Court) provides that the Court shall apply “international conventions, whether general or particular, establishing rules expressly acknowledged by the contesting state.” The term 'conventions' is utilised here ... in a general and inclusive sense. It would seem to apply to any treaty, convention, protocol, or agreement, irrespective of its title or form. A convention may be general either because of the character of its material; it may be particular because of the limited character of its subject - matter. A special agreement (compromise) or a stipulation between contesting parties may be in this sense called convection.

2.4 ECOWAS Parliament

Parliamentary supremacy, wherever it exists, normally recognises the legislative organ as the principal source of law. That is the constitutional convention, not only in the Anglo-American common law countries, but also in the civil law countries in Africa. It can be presumed, *prima facie*, that the ECOWAS Parliament, when operational, would constitute a primary source to obtain ECOWAS laws. On 6 August, 1994, the Protocol relating to the community Parliament⁷¹⁵ was initialed in Abuja. Article 6(1) of the Protocol spells out the competence of the Parliament which "may consider any matter concerning the Community, in particular issues associated with Human Rights and Fundamental Freedoms and make recommendations to the institutions and Organs of the Community".

2.5 Subordinate Legislation of the Community Organs

Article 4 of the 1975 Treaty, as amended by a Protocol established the following institutions for the Community: the Authority of the Heads of State and Government; the Council of Ministers; the Defence Council; the Executive Secretariat; the Tribunal of the community; Technical and Specialized Commission: Trade, Customs, Immigration, Money and Payment; Industry, Agriculture and Natural Resources; Transport; Telecommunications and Energy; Social and Cultural Affairs. The list has been improved by article 6 of the revised Treaty of 1993. It now includes the Community Parliament, the Economic and Sociable Council, the Community Court of Justice, and the Finance for Assistance, Compensation and Development.

⁷¹⁵Official Journal of ECOWAS, Vol. 27, July/August, 1994, 4-10.

In 1996, the Western African Monetary Agency (WAMA) was added. The constitutive instrument of ECOWAS is a law-making treaty. By virtue of articles 5(3) and 6(3) of the 1975 Treaty, its law-making capacity is delegated to, and exercised, by the Authority and the Council respectively.

2.6 International custom

The dynamic nature of the contemporary international community has brought about a pooling of the customary laws which have evolved to become the common customary law of mankind.⁷¹⁶

2.7 General Principles of Law

Schwarzenberger observes that the "European Public law" consisting of the Anglo-American and the Romano-Germanic legal systems inspired the overall principles of law enunciated in article 38(1)(c) of the Statute of ICJ.⁷¹⁷ The two legal systems now dominate the modern world which includes Africa. Some jurists respect the two systems as a 'family of Western law'⁷¹⁸ in contrast to the category of Eastern bloc rules under the hegemony of the defunct Soviet Union. For the reasons already discussed above, governments of ECOWAS Member States have been generally affected by the 'family of European laws'.

2.8 Judicial Decisions

Article 38(1)(d) of the Statute of ICJ regards judicial decisions as subsidiary means for the determination of rules of law, subject to the provisions of article 59 of the same Statute which states that the decisions of the Court have no binding force, except between the parties and in respect of this particular case.

2.9 ECOWAS Internal Laws

Seyerstedt affirmed that, usually, the relationship between an inter-governmental organization (IGO) and its own officials, who in their own right, are international civil servants, is not governed by the municipal law of the host state, nor by international law; rather it is governed by the internal law of the organisation.⁷¹⁹

⁷¹⁶CW Jenks, *The Common Law of Mankind*, (1958).

⁷¹⁷G Schwarzenberger & A Manualo, *International Law*, (1976) Oxford: Oxford University Press, 6.

⁷¹⁸As above.

⁷¹⁹F Seyerstedt, (1967) 3 *Recueil des Cours*, 33-443.

2.10 Revised Treaty of 1993

The ECOWAS Revised Treaty, it is interesting to, is not automatically directly applicable in Member States, but depends on its applicability on the manner in which it is incorporated into national legislation of States. In this regard Article 5(2) of the Revised Treaty provides that:

Each Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty.⁷²⁰

This provision deserves further evaluation. Noteworthy is that the English-speaking Member States of ECOWAS such as Nigeria,⁷²¹ Ghana,⁷²² Sierra Leone,⁷²³ Gambia⁷²⁴ and Liberia⁷²⁵ are generally regarded as 'dualist'. International law does not have force of law within the territories of these countries unless it has been promulgated as a national legislation (ratification and or domestication process). What it further connotes is that without such national legislation, the ECOWAS Treaty will not have the force of law in the country. Sadly, from all indications, it appears that these countries are not taking any tangible measures towards the enactment of such legislations at their national levels; therefore making the journey to full enforcement of ECOWAS laws still very far.

However, for the French speaking West African countries. there is a difference in the manner in which international law is received because they are 'monist' in orientation. As soon as international law is made it becomes part of the national laws of the given State, subject to the reciprocal enforcement of international law by other States. Article 147 of the Constitution of the Republic of Benin (1990) for instance, provides that Treaties or Agreements lawfully ratified shall have, upon their publication, an authority superior to that of laws, without prejudice for each agreement or treaty in its application by the other party. Thus, subject to the requirement of reciprocal application, the ECOWAS Revised Treaty is directly applicable in Benin Republic.

⁷²⁰Revised ECOWAS Treaty

⁷²¹See section 12 of the 1999 Constitution (as amended) of the Federal Republic of Nigeria

⁷²²Section 75 (1) of the 1992 Ghana Constitution provides that the President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana. (2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by- (a) Act of Parliament; or (b) a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament. See EO Dankwa 'Implementation of international human rights: Ghana as an Illustration' (1991) 3 ASICL Proc. 57.

⁷²³See Article 40 (4) ii of the 1991 Sierra Leone Constitution.

⁷²⁴Section 79(1)c of the 1997 Gambia Constitution.

⁷²⁵Section 57 of the Liberian Constitution

2.11 Supplementary Protocol

The Authority of Heads of States and Governments which is the supreme institution of ECOWAS was established by Article 7 of the Treaty and enabled by Article 9(1) to act, *inter alia*, by Decisions. Decisions of the Authority can be reached as a Protocol which has the same force as a Treaty.⁷²⁶ Article 9(4) of the Revised Treaty provides that 'Decisions of the Authority shall be binding on Member States and Institutions of the Community'. The combined provisions of Article 9(4) of the Revised Treaty and the analysis above on the manner of incorporation of Treatise (since the Protocols are equivalents of Treaties) can be read to the effect that the Protocols are directly applicable in Member States.

Article 10 of the Revised Treaty establishes the Council of Ministers and Article 12 provides that the Council of Ministers shall act, *inter alia*, by regulations. Regulations of the Council shall be binding on the institutions under its authority which will include staff of the ECOWAS Commission and some specialised organs. What this means is that if the regulations made by the Council of Ministers are approved by the authority, they automatically become binding on Member States. However, a literal reading of the provisions of Article 12 of the Revised Treaty indicates that regulations are not directly applicable or have direct effect until that have become Decisions of the Authority.

3. Legal Integration as a Means of Regional Economic Integration

3.1 Regional Integration (REI) in International Law

Regional Economic Integration can best be defined as an agreement between groups of States in a geographic region, to reduce and ultimately remove tariff and non-tariff barriers to the free flow of goods, services, and factors of production between each other.⁷²⁷ The level of integration could come in the following patterns from the least to most integrated: *Free Trade, Customs Union, Common Market, Economic Union, and Political Union*. With free trade, all the barriers to the trade of goods and services among Member States are removed. However, each State can determine its own trade policies with regard to nonmembers. Members are free to determine the level of protection applied to goods coming from the outside. Customs Union is one step closer to political and economic integration.

⁷²⁶See Article 1 of the Revised Treaty.

⁷²⁷C Kati, L Russell and C Deborah, 'Regional Economic Integration', *The Review: A Journal of Undergraduate Student Research* 2 (1999): 70-76. Available at <https://fisherpub.sjf.edu/ur/vol2/iss1/14> (last accessed 17 April 2023).

This union also eliminates trade barriers between member countries and adopts a common external trade policy. In a Common Market, labour and capital are free to move and there are no restrictions on emigration, immigration and cross-border flows of capital between member-countries. This can best be carried out under treaty agreement among Member States who are parties to the new arrangements. International law plays prominent roles in the affairs of such arrangement because it cuts across states coming together.

All West African States,⁷²⁸ except Liberia, experienced colonisation, which saw the introduction of present-day political institutions. While it is true that before the advent of colonialism, these 'new' States and their sub-state components possessed socio-political and cultural structures that provided the relevant governance mechanisms, the contemporary institutions in these States are based on structures and institutions introduced by colonial powers.

West African States have worked to address their institutional deficits and promote economic growth and development. One of the ways they have done this is through regional integration.

Although concrete discussions about regional integration in Africa began at the start of the 20th century, the real returns were not realised until about half a century later.⁷²⁹ The next half-century saw a proliferation of regional and sub-regional institutions on the continent, and today, there are more regional institutions in Africa than any other region in the world. The continent is a 'spaghetti bowl' of regional organisations, many of which have overlapping membership and obligations.⁷³⁰

In this regard, West Africa is a microcosm of the African condition, with several intergovernmental organisations in a region with fewer than twenty countries.⁷³¹

⁷²⁸West African integration in the light of the ECOWAS experience, references to West Africa will necessarily mean ECOWAS Member States, viz: the Republic of Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

⁷²⁹See A Ajala, 'Background to the Establishment, Nature and Structure of the Organisation of African Unity', (1988)14 *Nigerian Journal of International Affairs*, 35–63; JC Senghor *et al*, 'Going Public: How Africa's Integration can work for the Poor' (2009) London: African Research Institute, 22.

⁷³⁰Senghor *et al*, as above.

⁷³¹For instance, there are three main regional organisations in West Africa, viz, ECOWAS; the Mano River Union (MRU) (with Guinea, Liberia, Sierra Leone and Ivory Coast as members); and the Union Economique et Monetaire Ouest Africaine (UEMOA) (with Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Republic of Benin, Senegal, Togo as members). The Community of Sahel-Saharan States (CENSAD) also has a membership that spans West Africa, Central Africa, East Africa and North Africa. ECOWAS as a purely West African 15-State strong membership constitutes the exclusively West African institution with the widest coverage.

Historically, the foremost intergovernmental organisation in West Africa is the ECOWAS, which was established in 1975 with the adoption of the Lagos Treaty by the leaders of fifteen West African States.⁷³² Under the 1975 Treaty, integration was expected 'to promote cooperation in all fields of economic activity . . . for the purpose of raising the standard of living of . . . people, of increasing and maintaining economic stability, of fostering closer relations among . . . members and of contributing to the progress and development of the African continent'.⁷³³ In furtherance of this broad development objective, Article 2(2) of the 1975 Treaty set out [mainly economic] principles geared towards achieving the goals of integration.⁷³⁴ Interestingly, some of the Community's objectives and functions were targeted at 'citizens' of the Community, revealing a focus on peoples or individuals. For instance, the Lagos Treaty makes reference to the Community Citizen,⁷³⁵ as does the 1979 Protocol Relating to Free Movement of Persons, Residence and Establishment.⁷³⁶ In 1982, a Protocol was adopted, which defined the term "Community Citizen".

That Protocol provides a detailed overview of who constitutes a Community Citizen, and how citizenship is acquired and lost. Despite these provisions, however, the position of the individual in the integration process has remained weak.⁷³⁷ However, as will be shown below, there have been efforts to ensure that the benefits of integration accrue to Community citizens.

By the 1990s, the face of integration in West Africa had changed considerably, as socio-political, and economic challenges led to instability in Member States.⁷³⁸ In 1993, the Lagos Treaty was revised and the scope of the objectives, principles and institutions of the Community was expanded to address social and political concerns, in addition to the economic concerns of the 1970s. Since then, regional integration in West Africa has progressively addressed broad development and institution-building goals, particularly through the establishment of institutions for the regulation of integration and promotion of development in the Community.

⁷³²The original members of the Community were the Republic of Benin, Burkina Faso, Cote d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. Cape Verde was admitted in 1978, bringing the membership to 16, however, Mauritania withdrew its membership in 2000, bringing the membership back to 15.

⁷³⁴There were 10 paragraphs in this subsection, nine of which covered specific economic and trade goals and policies necessary for economic advancement, and the tenth was an omnibus clause that empowered the Community to undertake "such other activities calculated to further the aims of the Community as the Member States may from time to time undertake."

⁷³⁵Article 27 provides that "Citizens of Member States shall be regarded as Community Citizens . . ."

⁷³⁶Protocol A/P 1/5/79

⁷³⁷Senghor, n 24 above.

⁷³⁸Civil wars broke out in Liberia and Sierra Leone and there were successful military coups in almost every other country in the sub-region. For details of the region's security challenges and their historical origins and implications, see generally S Ellis, *The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension of an African Civil War*, (2007) London: Hurst & Co; A Bryden, B N'Diaye and F Olonisakin (Eds), *Challenges of Security Sector Governance in West Africa* (2008).

Furthermore, in 2006, the administration of the Community was transformed to 'endow the Community with greater supranational powers'.⁷³⁹ The idea was to facilitate a transition from 'an ECOWAS of states to an ECOWAS of people', in an effort to achieve real institutional effectiveness and achieve the goals of integration.⁷⁴⁰ These changes in the regional integration goals and practices of ECOWAS also touched on the 'judicial system' of the Community, as a Community Court was established, which came into operation in 2002. Its role was amended in 2005 to, *inter alia*, directly address the needs of Community citizens as will be further shown below.

Judicial institutions as a core component of the political system cannot be overemphasised, and their proper functioning contributes significantly to state effectiveness. Article 1(c) of the 2001 ECOWAS Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security lists independence of the judiciary as one of the constitutional principles shared by ECOWAS Member States, noting that 'judges shall be independent in the discharge of their duties'. This link between the independence of the judiciary and good governance has become a recurring theme in development discourse. Posner and Yoo note, for instance, that:

Domestic courts are, in a word, independent, and that independence helps distinguish successful market-based liberal democracies from authoritarian regimes and failed democracies in which corruption is the norm and markets are weak.⁷⁴¹

Therefore, democracy and good governance demand a properly functioning judicial system that meets the demands of citizens. In West Africa, one of the ways in which the challenges of access to justice and judicial institutions were addressed was through regional integration and the introduction of regional judicial institutions.

⁷³⁹ECOWAS Annual Report, 2006, 11. One significant change was that the Executive Secretariat became a Commission with a President and several Commissioners, signifying supra-national governance institution, similar to the European Union.

⁷⁴⁰As above.

⁷⁴¹EA Posner, and JC Yoo, 'Judicial Independence in International Tribunals', (2005) 93 *California Law Review*, 1–75, at p. 12.

3.2 International Law and Regional Integration

For several years, there has been a movement towards regional economic integration throughout the world. A regional integration arrangement can be regarded as preferential (usually reciprocal) agreement among countries that reduces barriers to economic and non-economic transactions. It is the unification of different economies of states in order to promote and facilitate the free movement of goods and services within themselves. All regional integration agreements have the objective of reducing or eliminating barriers between their members. However, they also exhibit a wide range of variation. In terms of depth, their variation depends on the level of integration undertaken by member countries.

In doing this, states are at liberty to join their economies for various reasons, some of which include attraction of foreign investment, enhancing cooperation, fostering security and generally attaining economic development. With these aims in mind, governments sign and become members of multiple regional integration schemes.

However, some of these integration schemes simply reflect the desire but not always the political will to capture the economic gains and international negotiating strength that regionalisation can bring.⁷⁴²

In terms of integration, Africa is not peculiar in this respect. A number of initiatives have been launched in the continent to bring economic and political integration. These integration efforts have been undertaken concurrently at continental and regional levels. On the continental level, the effort of integration started with the adoption of the OAU Charter in ¹⁹⁶³ which envisions initiatives to integrate the Africa region for the promotion of economic and social development. The integration effort in Africa was taken a step further, at least on paper, through the adoption of the Lagos Plan of Action (LPA) in ¹⁹⁸⁰. The failure of African countries to implement the LPA did not stop the governments from wishing to have a continent wide economic and political integration.

⁷⁴²RH Folsom, MG Wallace, and JA Spanogle, (2000) *International Trade and Investment in a Nutshell*, (2nd ed.), St Paul Minn, West Group, 393.

That is why, in 1991, the Heads of States decided to give another try for the talk of integration and revived the 1980 LPA through the adoption of the Treaty Establishing the African Economic Community (Abuja Treaty). The Abuja treaty, which entered into force in 1994, aims at forming an African Economic Community composed of all African states over a period of 34 years and using six stages of integration. The preexisting RECs are to be used as a building block for the establishment of the AEC and several efforts at arriving at integration process within the region. Despite all these efforts at integration, the continent still remains fragmented as a market, and its aspirations toward political unity is far from being real.

3.3 International Law versus Community Law

The term 'community law' has not been explicitly defined as yet, however, various attempts have been made at defining it. Erasmus defines community law as the binding legal instruments of specific RECs.⁷⁴³ He advances that community law is a form of international law but it is viewed as a *sui generis* legal regime.⁷⁴⁴

This is because ordinarily, states are the parties to international agreements and as such only states have rights and can litigate in terms of these agreements.⁷⁴⁵ However, regional economic community agreements have the ability to confer rights not only on states but also on individuals within Member States and these rights can be enforced either at the national level or regional level.⁷⁴⁶

Within the European Union, community law is given both narrow and broad definitions. Narrowly, community law is said to consist of the founding treaties and the provisions of the instruments enacted by the community institutions.⁷⁴⁷ In a broader sense, community law is said to include all the rules of the community legal order, that is, general principles of law, case law and supplementary law contained in conventions and agreements concluded between Member States in order to give effect to treaty provisions.⁷⁴⁸

⁷⁴³Erasmus (n 5) above.

⁷⁴⁴Erasmus 'The COMESA Court of Justice: Regional agreements do protect private parties' available at <http://www.tralac.org/files/2013/10/S13TB092013-Erasmus-COMESA-Court-of-Justice-Legal-agreements-protect-private-parties-20131015-fin.pdf>, (last accessed on 29 April 2023).

⁷⁴⁵AfDB, OECD and UNDP. ⁷⁹

⁷⁴⁶As above.

⁷⁴⁷W Mwanza 'Polytol Paints v Mauritius: Evidence of the existence and direct effect of community law in COMESA?' available at <http://paulroos.co.za/wpcontent/> (last accessed 29 April 2023) blogs.dir/12/files/2014/01/S14TB012014-Mwanza-Polytol-Paints-v-Mauritius-community-law-in-COMESA-20140124-fin.pdf, (last accessed on 29 April 2023).

⁷⁴⁸Available at http://dictionary.babylon-software.com/community_law/, (last accessed on 29 April 2023).

From these definitions it can be deduced that community law is a form of international law that creates rights and obligations within the community that are applicable to both Member States and individuals. Community law can have various sources. The primary source is the founding treaty/treaties of the community. Whilst secondary sources include the laws made by the community institutions through the powers that have been conferred on them. As Oppong advances, community laws can also take the form of regulations, decisions, principles, objectives and general undertakings.⁷⁴⁹

3.4 The Concept of Supremacy of Community Law

The supremacy of community law is a key aspect of the vertical relationship that exists between the Community legal system and legal systems of Member States. This is because supremacy to a large extent affects the reception and enforcement of community law in Member States.

The supremacy of community law is based on the premise that a Community is an independent entity that has its own legal system and its own legal sources. By becoming members of a Community, States bind themselves to observe the rights and obligations created by the Community, and this has the effect of limiting national sovereignty.⁷⁵⁰ It follows that in order for community law to be effective, a rule developed by the community legal system must not be capable of being overruled by a rule of national law.⁷⁵¹ Should this be the case, the attainment of the objectives set out in the community treaty would be at risk.⁷⁵² Thus, the supremacy of community law ensures community law will be the applicable law in instances of conflict with national laws. In addition, supremacy ensures the uniform application of community law in Member States.⁷⁵³

⁷⁴⁹Oppong (n 4 above).

⁷⁵⁰C Koch 'The Doctrine of Supremacy of European Community Law as A Condition Precedent For The Doctrine of Direct Effect' (2005) 9 *International Trade & Business Law Review* 201 at 209.

⁷⁵¹As above.

⁷⁵²As above.

⁷⁵³MR Phooko *The SADC Tribunal: Its Jurisdiction, Enforcement of Its Judgments and the Sovereignty of Its Member States* (unpublished LLM thesis, University of South Africa, 2016) 128.

A notable aspect of supremacy of community law is that the community legal system becomes an integral part of the legal system of Member States and national courts are under an obligation to apply it.⁷⁵⁴ The concept of supremacy therefore has the effect of community law being treated differently to other forms of international law. If supremacy is provided for, the mechanisms of reception of international law that have been developed become unnecessary. Ideally, provision for the supremacy of community law should be made in the founding treaties but it can also be made by other means. An example of this being the development of the doctrine of supremacy of community law by the European Court of Justice,⁷⁵⁵ whilst the European Union treaties are silent on the matter. As it stands, neither the SADC nor the COMESA communities contain provisions regarding the supremacy of community law.

However, although ECOWAS as an intergovernmental regional organisation following the Revised Treaty of 1993, there appears to be no community of the European Model, this is because these laws have no direct application in Member States, nor does it create right and benefits for citizens of the community except in human rights cases. The constraint regard is reinforced by the fact that the Community Court of Justice is an inter-states Court with regard to the interpretation and application of the laws of the community.

A Community citizen who has suffered from the non-implementation of these laws have no access to the Court to enforce a right until this window of opportunity is open and law applies directly and enforceable in courts of Member States, the concept of ECOWAS Community law will continue to be a mirage.

3.5 Redefining the relationship between ECOWAS law and national law- The supremacy of community law

The ECOWAS Court as the judicial organ of the Community has a significant part in the enforcement of ECOWAS law in national courts through the enforcement of its judgments in those courts. In particular, Article 15(4) states that the judgments of the Court shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies. 'Member States' could be read to include the courts in these States.

⁷⁵⁴As above.

⁷⁵⁵The European Court of Justice dealt with the question of the supremacy of community law in the case of *Costa v ENEL* Case 6/64 [1964] ECR.

What this provision consequently raises is the question of hierarchical relationship between the ECOWAS Court and national courts. It is submitted that where the Revised Treaty is directly applicable in a State as in the French speaking countries, the judgment of the ECOWAS Court is superior to and binding on the national courts. In English speaking countries like Nigeria where the Revised Treaty is not directly applicable, the national courts are not bound by the decisions of the ECOWAS Court. In this scenario therefore, it is difficult to assume that the ECOWAS Court can be useful or instrumental to the integration process of the region. It is yet to be seen what the role of the Attorney General of Member States in pushing for adherence to ECOWAS Court is regarding regional matters.

3.6 Granting individual access to the ECOWAS Court against States in violation of community obligations

It is interesting to recall that the ECOWAS Court of Justice received its first case in 2004, many years after its establishment in 1995. Trade and economic operators may also wish to note that this landmark first case (*Olajide Afolabi v. Federal Republic of Nigeria*) was filed by an individual businessman against the government of Nigeria for a violation of community law in the closing of the border with Benin.⁷⁵⁶ The Court ruled that under the Protocol only Member States could institute cases.

The Court's ruling triggered the process of dialogue headed by the Judges themselves, over the need to amend the Protocol to allow for legal and natural persons to have standing before the Court, especially based on the fact that the Applicant is a Nigerian national and it was a legal impossibility for Nigeria to have sued itself on behalf of the citizen.

In January 2005, the Community adopted the Additional Protocol to permit persons to bring suits against Member States. Beyond this monumental change, the Council took the opportunity to revise the jurisdiction of the Court to include review of violations of human rights in all Member States. This language made clear that the sources of law to be applied by the Court under its original Protocol would include not only general principles of international law, but also those in relation to human rights. Additional Protocol A/SP.1/01/05 also adds jurisdiction over any disputes arising under agreements, other than the Treaty, between Member States that so provide.

⁷⁵⁶This case was however a strictly from a human right perspective and not a commercial dispute.

The Additional Protocol also gave national courts of Member States the right to seize the ECOWAS Court for a ruling on the interpretation of community law. Previously, the language in the Protocol was unclear as to whether a Member State court could only seize the Community Court of a matter through the auspices of the national government. Therefore, contrary to the insinuations that access to the ECOWAS Court is limited to Member States, corporations and individuals can today submit complaints alleging human rights violations by the Community or Member State actors. These complaints are however strictly limited to human rights issues. There is no domestic exhaustion of remedies requirement limiting the Court's jurisdiction, meaning individuals do not need to pursue national judicial remedies before bringing a claim to the ECOWAS Court of Justice. Rather, the principal requirements are that the application must not be anonymous and that the matter is not pending before another international court. See *Hadijatou Mani Koraou v. Niger*.⁷⁵⁷

For the sake of emphasis, the ECOWAS Court has heard cases involving: education brought before it by corporate bodies,⁷⁵⁸ freedom of movement,⁷⁵⁹ due process,⁷⁶⁰ the rights of women and children⁷⁶¹ and slavery.⁷⁶²

The Court gained 'jurisdiction to determine case[s] of violation[s] of human rights that occur in any Member State' in 2005 with the implementation of Supplementary Protocol A/SP.1/01/5, which followed the adoption of Protocol A/SP1/12/01 on Democracy and Good Governance, requiring that the Court be given 'the power to hear, inter alia, cases relating to violations of human rights...'. The Court's decisions on human rights matters interpret the African Charter on Human and Peoples' Rights, considered by Article 1(h) of Protocol A/SP1/12/01 to contain "constitutional principles shared by all Member States" as legally binding on ECOWAS Member States.

⁷⁵⁷Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008.

⁷⁵⁸See *SERAP v. Nigeria*, Judgment, ECW/CCJ/APP/0808, Oct. 27, 2009, finding that education is a legal and human right).

⁷⁵⁹Femi Falana & Anor v Republic of Benin & 2 Ors

⁷⁶⁰See *Manneh v. Gambia*, Judgment No. ECW/CCJ/JUD/03/08, 5 June 2008)

⁷⁶¹See *Amouzou Henry v. Cote D'Ivoire*, Judgment No. ECW/CCJ/JUG/04/09, 17 December 2009);

⁷⁶²See *Hadijatou Mani Koraou v. Niger*, Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008).

See also *Habre v. Senegal*, Judgment No. ECW/CCJ/JUD/06/10, 18 November 2010, which concluded that the former President of Chad could not be tried by a Senegalese court for international crimes committed in Chad because it would violate the prohibition of non-retroactive penal law.

Another cursory examination of all the cases cited shows that none is directly related to trade and economic integration agenda of the ECOWAS region which was the primary objective behind the formation of ECOWAS in the first place, and for which many Protocols were signed and many policies currently being harmonised by Member States. Sadly, these are the same Protocols which the Court was *ab-initio* also established to interpret. Following this track of logic, it can be concluded that the Member States did not desire the Court to be an engine for realising the economic integration objective. In this way also, the private sector has been denied the pro-activeness of taking advantage of community laws and the Community Court to address integration issues and promote trade among Member States. Little wonder despite the fact that the Revised Treaty entered into force in 1995, the judges of the ECOWAS Court of Justice were not appointed until January 30, 2001. Yet, the Court was deliberately limited to a very narrow field of access-namely: that only the Authority of Heads of State and Government (the executive of the Community comprised of all the Member States) and the Member States acting individually were permitted to initiate a contentious case in the Court.

The power to request advisory opinions on the Treaty was until the adoption of Additional Protocol A/SP.1/01/05, limited to the Authority, the Council of Ministers, Member States, the Executive Secretary and other institutions of the Community. The effect of this limited standing in the Court was that until 2003, the Court was inoperative.

3.7 Improved means of enforcement of ECOWAS decision in National Laws

Application and enforcement in national courts refers to the ability of a citizen of an ECOWAS state to invoke ECOWAS law in a matter before that court and for that court to be bound to follow that law. This is the so called 'direct effect' of community law. The principle emerged from the case of *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) where the European Court of Justice (ECJ) established an important principle that provisions of the Treaty Establishing the European Economic Community were capable of creating legal rights which could be enforced by both natural and legal persons before the Courts of the Community's Member States.

In that case the ECJ adopted the criteria for establishing direct effect of the Treaty. The provision must be sufficiently clear and precisely stated; it must be unconditional or non-dependent; and it must confer a specific right for the citizen to base his or her claim on. The concept of direct effect has been extended to legislation adopted pursuant to the Treaty in the form of directives and regulations from the European Commission. Thus, in the *Commission v. France* (1997), the ECJ ruled that Member States have to instruct their national Police Forces to enforce EU law. For instance, In the French case, this meant using the Police to ensure the free movement of goods. Applying the principle of direct effect in the ECOWAS legal system would mean that provisions of the ECOWAS Treaty, Protocols, Decisions and Regulations there-under would have direct effect in ECOWAS national courts, whether this is the case is a matter entirely determined by the legal system of each Member State. Direct effect is to be differentiated from direct applicability by which a country determines how its Treaties become part of the national legal system and therefore binding on the national courts. When a treaty is directly applicable it is enforced as a national law.

3.8 The role of National Law in integration process in ECOWAS community

National courts play an essential role in the effectiveness of regional integration. It is through the courts that community law can be given effect without having to be incorporated through legislation. The courts act as guardians of economic integration and enforcers of the benefits that economic integration brings to individuals.⁷⁶³ One way national courts may enforce community law is by making use of the preliminary reference procedure. The preliminary reference procedure enables national courts to refer to regional courts for interpretive guidance. Through this procedure, a national court which has to decide a case involving the interpretation of a treaty provision may seek guidance from the relevant regional court before it makes its final decision. This procedure bridges the gap between community and national legal systems and avoids instances of national courts giving treaty provisions their own interpretations.

In addition, it is a mechanism through which regional courts can give their opinion on the application of community law and the status of community law within the legal systems of Member States.⁷⁶⁴

⁷⁶³RF Oppong, 'Integration through the law: an examination of the jurisprudence of regional economic integration judicial bodies in Africa' (2007) 7 *Monitoring Regional Integration in Southern Africa* 203 at 204.

⁷⁶⁴JB Rudahindwa 'The Role of integration through law in African FTAs', available at <http://giftaproject.org/wp-content/uploads/2015/07/Rudahindwa-2015-paper.pdf>, (last accessed 2 May 2023).

There are a number of Community treaties that make provision for the preliminary reference procedure such as the Treaty on the Functioning of the European Union⁷⁶⁵ and East African Community Treaty.⁷⁶⁶ With respect to SADC and COMESA, it is only the COMESA Treaty that makes provision for this procedure. Article 30 of the COMESA Treaty stipulates that where a question is raised before a court of a Member State concerning the application or interpretation of the COMESA Treaty, such a court may, if it considers that a ruling on the question is necessary to enable it to give judgment, request the COMESA Court to give a preliminary ruling on the matter.⁷⁶⁷ Thus, referring to the COMESA Court is at the discretion of the court. However, referring a question to the COMESA Court is compulsory if the court is one against whose judgment there is no judicial remedy under the national law of the Member State.⁷⁶⁸ Unfortunately, the SADC Treaty does not contain a similar provision.

4. Regional Legal Order and Maintenance of Regional Peace and Security

4.1 The relationship between regional integration and maintenance of peace and security

Regional integration (RI) is also seen as a means of achieving peace and security among the member countries. RI is not all about the dismantling of tariff and non-tariff barriers among the members. Rather, more positive action will be required from the member countries as deeper integration will require 'policy harmonization which entails replacement of national policies with common policy and coordination of national policies'.⁷⁶⁹ Policy harmonisation requires the attainment of common understanding on very essential economic points through discussion, which is possible when there is a smooth relationship between the member countries. There is considerable direct and indirect evidence which indicates that regional integration arrangements can promote regional peace and ultimately lead to political union.⁷⁷⁰

⁷⁶⁵Article 267 of the TFEU.

⁷⁶⁶Article 34 of the Treaty for the Establishment of the East African Community.

⁷⁶⁷Article 30(1) of the COMESA Treaty.

⁷⁶⁸Article 30(2) of the COMESA Treaty.

⁷⁶⁹NJ Udombana (2002), A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development, 13 *Ind. Int'l & Comp. L. Rev.*, 187.

⁷⁷⁰UNECA n 1, 15. However, there are also evidences showing that regional integration could lead to tension between countries and ultimately to conflict. The tensions in the East African Community-and ultimately conflict between Tanzania and Uganda-all involved bitterness about large income transfers and growing divergence in incomes from common external tariffs. Ibid

Regional integration will further increase bargaining power in multilateral negotiations. For some countries, regionalism relates to collective action in the course of addressing problems with regard to economic development or security. For these countries, building a collective bargaining capacity to negotiate effectively on multilateral trade negotiation fora is an important consideration for participating in regional integration mechanisms.⁷⁷¹ Integration will help the member countries to enhance their bargaining power and achieve more favourable trade terms during trade negotiations.

4.2 The ECOWAS model challenges and the way forward

Regional integration helps to pull resources together and facilitate investment by providing a wider and larger market. The availability of a wider market through integration of small fragmented markets is a requisite for the success of the integration.

It follows that wider markets created by integration enhance the premium to be reaped and lower per unit cost of production.⁷⁷² Although African countries have followed the footsteps of other continents, particularly the EU in pursuit of these benefits, it seems that the success achieved in other parts of the world on regional integration has eluded Africa. ECOWAS has introduced a common passport, though travel across the region remains challenging.⁷⁷³ It has also established national committees to address non-tariff barriers and started 'complaint desks' at borders.⁷⁷⁴ The establishment of the COMESA Competition Commission is another achievement in integration observed in the eastern part of the continent.

5. Conclusion

In order for a community to achieve its objectives, Member States must comply with the rules developed by the community that is community law. However, the leaders of Member States must be willing to comply with these laws and surrender their sovereignty to a certain degree. This, unfortunately, is not always the case. As such, strong mechanisms for the enforcement of community law are important for effective integration.

⁷⁷¹P Draper and M Qobo (2009), *Multilateralizing Regionalism: Case Study of African Regionalism*, in Baldwin and Lows (eds.), *Multilateralizing Regionalism: Challenges for the Global Trading System*, Cambridge: Cambridge University Press, 405

⁷⁷²Kiplagat, (2013)

⁷⁷³AfDB, OECD and UNDP (2014), *African Economic Outlook 2014: Global Value Chains and Africa's Industrialization*, p. 75

⁷⁷⁴As above.

However, a common challenge encountered by both of these communities, and many others, is the implementation of community objectives within Member States. More specifically, these communities face challenges in enforcing community law within Member States. Community law consists of the rules that are developed by the community and are applicable to community members. Community law serves the purpose of providing Member States with a set of rules to abide by so as to further the achievement of community objectives. The challenge faced in enforcement of this form of international law relates to the fact that Member States are independent, sovereign states with their own legal systems. Member States are as such reluctant to apply community law within their borders as they view this to be a violation of their sovereignty. This results in Member States choosing to apply national law over community law.

**THE ENABLING LEGAL ENVIRONMENT FOR
ECOWAS: ECOWAS COMMUNITY LAW
BY
PROF. KOFI ABOTSI**

Abstract

Regional integration projects are fundamentally legal initiatives often anchored on a compendium of rules, regulations and constitutive charters. Yet, the character, dynamics and evolution of that process is largely mired in complexity if not altogether contested, and this appears pronounced in the case of the West African experience. Few however can rationally doubt the relevance of ECOWAS' mutation towards a concentrated legal-based order in which the rule of law is not only mainstreamed but prioritized. This paper examines the 'constitutionalization' of ECOWAS through norm explication designed to create an effective community legal order. Consequently, the evolution of the regional body from an intergovernmental arrangement towards a supranational entity, it is argued, should be premised on a subj-regional version of the rule of law taking into account the peculiarities of state dynamics within ECOWAS and adjustment difficulties in the integration process.

Introduction

The evolution of ECOWAS towards a more concentrated regional integration model has been the defining feature of the sub-regional community grouping within the last thirty years. Designed to advance an effective implementation of the commitments and expectations of Member States, the rule of law approach has come to dominate the reform of ECOWAS in the direction of a sub-regional supranational entity. Thus, from the establishment of a Community Court of Justice to a collegial Parliament with quasi or subsidiary authority, the institutional architecture of ECOWAS has increasingly become reflective of a regime morphing into a more robust system of rules and correlative incentives. Yet the attainment of the overall goals of ECOWAS as a treaty-based regime depends on the prevalence of the appropriate legal enablers such as the requisite jurisdictional competence of the ECOWAS Community Court of Justice (ECCJ) as well as necessary facilitative structures that ensures the effective competences of Community structures within the municipal realm.

Thus, while the overall design of ECOWAS mirroring ideal types of integration institutions should *prima facie* be suggestive of an effective regime and the evolving legal order of the Community, the need for a more intentional nurturing of the variables and legal enablers cannot be overemphasised if the body is to crystallise as a viable legal order. As will be repeatedly argued in this piece however, the puzzling persistence of benign sovereignty assertions and a failure on the part of ECOWAS itself to goad the process into fruition through *inter alia* the empowerment of the ECCJ has ensured regime suboptimality. Yet, the development of a legal order within ECOWAS remains a necessary aspect of its efforts at attaining supranational status and enhance its capacity to deliver on the mandate of its establishment. Even so, the rule of law model while experimented elsewhere to a significant degree remains largely untested as a constituent agent of supranationalism and accordingly presents different sets of challenges for a nascent project like ECOWAS. This paper accordingly proposes a structured approach in which the development of the legal order in ECOWAS should be led by the ECCJ whose interpretive mandate can be leveraged on to articulate the substantive norms and principles of the new legal order.

1. ECOWAS Community Law as a Mechanism of Integration

The use of law as a mechanism of integration has become a rather accepted model of building supranational blocs within the last three decades. While various regions have experimented with this approach to different degrees of success, law,

and in this case, norms with direct effects within the realms of Member States have enjoyed a significant attraction and is reflected in the architectures of virtually every major regional integration initiative around the world. But is law an important variable in the building blocks of the integration model adopted under ECOWAS? And if so, what is the character and exact role of law in this process of constructing a community of states bound by common goals and aspirations-at least from the standpoint of the broad aims and goals of the regional grouping?

It is important to state from the outset that the appeal of the rule of law may seem to have been predicated on the assumption that law provides a predictable set of rules and values around which to organise the integration effort. By cementing its objects in enforceable propositions, law is able to better exact accountability and commitment from the sovereign entities whose complicated domestic pressures otherwise undermine the prospects of voluntary compliance with assumed obligations. In other words, the nature and dynamic of the rule of law as a binding instrument tends to better dispose it as a viable tool of integration. Capped with the legitimating effect of its distribution of rights and liabilities, the rule of law has become the dominant policy mechanism for regional integration initiative and general governance reform since the inception of the 1990s.

ECOWAS' adoption of a constitutive treaty in 1975, revised in 1993 reflects not only the standard model for establishing regional economic blocs, but a necessary foundational instrument for beginning a multilateral arrangement designed to cede portions of state autonomy of the countries involved. By that treaty, the original framers and founders of ECOWAS articulated a set of vision and objectives and laid the groundwork for the project. The use of the rule of law model enabled the framing of common values and objectives and in the process ensured that disparate ideologies and expectations are harmonised into a set of workable objectives. The 1993 Revised Treaty further helped the group refashion the original ideals while reengineering the structural framework of ECOWAS designed to help ensure that the Community better delivers on its mandate in line with contemporary expectations and global developments.

The use of the rule of law model therefore led to the enactment and adoption of a panoply of protocols and other binding rules structured to optimise compliance with specific policies and deliverables of the group. By adopting the law-based approach to integration, ECOWAS has benefitted from the advantages of law over voluntary participation and compliance with obligations that were either assumed

or imposed. More crucially, the rule of law model has enabled ECOWAS to implement a regime that is relatively more effective and overcomes the quagmires of sovereignty assertions and national autonomy claims. Arguing a case on the legal imperatives of regional integration in Africa, Fagbayibo⁷⁷⁵ enumerated four key indicia or variables whose prevalence or otherwise helps or undermines the integration efforts, namely, (a) the state of constitutional developments in member states, (b) a framework for ensuring compliance with institutional directives (c) enhanced cooperation between regional and national institutions, (d) increased interaction among legal stakeholders across the continent.

These suggested factors present plausible legal indicators of the background factors necessary to attain optimal integration within regional economic communities (RECs) in Africa. For starters, they seem to be reflected to different extents in the overall framework of ECOWAS' structure and operations. The conscious effort to ensure the participation of national judiciaries through the mandatory enforcement of the orders of the Community Court through local tribunals represents an active application of his variable "c" and is implicitly a repudiation of the bullish model which ignores sovereignty concerns and peculiarities of municipal constitutional circumstances when enforcing the orders of international courts or community judicial institutions. On the other hand, the factor dealing with the impact of differing constitutional developments on the overall integration effort, it may be argued that the paradigmatic prevalence of broad constitutional weaknesses in the various countries reflects a central weakness in the current integration effort and has impacted the deeper concentration of integration at the various levels of legal integration.

For example, the substantial political instability of the 1970s and '80s seem to have been the main factor stultifying the initial attempts at integration and succeeded in keeping the initiative moribund until after the inception of the 'third wave of democratisation' on the continent. Discrepancies in domestic constitutional developments tends to exert a measure of contagion on the general compliance with community directives and policies as the collateral pressures emanating from the municipal governance development depress the participation of members in group decisions.

⁷⁷⁵B Fagbayibo, *Exploring Legal Imperatives of Regional Integration, in Africa*, (2012) 45 (1) *Comparative and International Law Journal of Southern Africa*, 64 – 76/

Another way domestic constitutional development may affect the integration initiative may be in the area of collective action(s) taken against Member States whose governments suffer military take-overs. In recent times, this has taken the nature of sanctions or expulsion from membership with costs (usually unspecified) exacted or imposed on members who breach these sanctions. Political actions, while intended to rectify macro governance deficit disruptive of the legitimate establishment within Member States tend to exert deleterious impacts on the integration initiative given that not only are existing rights and obligations of the impugned government/state suspended, but also interstate relations between the state involved and other members of the group gets frozen in time. This remains the case even though as has been the case in some suspended ECOWAS Member States, certain extant rights and obligations such as free movement of persons remained even after membership of the countries involved had been suspended. Building a resilient culture and ethos of governance within member countries therefore invariably seem a core strategy to driving a rule of law-led model of integration.

Beyond the factors that facilitate or undermine the law laden approach to integration, it is equally useful or imperative to examine the normative dimensions or even justifications for advocating strategy to integration as opposed to say a purely political arrangement, for example. Building on the premises earlier articulated, framing the ECOWAS project around law would help attain predictable outcomes and ensure an effectuation of the shared goals of integration. Given that integration fundamentally requires the cession of certain key entitlements such as absolute legislative autonomy, the reciprocal or indiscriminate impact of law on all members promotes not only regime equity, but also a state of greater commitment on the part of Member States towards the implementation of obligations assumed. States are naturally driven to act and comply with obligations when they know that other states are not only equally complying but labour under the same obligation through a regime of law. On the other hand, hortatory political commitments made can hardly form a basis for sustained respect and implementation of commitment of obligations assumed given the prospect and indeed likelihood of actor default. From a more generalised global perspective, the overarching use of the rule of law orthodoxy

since the inception of the 1990s by the leading international financial institutions (IFIs) such as the World Bank and IMF has come to imply that the rule of law has assumed a very high threshold of legitimacy and effectiveness relative to other options. This presents an opportunity given that its justification has come to be presumed broadly speaking. It therefore goes without saying that leveraging on the benefits of the rule of law as a design strategy could present formidable advantages for ECOWAS and help in a more intentional evolution and outcomes than a framework founded on purely political variables.

2. Sources of ECOWAS Law

A useful starting point for examining the legal order established within ECOWAS is to briefly analyse the sources of community law and the interactive dynamics of their operation. As generally agreed among scholars including Ajulo, the sources of ECOWAS law which can be broadly categorised into primary and secondary sources are: the constitutive instruments including the ECOWAS Treaty, its amendments and protocols, accession treaties as well as conventions, decisions, regulations and directives. While much has been written about these sources of community law, there still remains nagging gaps on explanatory reasons as to why, with the exception of a tiny few, ECOWAS' law remains an insular regime and detached from the daily realities of municipal institutions and citizens.

From a structural standpoint, the primary sources of law represent an apex category and create overarching obligations for ECOWAS Member States. Thus, the Treaty, its amendments and protocols collectively form higher norms within the evolving legal regime of ECOWAS and bind the governments and institutions of the body without further ado. In other words, once adopted, these rules and treaty provisions represent a set of self-executing laws that bind members and compel the taking of action or necessary forbearances consistent with the treaty rules. While some scholars have raised questions against the status of treaties as a source of law impressed with the legal quality of liability and would rather prefer to designate them as a source of *obligations*,⁷⁷⁶ it is argued that the nature and treatment of the ECOWAS' Treaty makes it adequately suited to be considered a source of law. As Ajulo rightly argues,

⁷⁷⁶DJ. Harris, *Cases and Materials on International Law*, London, 1973.

ECOWAS Treaties have created rights and obligations for the member states of ECOWAS on the one hand and ECOWAS citizens on the other. For instance, ECOWAS Protocol relating to free movement of persons and right of residence and establishment creates obligations for every member state and rights for every ECOWAS citizen. Moreover, the "Decisions" of the Authority of ECOWAS and of the "Regulations" of the ECOWAS Council of Ministers have binding force "on the member states and institutions of the Community."⁷⁷⁷

The effect is that ECOWAS' laws tend to have a constitutionalising effect over and above the standard treaty dynamic of international norms and the emerging supranational strategy is further designed to advance that status of the Community law. The functionally intrusive effect of the constitutive rules and subsidiary norms of the body imply that these rules have the effect of laws, at least in theory, given they are designed to apply to citizens in their daily lives and within municipal terrains without any additional act on the part of ECOWAS or its institutions.

Similarly, the protocols to the ECOWAS treaty form a part of the apex laws of the Community being the main mechanism of perfecting and amending the Treaty. The generality of the application of protocol such as that on free movement of persons testifies to the importance of protocols in actualising the goals of the Community's establishment. Within the new framework of ECOWAS, the *completion* and modification of Treaty obligation is now expected to be undertaken through Acts of Community organs and the ostensible goal is to make the entity both nimbler and more effective in its operation. The use of Acts and the establishment of the Commission together with the Council of Ministers will give these institutions a more efficient means of assuming and implementing key decisions within the group while incrementally building on Community norms and the emerging legal order. The ECCJ's clear position on the nonexistence of an appellate jurisdictional relationship between it and the municipal courts of

⁷⁷⁷SB Ajulo, 'Sources of the Law of the Economic Community of West African States (ECOWAS)', (2001) 45 (1) *Journal of African Law*, 73

member countries is a functional step to deconflicting the fraught relationship between the Court and country-level institutions. Yet as will be argued in a later section of this piece, nurturing a legal order to maturation will require the building of a structurally coherent system in which the interpretive powers of the Court are bolstered by norm expatiation backed by the development of normative principles broadly shared throughout the Community.

3. The ECCJ and Evolving Legal Order

The establishment of the ECOWAS Community Court of Justice (ECCJ) is perhaps the most watershed moment in the history of the integration initiative within the sub-region. Constructed along the models of its European prototypical equivalent, the ECCJ is arguably the most consequential of the entities established to drive the ECOWAS integration agenda given its operational history and the jurisprudential impact. The adoption of a court of justice came as an appendage to the original conception of integration and the evolution of the ECCJ reflects the shift in thinking within ECOWAS. While some may argue therefore that the ECCJ represents an ancillary structure within the scheme of arrangements of ECOWAS, it equally bears noting the fact that the adoption of the ECCJ system reflects an attempt by the Member States to deepen the legal accountability and ensure a micro-level impact of the operation of ECOWAS as a supranational organisation within the municipal realm. In a sense, the planned adoption of a community tribunal systems-a precursor to the Court of Justice represented an earlier statement of intent of the designers to ensure the effectiveness of the ECOWAS framework by including a judicial system within the economic integration initiative. However, the fact that a judicial arrangement was not incorporated in the original conception of ECOWAS in 1975 is not surprising given the overly political nature of the initial project and the centrality of sovereignty to the national policies of the founding members of the grouping at the time. Given that judicial institutions quintessentially numb the assertion of sovereignty within the scope of compliance with rules, the subsequent addition of a tribunal, and later the court, is telling of the evolving assumptions informing the establishment of ECOWAS and the needs of an effective regional integration project.

From a purely conceptual standpoint, the ECOWAS Court of Justice fits Grossman's definition of an international adjudicative body given its feature of deciding disputes between actors at least one of whom is a state.⁷⁷⁸ While the functional autonomy and legitimacy of the ECCJ is taken for granted both by the Court itself and the States which created it, the juristic positions on the imperatives informing its establishment still remain open ended. This is not surprising given the fixation with the issue or subject of institutional effectiveness *per se* and the capacity of the Court to make real and meaningful impact on the integration effort as opposed to an evaluation of the functional and historical justifications for its establishment. The subject of effectiveness itself invariably trumps variables of institutional importance or utility *per se* in projects of integration especially on the African continent where some of these initiatives have floundered notwithstanding the lofty and well-intentioned ideals informing their initial adoption.

Reviewing the literature and with the benefit of hindsight, a number of reasons can be adduced and justifiably derived from the overall structuring of institutions within the Community. In this sub-unit, I discuss briefly the justifications for including an official judicial institution within a largely political arrangement underpinned by treaty obligations for Member States of ECOWAS. In this vein, I am mindful of the counter-narrative which challenges the role of judicial institutions in regional integration efforts and international legal arrangements in general. A key critique levelled against regional courts have been their tendency to remain insulated or compartmentalised in their treatment of complaints, and this creates resistance at local levels once decisions or opinions are issued.⁷⁷⁹ Within the context of human rights adjudication, a new strand of the critique argues that given that sub-regional integration projects are fundamentally economic in outlook, courts that are established in the context of those initiatives tend to have their ability and commitment to embrace the role of human rights protection questioned.⁷⁸⁰

⁷⁷⁸N Grossman, 'Legitimacy and International Adjudicative Bodies', (2009)

41 George Washington International Law Review, 107, (published in August 2010)

⁷⁷⁹V David, 'Cultural Difference and Economic Disadvantage in Regional Human Rights Courts', Intersentia, March 2020

⁷⁸⁰L N Murungi & J Galinetti, 'The Role of Sub-Regional Courts in the African Human Rights System', <https://sur.conectas.org/en/role-sub-regional-courts-african-human-rights-system/>

(a) ECCJAs Interpreter of Community Law

Regional integration efforts are political projects held together by legal rules. The adoption of a treaty of the union of necessity therefore implies the assumption by Member States of obligations and corresponding liabilities for the evolving union established. On the other hand, the interpretation of the constitutive community text is often left to a professionally neutral and independent body in the character of a judicial organ. The establishment of the ECOWAS Court of Justice advances that model and the approach adopted within ECOWAS is one designed to promote the rule of law across the states of the sub-region while reinforcing the external accountability of the Member States. Within the context of the latter, the ECCJ, like others of similar ilk, has been designed to rein in the abuse of state authority in a country's treatment of its citizens relative to human rights, and further, in the manner and extent to which Member States comply with their obligations under the treaty as well as connected protocols.

In order to aid a contextual understanding of the discussion, reference to the jurisdiction of the court is instructive. Fundamentally, the Court has power to hear cases involving human rights abuses, and to interpret the text of the treaty.⁷⁸¹ In terms of the substantive power of defending human rights abuses against the unlawful uses of state authority, the Court's jurisdiction invariably extends to receiving complaints against the abuses of human rights from citizens of Member States. This aspect of the Court's jurisdiction sets it up as a mainstream remedial chamber in which the Court hears complaints of violation and issues orders compelling actions to be taken by offending states.

The powers of international judicial bodies to assume jurisdiction in respect of human rights violations have always been deemed intrusive resulting in collisions between countries and these bodies. In the case of ECOWAS, this reality extends to institutions of the Community and the recent disquiet between the Court and the Commission of the Community following the former's orders directed at the Commission reflects that systemic inertia. The resulting tension between regional courts and national authorities is therefore hardly surprising given the fact that very often the character of these orders compels the reversal of executive actions and in some cases extensive review of existing procedural and substantive policy as well as implementation of a variety of changes in a country's internal order. The situation is aggravated by the Court's activist posture on the protection of human rights in keeping with the original motivations for establishing it.

⁷⁸¹Supplementary Protocol A/SP.1/01/05 of 2005 and (A/SP.1/06/06) of 2006

This is exemplified in its handling of the subject of jurisdiction in cases like the *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v. Federal Republic of Nigeria & Another*, when it asserted inter alia,

... For this Court to have subject-matter jurisdiction over the suit as instituted by the Plaintiff, the subject matter of the suit must fall within the confines of Article 9 of the Supplementary Protocol to the Court The Court has jurisdiction over human rights enshrined in the African Charter and the fact that these rights are domesticated in municipal laws of the Federal Republic of Nigeria cannot oust the jurisdiction of the Court. ... This Court clearly has subject matter jurisdiction over human rights violations in so far as these are recognized by the African Charter on Human and Peoples' Rights, which is adopted by Article 4(g) of the revised Treaty of ECOWAS...

The framing of this boundary-delineating judgment sets the tone for the court to actively assume jurisdiction over cases that are deemed otherwise to fall within the purview of local courts. From the standpoint of court watchers, this posture could be deemed to be good for the rapid development of Community law. In another vein, the Court's activist dynamics may prove functional given the need to 'supervise' the operations of local courts in their administration of justice and the rule of law system prevalent in any given country gauged from the incentives of local courts to often align with existing political establishments.

The establishment of the ECCJ thus finds ample justification on grounds of promoting an effective system of the rule of law and gradual accretion of a legal order within the Community regime while ensuring that the principles of constitutionalism are at work in the relationship between governments and their citizens *inter se*. In other words, the norm-explication and implementing role of the court as a judicial body makes it pivotal in the overall integration effort and positions it as a central player in the creation of a unified legal order within ECOWAS. At its optimal operation therefore, the ECCJ can become a beacon for the enforcement of Community rules and a pathway for the construction of standard principles and guiding rules for the development of the Treaty.

While the issue may rather sound obvious at first, it bears stressing the point that the binding effect of judicial interpretation of treaty rules settles the contested claims of political disagreements on the nature and meaning of specific aspects of the Treaty, and this enables a quicker and more efficient resolution to disputes surrounding the interpretation of the treaty and its protocols.

(b) Court of Justice as Chamber of Human Rights Jurisprudence

An important reason that inspired the establishment of the ECCJ is the protection of human rights. The fact of the widespread prevalence of human rights abuses across the continent speaks to the need to establish a sub-regional body that adjudicates on the cross-border protection of human rights. It has been argued that the human rights jurisdiction of the court is historically derivative and appears to have largely been initially 'taken' by the Court in light of its interpretive functions.⁷⁸² The issue is now well beyond the scope of controversy given that the human rights jurisdiction of the ECCJ was subsequently textually codified in the 2005 protocol to the Court in which the jurisdiction was expressly recognized and conferred on it.

As earlier argued, the judicial protection of human rights inevitably brings the Court into the zone of jurisdictional conflict with member states and municipal courts given that the ECCJ has relaxed the rules of admissibility broadly speaking and compromised on the stringency of the exhaustion of domestic remedies in the commencement of actions at the Court. This is a marked departure from the traditional approach under international law in respect of which parties seeking to activate the jurisdiction of international courts are often mandated to have exhausted domestic remedies for resolving these complaints. The protection of human rights jurisdiction of the Court seem largely inspired by the need to ensure a robust and effective sub-regional regime on human rights in which the principles and ethos of human rights will be deemed *prima facie* to transcend the limits imposed by local law *per se*. Consequently, the competence of the Court to pronounce on, and enforce the African Charter on Human and Peoples' Rights (ACHPR) reflects a trend in which ECOWAS has been using the instrumentality of the Court to give the Charter the needed bite within the municipal space in

⁷⁸²See <https://www.justiceinitiative.org/publications/ecowas-community-court-justice>.

countries within the sub-region. By imbuing the Court with this jurisdiction, the Treaty and protocol establishing the Court have empowered it to develop transcendental jurisprudence through which the Court can promote the broad values and principles contained under the ACHPR.

Yet, the ECCJ's power to adjudicate human rights violations within the scope of the ACHPR can prove problematic, its broad advantages notwithstanding. For example, the ACHPR as a regime has been criticised for being retrogressive gauged from the standpoint of its claw-back clauses which repeatedly vest the African state with a wide margin of appreciation and latitude for deviation on grounds of extraneous factors.⁷⁸³ In other words, the prevalence of wide-ranging claw-back clauses in the ACHPR implies that the jurisprudence of the Court may suffer from the contagion effect of dabbling in restrictive interpretation in which the rights conferred will very often be seen in the guises of those strictures.

This remains true notwithstanding the Court's decision in cases such as *Hadijatou Mani Koroua v. Niger*⁷⁸⁴ in which it adopted an expansive interpretation to the liability of the defendants by applying the concept of *passive liability* to the action of Niger in tolerating the practice of slavery even if it did not actively partake in the practice as a state. *Karoua*, while watershed in defining the scope of state liability within the jurisprudence of the Court, nonetheless did little to assuage the fears of some regarding the effectiveness of the Court as an instrument of human rights advancement in the ECOWAS region. Critics still hold on to the position that the overall effectiveness of the Court is tenuous when gauged from the standpoint of compliance and implementation complexities vis-à-vis member states and local courts' posture when dealing with judgments of the ECCJ.⁷⁸⁵

A related difficulty however is the issue of the very competence of the Court to pronounce on human rights cases in spite of the obvious now textual allocation of the power to the Court under the ²⁰⁰⁵ Protocol.

⁷⁸³L Mapuva, 'Negating the Promotion of Human Rights Through "Claw-Back" Clauses in the African Charter on Human and People's Rights', <https://core.ac.uk/download/pdf/234670951.pdf>

⁷⁸⁴(2004 – 2009) CCJELR, 217

⁷⁸⁵RF Oppong, 'The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment', 25 (1) AJICL, Vol. 25, Issue 1

It has been argued that given that the original treaty establishing the ECOWAS was not cast in 'right' terms and hardly contained anything on human rights *qua* rights, the subsequent inclusion of human rights as a significant sub-category within the jurisprudence of the Court constitutes a deviation from the mandate of ECOWAS and may be accordingly wrong. Arguing that the interpretation of treaties should be strictly confined to enumerated powers, Ebobrah stresses that powers that are not textually assigned or allocated to any entity or body should be deemed to be excluded and accordingly not exercisable by that person or body.⁷⁸⁶ In his opinion, this position remains overarching notwithstanding the application of the principles of implied powers which fundamentally authorises an international body to assume such powers and authority as may be necessary for the effective exercise of conferred powers.⁷⁸⁷

4. Dualism and Community Law

An important legal issue that continues to confront ECOWAS is the scope and effect of community laws within the panoply of laws of Member States. This has been a long-standing difficulty which has challenged the competency of international law in its relationship with municipal law. Conceived of in vertical or horizontal structures, countries have been said to be either monistic or dualistic on the basis of whether international law has an automatic applicability within the municipal real or otherwise requires a transformative⁷⁸⁸ act on the part of an adopting country in order to give it effect within a given country. The subject assumes practical problematic dimensions when viewed from the standpoint of the issue of state responsibility or liability and the extent to which individuals can invoke international law in municipal courts when they allege violations or breaches on the part of the State. Within the context of regional integration initiatives such as ECOWAS, the monist/dualist dynamic and the particular status of a given state has specific implications for the application of community laws and effect of treaties adopted within the community pursuant to the integration project.

⁷⁸⁶ST Ebobrah, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice', (2010) 54 (1) *Journal of African Law*, 1-25

⁷⁸⁷See M Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', (1970) 44 *British Yearbook of International Law*

⁷⁸⁸The English judge, Lord Denning referred to dualism as a doctrine of "transformation" under which international law can become municipal law only through an independent municipal act. See *Trendtex Trading Corp. v. Central Bank of Nig.*, 1977 Q.B. 529, 533-54 (C.A.); See also JG. Collier, 'Is International Law Really Part of the Law of England?' (1989) 38 INT'L & COMP. L.Q. 924, 925; J Turley, 'Dualistic Values in the Age of International Legisprudence', (1993). 44 Hastings L.J. 185
Available at: https://repository.uchastings.edu/hastings_law_journal/vol44/iss2

The scholarship surrounding monism and dualism however suggests a certain state of fluidity and uncertainty about the practical application of the theories and the effect of a State's ascription to either theory in its enforcement of international law within the domestic plane. It has been argued for example, that while monism and dualism may *prima facie* appear conceptually distinct and identifiable doctrines, their practical application may show some similarities and that it is indeed the case that aspects of monist and dualist variables tend to be seen in the practices of States at one and the same time. Ghana perhaps presents an illustrative example given its largely dualist constitutional structure also incorporates aspects of monism through its recognition of the direct application of international law within the municipal realm.

The persistent tensions characterising the application of monist/dualist distinction raises foundational questions such as what is the reason(s) informing the adoption of a dualist model in an international regime in which the effectiveness of international legal rules continue to be undermined by prevalent domestic obstacles broadly speaking.

Turley offers an explanation for the adoption of legal dualism in the United States by stressing that US courts have developed interpretive strategies through which dualism has come to be both defined and reinforced. He argues that this has been done through the courts' avoidance of pronouncing on subjects which implicates foreign or international law by consigning these at the doorsteps of the executive and legislative branches of government mainly through the political question doctrine. Legal dualism, therefore, it would seem at least from the experience of the United States may appear to have become institutionalized largely through historical experiences of the country and the disposition of its judicial branch to the question of international law and the courts' willingness to assume jurisdiction over it. The United States scenario is however, not reflective of a general trend as it may seem that the adoption of dualism by the generality of countries appears steeped in a tendency to project the primacy of domestic law. Indeed, Turley, argues that part of the problem may stem from the mistrust of international law by domestic institutions and constituents arising from the lack of deliberative legitimacy of international and its core structure of being designed to apply between nations *per se* and not to the affairs of individuals who have no participation in its enactment or making. Thus considered, dualism becomes a sifting instrument through which the democratic legitimacy of municipal law becomes protected against the actions of state actors on the international plane.

The implications of legal dualism for regional integration and the evolving supranational scheme under ECOWAS are general obvious. The requirement of express incorporation under dualism would mean that the obstacles of domestic constitutional processes are going to be more pronounced in the enforcement and effectiveness of community treaties and protocols given the two-layered process of adoption of community legal policy. This naturally implies that the speed with which ECOWAS is able to adopt and implement certain key policy decisions will be affected as different countries confront their domestic constitutional processes when seeking to implement decisions adopted by the body.

The above notwithstanding, it may seem that the structure of ECOWAS, particularly its court of justice and the distribution and structure of authority, compels an examination of the principles of the 'direct effect' of rules against the backdrop of legal dualism. The jurisdictional competence of the ECCJ reflects an admixture of traditional international law rules of *standing* before international courts which reserved capacity to states, and evolving international human rights approach which fundamentally recognised citizens as primary parties who could present applications for violation of human rights. Reexamining the effect of dualism on an evolving Community legal order from the angle of the Court is significant given the fact that by understanding the laws cognizable by the Court in the determination of the various claims of liability, one is able to appreciate the scope of legal rules deemed directly applicable within the domestic realms of Member States. The ECCJ's jurisdiction to hear and determine cases of human rights abuses implicate the prevalence of the direct effect of rules within ECOWAS. Understood as a concept which empowers courts to recognise rules of international law and to enforce these within the municipal realm, the principles of direct effect as developed in the European case of *Van Gen en Loos* suggest a system in which adopted rules of international law automatically create enforceable rights between citizens inter se, and between citizens and the state party. This would imply that the adoption of dualism notwithstanding, the principles of direct effect could operate to render effective community laws within the ECOWAS region and among members. In other words, the piercing effect of the model of direct effect in the application of legal rules suggests that once adopted a source of law, ECOWAS laws become enforceable in the jurisdictions of all Member States and the distinctive characteristics or strictures of dualism thereby creating rights and liabilities for citizens and states.

Indeed, the jurisprudence of the ECCJ thus far reflects that recognition of the principles of direct effect of the human rights laws applicable within the

community. Its enforcement of these rules demonstrates a vertical assumption of jurisdiction in which the rules of human rights adopted within the community are deemed to occupy an apex position relative to municipal law. While not self-executing and therefore still limited in the fundamental respect of needing to be enforced within local courts, the status of community law when applied in concrete cases coming before the Court is cemented. The conferment of human rights jurisdiction on the court is particularly telling in the effectiveness of community legal rules given the capacity of courts to enforce general rules through human rights provisions. In other words, given that the general policies of the region can implicate human rights of community citizens, it is conceivable that future jurisprudence of the Court could reflect an activist posture in which the Court employs the principles of direct effect to enforce community rules at various levels of application. Yet the experience of the ECCJ jurisprudence counsels against an insular but bullish application of the principles of direct effect by the Court *per se*. The refusal by courts to enforce some decisions of the ECCJ by local courts within ECOWAS suggests the need to adopt a multi-layered approach in optimising the effectiveness of the Court's decisions and orders using the principles of the direct effect of community rules. The truth remains that of themselves, courts are powerless in enforcing their decisions within the territorial domains of countries without either the use of external force, another more powerful country or compliance by the executive and judicial authority of the State affected. The effectiveness of the doctrine of direct effect applied within the context of ECOWAS would necessarily be dependent on either the voluntary compliance with judicial decisions or the adoption and implementation of the collective sanctions of ECOWAS as a group.

On the other hand, jurisdictional dualism in matters affecting interstate disputes submitted before the Court would hardly lend themselves to the application of the direct effect of community rules. This is particularly so given the horizontal effect of legal rules at the interstate level and the requirement of incorporation or domestication in order to enforce rules against states. In this vein, the limitations in the way of the Court presented in enforcing community rules directly against an impugned state represent real obstacles to the direct effect approach developed in *Van en Gend Loos*.⁷⁸⁹

⁷⁸⁹Judgment of the Court of 5 February 1963

The standing given to individuals in human rights litigation invariably clothes these actions with the direct applicability of these rules within the municipal realms of the states against which complaints are made. Interstate complaints however present different set of dynamics given the requirements in dualist constitutions for specific acts of state incorporating assumed obligations into domestic law. Applying the direct effect approach would therefore of necessity require the truncation of domestic constitutional rules which would inexorably lead to conflict and undermine the voluntary compliance of states with judicial orders.

Deepening the values of *supranationality* would imply minimising the effect of legal dualism at least from the standpoint of human rights jurisprudence of the Court and the ECCJ's past approach to exercising its jurisdiction reflects a desire to robustly assert the direct application of community rules of human rights within the domains of member states. Cases like *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria & Another* provide useful prisms to gauge the activist posture of the Court in asserting the direct enforcement of human rights norms in the ECOWAS region. The ECCJ's extra judicial efforts at exploring ways of deepening its relationship with national judiciaries represents a plausible model for overcoming some of the challenges presented by legal dualism. Judicial cooperation presents an opportunity for courts to appreciate the principled basis of their respective jurisdictions and decision-making processes and helps enhance the desire of local courts to perfect the ends of justice by enforcing decisions made at the supranational level.

5. Supranationality and Community Legal Order

The inevitable implication of legal and structural dualism is that there persists considerable uncertainty in the extent to which Community rules will be effectively implemented when adopted. On the other hand, ECOWAS' move towards building a legal order requires that it gets a handle on the effectiveness of its rules by ensuring that acts of its institutions are ultimately implemented. The body's stated objective of building a supranational group out of the existing framework premised on intergovernmentalism appears to gain expression in the establishment of a Commission with a relatively greater executive leverage in the implementation of Acts of the Community. Clearly, the reforms within ECOWAS reflects a desire to better improve on the group's overall effectiveness in delivering on its mandate.

Supranationality connotes the operation of a more concentrated and centrally effective mechanism of regional integration. Conceptually speaking intergovernmentalism and supranationality are different arrangements in the structuring of regional integration bodies. Intergovernmentalism refers to arrangements 'whereby nation states, in situations and conditions they can control, cooperate with one another on matters of common interest'. This arrangement fundamentally involves the distinct assertion of individual autonomy of states and as such there is no pooling of sovereignties for a common or shared cause. Intergovernmentalism therefore operates on the subsisting assumption that States involve themselves in a loose grouping in which ceded sovereignty (if any) remains highly limited and ephemeral. States to this arrangement consequently continue the assertion of sovereignty and this constricts the extent to which the regional integration body is able to secure compliance with key agreements or of the body. Supranationality on the other hand implies an arrangement in which there is a significant cession of authority by states to a regional integration arrangement in which the regional body exercises more competences especially legislative actions on behalf of the state. Accordingly, to the relationship between the state and the regional integration body is one fixed by pre-commitment on the part of the former to respect and abide by the decisions of the body. As Nugent notes 'supranationalism takes inter-state relations beyond cooperation into integration and involves some loss of national sovereignty'.⁷⁹¹ The core of supranationality rests on the 'limited replacement' of the State in the area of assertion of legislative competence in particular areas previously occupied by the State. ECOWAS' progression towards supranationality should of necessity imply that the Member States of the Community are agreed on the intrusion on their respective legislative competences. Given the vertical application of sub-regional rules, and in the case of ECOWAS, Acts of the Council of Ministers including regulations, the adoption of supranationality as the new defining sub-regional model of governance should ordinarily lead to greater efficiency and effectiveness of Community rules.

⁷⁹¹N Nugent, (2003) *Government and Politics of the European Union*, Basingstoke: Palgrave Macmillan.

ECOWAS' stated de-emphasis of using conventions and protocol for the preferred mode of Community Acts through its relevant institutions reflect the trend of moving towards supranationality given the rather decentralised and devolved character of the former. In other words, the administrative character of supranational institutions such as the Council of Ministers compares favorably to the overly political nature of the adoption process of protocols and conventions. The particular use of Acts as a means of completing the Treaty represents a more strategically nuanced means of ensuring a more prompt, efficient, and effective means of implementing commitments agreed on within the Community. While broadly effective in outcomes however, the use of a supranational stratagem could create insularity for errant and further undermine attempts at consensus-driven and organic growth within the Community.

Moving beyond intergovernmentalism to a state of supranationality would require a high degree of norm effectivity and the respect of States for the legal orders issuing from institutions of ECOWAS. Benign and overt circumstances of non-compliance numb regime effectiveness and ECOWAS' ability to reach the threshold of the systemic quality of a legal order would be dependent on the extent to which its legal institutions are able to compel obedience for its rules and orders. In other words, while the institutional transformation of ECOWAS towards supranationality will conduce to promoting the gradual attainment of a regional legal order, that reality of itself would not help in the attainment of the goal. This implies that in order to ensure a progressive realisation of supranationality within ECOWAS, there is the need to consciously promote legal institutional effectiveness in which the norms and judicial orders of ECOWAS are treated as binding, and a mechanism structured to enforce decisions within the various municipal jurisdictions of the sub-region.

Achieving this would require the avoidance of conflicts and parallel assertion of authority or *margin of appreciation* claims in the enforcement of judicial orders. This point is depressed by recent developments in which orders of the ECCJ has been ignored by the Commission in addition to the overall sub-optimal enforcement level of the ECCJ's decisions. From a more pragmatic perspective, it is arguable that the development of a legal order within ECOWAS would of necessity have to be led by the ECCJ and not by the more politically-oriented bodies like the Community Parliament or Commission. Thus, while the Commission and Council of Ministers may be actively involved in norm creation by their very establishment, the mandate of these institutions makes them less

suitable to lead the venture on the evolution of a community legal order than the ECCJ is able to do.

The prevailing *status quo* then requires that existing obstacles in the way of the Court's effective operation need to be removed including the tacit disregard of its orders. More crucially and as argued above, such systemic factors as the potential for conflict at the municipal level through the assertion of rival jurisdiction and enforcement deficits within implementing executive agencies at the national level need to be carefully reviewed and intentionally dealt with. On the other hand, the reality remains that while the overall architecture of ECOWAS mimics the EU, municipal institutions in the latter are comparatively more mature and are better responsive to the judicial orders of the ECJ and the ECHR than they are in the former. This would then require the specific development of legal principles *erga omnes* for the evolution of the regime including those akin to the principles of *proportionality* and *subsidiarity* prevalent within the EU designed to ensure accommodation for local competences while keeping Community institutions at a higher pedestal and only performing those functions textually allocated and cannot be performed by local institutions. Adopting a systemic approach to the ECCJ's work remains a *sine qua non* for its effectiveness and the evolving legal order of ECOWAS viewed from the need to ensure a coherent and organic growth of the jurisprudence of the ECCJ. Recognising and tackling this is critical given that at the core, a supranational judicial body like the ECCJ lacks the correlative supporting police powers necessary to complete the judicial process and tends to depend, to a significant degree on the cooperation of local institutions for effectiveness and completion. Given its reliance on a mix of political sanctions and culprit-cooperation for enforcement therefore, the ECCJ needs to bolster and reinforce the principled basis and justification of its decisions through the development of higher principles broadly shared by the Member States to the body. Even so, the use of these principles can only constructively advance the goals of a more legally concentrated body if they are used in a nuanced way reflecting the need for a fine balance between appropriate deferral to local or municipal action and sub-regional orders designed to reflect the development and maturity peculiarities of municipal entities within ECOWAS.

The ECCJ's contribution to the development of a legal order within ECOWAS can thus be supplemented by the norm-creating powers of the Commission, Council of Ministers and importantly, the ECOWAS Parliament. The Parliament's mandatory assent powers can especially be harnessed to promote regime constitutionalism through a supervisory use of its authority. Given its structuring as being an

aggregator of community citizens' views and interests, the Community Parliament could help in legitimising the basis of Community norms in a manner that gives a representative dimension to the Acts of the Community. The institution's role in the enactment of Community Acts could therefore reinforce the sense of legitimacy of Community norms.

Reviewed with the context of community law and an evolving legal order, ECOWAS laws can only enjoy the quality of legal effectivity if situated with a unified system of rules and structures in which there is clarity on jurisdictional competences, acceptance of the legitimacy of community norms, a willingness by municipal institutions of the binding effect of community norms and institutional orders as well as the ECCJ's articulation of higher principles of community norms

6. Conclusion

Supranational legal orders invariably confront manifold tensions and obstacles bordering on stately orthodoxies. Consciously dismantling or negotiating around these challenges is a significant determinant of the success of any given integration project. ECOWAS' experience peculiarly reflects that dynamic but also the complexity of systemic inertia within ECOWAS including the challenge of rival assertions of jurisdiction and seeming reluctance of municipal judicial bodies and Community institutions to respect the orders of the Court when issued. The evolving legal order of the regional body can best be achieved through a judicial enforcement of Community Acts and norms given the inherently legitimating basis of judicial decision-making and its validation of legal ordering. In the circumstances, the skewed preference towards executive institutions within ECOWAS to the detriment of the ECCJ coupled with a developing tendency of Community institutions to disregard the decision of the Court could stultify if not completely undermine the reform towards supranationalism. Situating the ongoing reform within a framework of the rule of law with an overriding judicial authority at the apex would inure to the effectiveness of legal institutions and overall systemic functionality. The default cannot be contemplated and risks perpetuating the status quo of stagnation and suboptimality.

SUB-THEME 7

ROADMAP ON MECHANISMS FOR THE ENFORCEMENT OF JUDGMENTS OF THE COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES-ECOWAS

**ROADMAP ON MECHANISMS FOR THE ENFORCEMENT OF
JUDGMENTS OF THE COURT OF JUSTICE OF THE
ECONOMIC COMMUNITY OF WEST AFRICAN
STATES-ECOWAS**

BY

LADISLAU CLEMENTE FERNANDO EMBASSA

JUDGE OF THE GUINEA-BISSAU SUPREME COURT OF JUSTICE

Introduction and delimitation

The jurisdictional guarantee of the law of the Economic Community of West African States (ECOWAS Community Law or Community Law) has been entrusted, on the one hand, to the national courts in general, since they are the ones who primarily apply a considerable number of Community norms and acts, consisting of provisions directly applicable or with immediate effect, in disputes that may arise between private individuals (individuals or companies) and between individuals and Member States, and on the other hand, to the ECOWAS Court of Justice. In fact, it is on this second segment of jurisdictional activity within the Community that our communication will focus, more specifically on the enforcement mechanisms of the decisions handed down by the ECOWAS Court of Justice. It is, therefore, one of the most important components of the justice system, without which the jurisdictional nature of the judicial body is put at stake. In other words, a court whose decisions are not enforced becomes, in practice, a mere advisory body.

A judicial decision is not an end in itself. Its validity depends on the result it will produce in the legal order or in the legal situation of the parties. This is what justifies that at the national level, failure to comply with a judicial order or decision is elevated to the category of a crime, namely the crime of disobedience or obstruction of judicial activity. If the ideal of justice is embodied in a judicial decision, it is only materialized through the faithful and bona fide execution of judicial decisions.

However, the importance of the matter contrasts with the way it is handled in the international instruments that create international courts. As will be seen below, it follows from an analysis of the treaties or protocols creating the international courts that they are usually laconic or sparse in provisions dealing with the enforcement of decisions. This scarcity is an additional rationale for the importance and pertinence of reflection on the topic.

In terms of methodology, the work I present to you consists of an analysis of the relevant provisions of the instruments governing the functioning of the ECOWAS Court of Justice and, in comparative terms, those of other similar judiciary entities such as the Court of Justice of the East African Community, the European Court of

Human Rights, and the African Court on Human and Peoples' Rights.

Thus, the presentation is structured around the following points:

- i. Delimitation of the concept of decision for the purposes of this presentation;
- ii. Enforcement mechanisms and the principle of *Pacta Sun Servanda*;
- iii. The role of the national authority responsible for the execution of ECOWAS Court decisions;
- iv. The role of the parties in the enforcement of ECOWAS Court decisions;
- v. The liaison between the national enforcement authority and the parties;
- vi. Follow-up on the Execution of ECOWAS Court Decisions;
- vii. The Role of the ECOWAS Commission in the Execution of Court's Decisions;
- viii. Comparative analysis of the enforcement mechanisms of the ECOWAS Court's judgments and that of similar Courts;
- ix. The involvement of political bodies in the enforcement of international court decisions;
- x. Best Practices on Enforcement of International Courts Decisions;
- xi. Brief conclusions;
- xii. Recommendations

1. Delimitation of the concept of decision for the purposes of this presentation

A broad concept of decision would encompass a set of determinations made by a court in the exercise of its administrative or judicial competence. However, not every decision of a court is relevant for the purpose of enforcement. Thus, the following decisions are excluded:

- Administrative or internal *modus operandi* decisions;
- Decisions relating to procedure which are instrumental in relation to taking cognizance of the substance of the matter;
- Decisions concerning the consultative competence, which consist of mere opinions;
- Decisions rendering the action incompetent or inadmissible;
- Decisions not finding a violation;
- Decisions finding violation without ordering specific reparations.

In this regard, the decisions of the ECOWAS Court of Justice that demand enforcement are two:

- Decisions ordering precautionary measures; and
- Decisions finding a violation and ordering measures that lack material acts of enforcement.

Court decisions finding violations are subdivided into:

- a) Decisions concerning conflicts of interpretation and application of Community law, in particular (Article 9.1 (a) to (c) and (e) of the 1991 Protocol):
 - Decisions on Community law relating to the interpretation and application of treaties, conventions, protocols adopted within the Community.
 - Decisions to monitor the compliance of subsidiary Community law with higher-value Community instruments.
- b) Decisions concerning States' non-compliance with the Community law (Article 9.1 d) of the Protocol).
- c) Decisions concerning disputes between officials and Community Institutions of the Community (article 9(1)(f) of the Protocol).
- d) Decisions regarding damage caused by the Community or its officials to third parties (Article 9.1.g of the Protocol). e) Decisions concerning litigation against the Community's non-contractual civil liability for damage caused to third parties (Article 9(2) of the Protocol).
- f) Arbitration decisions, in the light of article 16 of the Treaty (art. 9.5 of the Protocol).
- g) Arbitration decisions, in the application of the jurisdiction conferred by an arbitration clause (Article 9.6 of the Protocol).
- h) Decisions taken in the application of any other jurisdiction conferred upon it by Community provisions or by the Authority of Heads of State and Government (Article 9.7 and 9.8 of the Protocol).

Finally, the following decisions of the ECOWAS Court of Justice relating to human rights litigation, in particular those orders under Article 9(4) of the Court's 2005 Supplementary Protocol, which may take various forms, are to be enforced:

Reopening the case and repeating the trial; Order to release the prisoners; Admission of electoral candidacies; Repealing or modifying legislation or changing illegal administrative practices; Readmission of employees; Payment of compensation; Public apology; Publication of decisions; and Construction of memorials to victims, etc.

2. Enforcement mechanisms and the principle of *Pacta Sun Servanda*

Looking at the variety of the jurisdiction vested on the ECOWAS Court of Justice, which includes matters of general international law, Community law, arbitration law and human rights, we can deduce the existence of a plurality of enforcement regimes.

Until 2005, we can say that there were three main regimes: a) the general regime; b) the Community regime; and c) the arbitration regime. As of 2005, with the amendment to the 1991 Protocol, what we call the special regime-d) was created. Our attention will be focused on this regime, which is in fact the one that has absorbed most of the ECOWAS Court of Justice, since most of the cases brought before the Court are related to human rights violations.

a) General regime for the enforcement of decisions by the ECOWAS Court of Justice

The general regime is the classic regime of general international law, which gives sovereign States wide discretionary powers in enforcing the decisions of international courts or tribunals. Under this system, it is up to the Member States to adopt, by internal procedure, the measures they deem appropriate to comply with the decisions of the international courts, which normally do not constitute an enforceable order.

Under the general regime, the Member State is bound by the result and is guided by the principle of *Pacta Sun Servanda*, which is understood to mean that international instruments in force bind the parties and must be applied in good faith, in accordance with Article 26 of the 1969 Vienna Convention on Treaties between States. In the case of the ECOWAS Court of Justice, the application of this principle intends that its decisions must be complied with in good faith by the condemned Member State.

Although it is not clear, we think that the national authority responsible for the enforcement of the decisions of the ECOWAS Court of Justice, provided for in Article 24(4) of the 2005 Supplementary Protocol, is also responsible for monitoring the enforcement of such decisions.

b) Community regime

Although Community litigation is not well developed by the jurisprudence of the ECOWAS Court, its jurisdiction is well established, in the application of which it

can make decisions that need to be enforced. As the Community Court, we think that the ECOWAS Court acquires the attributes of a supranational judicial body. Unfortunately, we do not have much to say about this enforcement mechanism, for lack of regulation, as the Protocol and Rules of Procedure of the ECOWAS Court of Justice do not provide specific provisions on the issue.

c) Arbitration regime

Insofar as the ECOWAS Court functions as an arbitral court, particularly within the framework of an arbitration clause provided for in contracts, the mechanism for the enforcement of its decisions may be that provided for in the instrument implementing it or that which is determined in the arbitration clause conferring arbitral competence on the ECOWAS Court of Justice.

d) Special Regime for the Enforcement of the Court's Decisions

Finally, there is the special regime, introduced by Article 24 (Enforcement of Court Judgments) of the 2005 Supplementary Protocol A/SP.1/1/05, which amended the 1991 Protocol. That article states the following:

1. Judgments of the Court that impose a pecuniary obligation on persons or States shall be enforceable.
2. The compulsory execution, which shall be submitted by the Registrar of the Court of the Member State concerned, shall be governed by the rules of civil procedure in force in the Member State.
3. The method of enforcement shall be applied without any other control than verification of the authenticity of the document by the national authority which the government of each Member State shall designate for this purpose.
4. The Member States shall designate the national authority competent to receive or enforce the Court's decision and shall notify the Court of this designation.
5. Enforcement may be suspended only by a decision of the Community Court of Justice.

The numbers 1 and 2 of the French and Portuguese versions do not match the English version. The English version speaks of binding judgment, while the French and Portuguese versions speak of titre exécutoire for the French, and título de execução for the Portuguese. We think that the French and Portuguese names are the most appropriate, because the decisions of the ECOWAS Court of Justice are

already mandatory under Article 19 (2) of the 1991 Protocol. Article 24, paragraph 1 of the 2005 Supplementary Protocol adds the nature of an enforceable order to pecuniary convictions.

Regarding Article 24(2) of the 2005 Supplementary Protocol, the English version states that the Registrar of the ECOWAS Court of Justice, after conferring enforceability on the Court's decision, shall transmit it to the Member State concerned for the purpose of enforcement in accordance with its law of civil proceedings. However, the French and Portuguese versions assign this role to the Registrar of the Court of the Member State concerned. We think the English version is more appropriate because it outlines the most logical procedure. There is a decision of the ECOWAS Court of Justice, which is transmitted to the Member State concerned for the purpose of enforcement in accordance with the applicable provisions of civil proceedings.

It should be noted that by providing for a special procedure for the enforcement of a specific type of decision of the ECOWAS Court (pecuniary orders), this provision aims to give a specific configuration to the principle of *Pacta Sun Servanda* in its relationship with Member States.

Thus, it follows from the interpretation of this provision that:

- ✓ The pecuniary orders of the ECOWAS Court of Justice constitute an *enforceable order*;
- ✓ The Registrar of the ECOWAS Court of Justice shall confer enforceability on the decision of the ECOWAS Court of Justice and transmit it to the Member State concerned for the purpose of enforcement in accordance with the applicable provisions of civil proceedings;
- ✓ The Member State shall designate a national authority responsible for the enforcement of the decisions of the ECOWAS Court of Justice;
- ✓ The *exequatur* formula given by the competent entity of the Member State should only consist of verifying the authenticity of the decisions of the ECOWAS Court of Justice;
- ✓ The verification of the authenticity of the ECOWAS Court of Justice decision can be done by the entity indicated by the Member State; in the case of a forced execution by a judicial entity, in this case the Judge; and
- ✓ The enforcement can only be suspended by a decision of the ECOWAS Court of Justice.

In fact, article 24 of the Additional Protocol departs from the general regime of *exequatur*, which presupposes the enforcement of judgments of foreign courts. This is the right approach, since, strictly speaking, the ECOWAS Court of Justice does not belong to any foreign state. It is a judicial body of the Member States of the Community, although it is not part of the judicial system of the Member States. Therefore, a differentiated treatment of its decisions compared to the decisions of foreign courts is justified.

It should also be said that Article 24 (1) of the 2005 Supplementary Protocol resolves a shortcoming in the decisions of international courts, which are normally declaratory. Therefore, Article 24 (1) of the Supplementary Protocol creates a new category of enforceable order in the legal order of the Member States.

3. The role of the National Authority responsible for the enforcement of ECOWAS Court of Justice decisions

By the spirit of Article 24(4) of the Additional Protocol, the indication of the national authority responsible for the enforcement of the decisions of the ECOWAS Court of Justice is of crucial importance. It would solve the problem of the tendency of States to take no interest in the enforcement of decisions in which they are condemned or found in violation by an international body.

Article 24(4) of the Additional Protocol introduces a new authority for the enforcement of international courts decisions, which will be responsible not only for promoting the voluntary enforcement of the ECOWAS Court of Justice decisions, but also for their compulsory enforcement. In this regard, an important change is introduced in the legal order of the Member States, since the national authority in question, besides the parties, will now have standing to initiate legal proceedings for the enforcement of the ECOWAS Court of Justice decisions.

4. The role of the parties in the enforcement of the ECOWAS Court of Justice decisions

The parties are the main stakeholders in a judicial proceeding. Once the declaratory decision has been obtained, it is up to them to promote its enforcement. Article 24(4) of the 2005 Supplementary Protocol focuses on the national authority that will be responsible for enforcing the decisions of the ECOWAS Court of Justice and says nothing about the role of the parties.

The question arises as to whether the omission in Article 24(4) of the Protocol exempts the parties from intervention in the enforcement. We think the answer is no. If declaratory proceedings belong to the parties, the appointment of a national authority responsible for the enforcement of the declaratory decision should be understood to strengthen the parties, not to exclude them from the enforcement.

It should be noted that the role of the parties is particularly important in cases where the national authority has not yet been appointed. In this case, the parties should be the ones to promote the enforcement of the ECOWAS Court of Justice decision, in particular the compulsory enforcement by the courts.

5. The liaison between the national authority and the parties

On the assumption that the national authority and the parties are all interested in the effective enforcement of the Court's decision, a liaison between them is necessary. However, the possibility of conflict or disagreement between the party that won the court case and the losing party or the national authority responsible for the enforcement cannot be ruled out.

In case of conflict, the interest of the winning party must prevail, especially when it comes to compulsory enforcement within the scope of a judicial proceedings. Although there is a national authority responsible for enforcement, the right lies with the party in whose favor enforcement is to take place.

6. Follow-up on the Enforcement of the ECOWAS Court of Justice Decisions

The Protocol and Rules of Procedure of the ECOWAS Court of Justice do not provide any mechanisms for enforcing the Court's decisions. Following on from what we have already said above, the follow-up to the enforcement of the Court's decisions will be done according to the type of decisions. In any case, we can admit two major follow-up scenarios: the general regime and the special regime.

a) General regime

Under the general regime, the follow-up of enforcement is done in classical terms, whereby the ECOWAS Court of Justice would have little relevance and the parties responsible for enforcement would have the control of means to do so, reporting only the outcome of the enforcement to the ECOWAS Court of Justice.

The question arises whether the ECOWAS Court of Justice can, through a court decision, find compliance or non-compliance with its decision.

The Protocol and the Rules of the Court say nothing about the issue. It appears that the ECOWAS Court of Justice has no mechanism that would allow it, in the same main proceedings, to find that the parties, and in particular the targeted Member State, have failed to comply with its decision.

However, it is conceivable that it may do so in the context of an autonomous procedure for failure to comply with Community law. In this case, it should be noted that, according to Article 10 (a) of the Protocol, individuals do not have access to this process.

b) Special Regime

Under the special regime, provided for in Article 24 of the Supplementary Protocol, follow-up of the enforcement of its decisions by the ECOWAS Court of Justice is done in conjunction with the national authority responsible for the enforcement and the parties. In case of voluntary compliance by the losing party, the national authority responsible for enforcement reports such compliance to the ECOWAS Court of Justice. If the latter is satisfied, the process is definitively terminated. Otherwise, the enforcement process will continue until the ECOWAS Court of Justice finds that its decision has been fully complied with, including recourse to compulsory enforcement.

This conclusion is supported by Article 24(5) of the Protocol, which provides that only the ECOWAS Court of Justice can suspend the enforcement of its decision.

6.1 Challenges of the Court Judgment Enforcement Mechanism: the dilemma of national courts

In relation to the general regime, i.e., when it comes to judgments handed down under Community jurisdiction or arbitration, there are no major constraints, since the enforcement of such judgments does not place the national judge under the direct jurisdiction of the ECOWAS Court of Justice.

The big challenge arises when it comes to the special regime, provided for in Article 24 of the Supplementary Protocol. Four (4) main challenges can be highlighted:

i. The question of national judge independence

A judge, by the nature of his or her duties, is independent and almost absolutely entitled to the process he or she conducts. In the performance of his/her duties, s/he does not receive instructions from other judges, even from higher courts. However, Article 24 (5) of the Supplementary Protocol intends the opposite, at least with regard to the suspension of enforcement, whereby only the ECOWAS Court of Justice can authorise it.

The submission of a national judge, who applies domestic rules, under the control of an international judge, who does not apply the same rules, creates a situation of potential conflict. The risk of such a conflict is even greater if we take into consideration that the Protocol and the Rules or the internal procedural instructions of the ECOWAS Court of Justice, say nothing about how the relationship between the national judge and the ECOWAS Court of Justice in enforcement matters should work in practice.

We think that placing a national judge under the dependence of an international judge when it comes to the application of internal enforcement rules is a problematic way to overcome the unwillingness of States. One should not lose sight of the fact that this lack of will on the part of States is a structural problem that also exists internally. It is not only a problem of international law. It is a problem that only the existence of a true rule of law in the Member States can solve.

ii. The need for protection of the public interest

Under Article 24 (1) of the Supplementary Protocol, a pecuniary order is an enforceable order and may therefore be subject to enforcement proceedings by national courts. In this case, the national enforcement judge becomes the natural judge of the case. Its decision to suspend an enforcement must depend on considerations of public interest or the appropriateness of the means of enforcement used. When the national enforcement Judge is subjected to the orders of an international Judge, s/he may be placed in the contingency of having to decide between obeying the decision of the ECOWAS Court of Justice and protecting the public interest.

For example, if the enforcement covers an asset whose seizure will endanger public health or internal security, its suspension by the national judge would be the most appropriate measure. If the ECOWAS Court of Justice will not authorise the suspension, the national judge will tend to decide not to continue with the

enforcement in order to protect the public interest to the detriment of the ECOWAS Court of Justice decision.

iii. The need to protect the interest of third parties

According to Article 24 (2) of the Supplementary Protocol, the enforcement procedure shall be carried out in accordance with the applicable provisions of the national Code of Civil Procedure, meaning the enforcement procedure. In cases where the enforcement proceedings involve third parties, they must be able to defend themselves and do so before the national judge and may use the appeal mechanisms available to them under domestic law.

As the appeals imply suspension of enforcement, the liaison with the ECOWAS Court of Justice for the purposes of suspending or not the enforcement, will not be possible because the ECOWAS Court of Justice has no procedural mechanisms to address appeals by these third parties in the framework of an ongoing compulsory enforcement at the national level.

iv. The issue of equality among the beneficiaries of justice

The decisions of the national courts are subject only to the national enforcement procedure, under the control of the national judge. In the case of decisions of the ECOWAS Court of Justice, their enforcement at the national level is partially controlled by the national courts. Hence, we have two regimes: one for the enforcement of national courts and the other for the enforcement of the ECOWAS Court of Justice decisions.

This duality of regime creates a framework in which beneficiaries of national justice may feel discriminated against, since national authorities can suspend the enforcement of national decisions but cannot suspend the decisions of the ECOWAS Court of Justice.

7. The Role of the ECOWAS Commission

The role of the ECOWAS Commission in enforcing the decisions of the ECOWAS Court of Justice depends on the type of decisions and cases in issue. If the ECOWAS Commission is condemned or found in violation by the ECOWAS Court of Justice, it must itself enforce the condemnatory decision. When it comes to cases involving other institutions of the Community, the ECOWAS Commission, being the highest executive organ of the Community, can be relevant in promoting the enforcement of decisions by the condemned institution.

The ECOWAS Commission will be most useful when it comes to other types of condemnations, where its intervention in the framework of what we call *enforcement diplomacy* is particularly relevant. We are thinking in particular of decisions that require a change in legislation, procedure or policies.

7.1 Comparative Analysis of the Enforcement Mechanism of ECOWAS Court of Justice Judgments and those of other Regional Courts

Here, we will do a comparative analysis, involving three institutions: a) the East African Community Court; b) the European Court of Human Rights; and c) the African Court of Human Rights.

a) East African Community Court of Justice

According to Article 44 of the East African Community Treaty and Article 74 of the Rules of Procedure of the Court of Justice of the East African Community (EAC), pecuniary orders are enforced in accordance with the rules of domestic civil procedure of the State Party involved. At the request of the interested party, the Registrar shall append the order for enforcement to the decision, after which enforcement may be initiated internally by the interested party (according to Article 74(3) of the Rules of Procedure). This is close to the regime under Article 24 of the Protocol on ECOWAS Court of Justice, the difference being that there is no mechanism for supervision of enforcement at the national level by the Community judge.

Regarding non-pecuniary orders, the silence of the EAC Treaty and the Rules of Procedure of the EAC Court indicates that the general regime of enforcement of decisions of international courts is followed, in which States are bound only by the result.

b) European Court of Human Rights

Under Article 46 of the European Convention on Human Rights (ECHR), the Council of Ministers of the European Council monitors the enforcement of the decisions of the European Court of Human Rights (ECtHR). If the Council of Ministers has difficulties in monitoring the enforcement of the ECtHR's decision because of doubts in its interpretation, it can request the ECtHR to clarify the issue at stake (Article 46(3) ECHR); if the Council of Ministers is not satisfied with the enforcement by the condemned (affected) state, it can request the ECtHR to decide whether there has been non-compliance.

If the ECtHR decides that there has been non-compliance, the matter goes back to the Council of Ministers to take appropriate action (Article 46(4) ECHR). If the ECtHR finds that there has been no non-compliance, the matter is referred back to the Council of Ministers and the follow-up enforcement procedure is closed (Article 46(5) ECHR). This is essentially a political-diplomatic mechanism, where judicial intervention is residual, being limited to interpretation and the establishment of non-compliance at the request of the Council of Ministers.

c) African Court on Human and Peoples' Rights

Article 29 (2) of the Protocol of the African Court on Human and Peoples' Rights (African Court) states that it is the responsibility of the Council of Ministers of the African Union (now the Executive Council of the African Union) to ensure the enforcement of the decisions of the African Court. In turn, Article 31 of the Protocol of the African Court mandates that the Court, when submitting its Activity Report to the Authority of Heads of State and Government of the African Union (Authority), must indicate which condemned States have not complied with its decision.

Until the new Regulation of September 25, 2020, the African Court did not judicially monitor the enforcement of its decisions. The follow-up was done on the basis of monitoring the submission of enforcement reports by condemned States. Failure to submit the enforcement report was considered as non-enforcement and this was included in the Activity Report of the African Court.

With the new Regulation, in Article 81, the African Court has established a judicial mechanism to follow-up on the enforcement of its decisions, under which it examines reports on enforcement measures submitted by condemned States, collects information on enforcement from various sources, organises hearings on the enforcement process and, in the event of non-compliance, finds it through a judicial decision and informs the AU Executive Council.

The African Court has a hybrid model, in which it combines the judicial follow-up, inspired by the IACHR⁷⁹² system, with the political model, inspired by the European model.

⁷⁹²See Article 69 of the January 2009 Rules of the Inter-American Court of Human Rights•

8. The involvement of political bodies in the enforcement of international court decisions

Every international Community or organisation, within which there is an international court, always has political bodies, namely the Authority of Heads of State and Government; the Councils of Ministers, in particular those of Justice or Foreign Affairs; the Parliaments or Parliamentary Committees; and the Commission or Executive Secretariat, as well as entities that house representatives of civil society, such as the Economic and Social Councils.

These bodies also have a role to play in the enforcement of the decisions of their respective courts. Their engagement is particularly important when it comes to decisions involving non-compliance with Community law or behaviour by States that calls into question the founding principles and values of the Community or organisation to which they belong.

9. International best practices

From what has been aforementioned about the practices of other courts, we cannot say that one or another institution has the best practice. Each institution has its strengths and weaknesses. Here are what we can consider some good options in terms of execution:

- Differentiation of the nature of decisions for enforcement and their follow-up mechanism, as is the case with the East African Court;
- Attributing the force of an enforceable order to pecuniary orders, as in the case of the East African Court;
- The submission of the compulsory enforcement of pecuniary orders to the national rules of civil procedure, placing the national judge in charge of the enforcement process, without depending on the international judge, as is the case of the East African Court;
- The existence of internal judicial mechanisms for monitoring enforcement, which can lead to a finding of non-compliance, as is the case with the African Court;
- The existence of a functional diplomatic political mechanism for following up on decisions, supported by the judicial instance whenever necessary, such as the European Court of Human Rights;
- Combination of the judicial enforcement mechanism with the diplomatic political mechanism, such as the African Court.

ii. Brief conclusions

The majority of international courts and tribunals reviewed, including the ECOWAS Court, directly or indirectly enshrine a general regime of enforcement, under which decisions on the merits are declaratory and therefore follow the general enforcement regime of general international law, whereby the parties, in particular the condemned state, are bound only by the result.

The special regime, which confers the force of an enforceable order on pecuniary orders, appears only in the ECOWAS Court of Justice and the East African Court.

The idea of having a national authority responsible for the enforcement of ECOWAS decisions in Article 24(4) of the ECOWAS Court of Justice Protocol is innovative and should be extended to all ECOWAS decisions that require enforcement at the national level. However, placing the national enforcement judge under the ECOWAS Court of Justice does not seem realistic to us. It stands on the ground that the international law and domestic law do not yet accommodate each other. On the other hand, it aims to solve an enforcement problem that is not even solved at the national level.

Despite the control over the enforcement of pecuniary orders, the Protocol and Rules of Procedure of the ECOWAS Court of Justice are silent on the normative framework for monitoring the enforcement of its decisions.

10. Recommendations

To make the enforcement mechanism for ECOWAS Court of Justice decisions more effective, the following changes are needed:

- i. The Regulation of the follow-up mechanisms for the different types of the ECOWAS Court of Justice decisions, covering its diverse material scope of competence: Community, arbitral and human rights.
- ii. The regulation of follow-up mechanisms should include the diplomatic political monitoring mechanism, especially for the enforcement of non-pecuniary orders. An ECOWAS Committee of Ambassadors or Representatives can perform this function.
- iii. Monitoring compliance with ECOWAS Court of Justice decisions should include organising hearings or field trips, if necessary, and may lead to a finding of non-compliance or not;
- iv. The extension of the competence of the national authority responsible for the enforcement of ECOWAS Court of Justice decisions to non-pecuniary orders.

- v. The total submission of the process of enforcement of pecuniary orders to the national courts, and the intervention of the ECOWAS Court of Justice will be only to verify the compliance or non-compliance with its decision.
- vi. In countries that do not have the automatic reception system for international law, they should amend their legislation to incorporate pecuniary orders as an enforceable order.

Thank you very much!

**AN APPRAISAL OF THE JUDGMENT ENFORCEMENT
MECHANISM OF THE ECOWAS COURT OF JUSTICE
BY
ANTHONY ANENE-MAIDOH**

FORMER CHIEF REGISTRAR, COMMUNITY COURT OF JUSTICE

Introduction

The ECOWAS Community Court of Justice (ECCJ) has churned out a large number of judgments⁷⁹³ since its establishment, but its judgment enforcement mechanism has not enabled the effective implementation of its judgments. Generally, international courts and tribunals often encounter challenges in the enforcement of their judgments, and the ECCJ is not an exception. Since they usually do not have at their disposal coercive organs for the enforcement of their judgments, they invariably rely on state parties to either voluntarily comply with their judgments or to use their coercive organs and municipal procedures to enforce the judgments under municipal law. State parties under the international law principle of *pacta sunt servanda* (agreements shall be complied with) are expected to voluntarily comply in good faith, with the judgments of international courts and tribunals that they set up under a treaty. Where state parties fail to voluntarily comply, the judgment enforcement mechanism becomes of utmost significance.

The former Registrar of the International Court of Justice, Hague (ICJ) Mr Philippe Cuvreur on 4th May, 2009,⁷⁹⁴ made a comment about the challenges of enforcement of decisions of international courts and tribunals and particularly that of ECOWAS Court of Justice. He stated that state parties comply with judgments of the ICJ not because of the United Nations Security Council, but because it is in their interest to comply. Furthermore, that that is the only way such state parties, can show that they are part of the civilized world. Secondly, that the international community, through bilateral and multilateral actions, also exert pressure on state parties to comply with the judgments of the ICJ. An example was the multilateral pressure that was mounted on Nigeria to sign the Green Tree Agreement in June 2006, in respect of the implementation of the judgment of the ICJ, by the United States, France, Britain and Germany, particularly the United States, compelling Nigeria to comply with the judgment of the Court in the land and maritime boundary dispute between Nigeria and Cameroun, where the Court ruled that Cameroun was the rightful owner of the oil rich Bakassi Peninsula on 10th October, 2002. After intensive bilateral and multilateral pressure, the Green Tree Agreement between Nigeria and Cameroun was brokered by the United Nations and

⁷⁹³349 Judgments as at 16th March, 2023 out of which 141 judgments are enforceable

⁷⁹⁴Report of the One Day Visit by the Chief Registrar of the Community Court of Justice, ECOWAS, Mr. Tony Anene-Maidoh to the International Court of Justice at the Hague on the 4th day of May 2009

witnessed/guaranteed by four world powers, Britain, France, Germany and United States on 12th June, 2006.⁷⁹⁵

The initial Protocol on the ECOWAS Court of Justice did not provide any method for enforcement of the judgments of the Court. This lacuna was remedied by the 2005 Supplementary Protocol on the Court which provided the method of enforcement in a new Article 24. The provision gave each Member State the responsibility for the enforcement of the judgments of the Court in accordance with its Rules of Civil Procedure.⁷⁹⁶

Although Article 24(4) of the 2005 Supplementary Protocol on the Court, provides that each Member State shall determine the competent national authority for the purpose of reception and processing of the writ of execution of the judgments of the Court in its territory, only seven Member States have complied. This therefore poses a challenge for the enforcement of the judgments of the Court. However, it is noteworthy that some countries that are yet to appoint national authorities have complied with some decisions and judgments of the Court. Notwithstanding the provision of a method of enforcement of the decisions of the Court in the Protocol (as amended), the compliance rate with the judgments of the Court remains unsatisfactory. No Member State has communicated to the Court the status of decisions and judgments complied with so far.

Due to the failure of the Member States to render returns to ECCJ on the implementation of its judgments, the effort by the Court to determine whether or not Member States are in full or partial compliance or non-compliance, has been fraught with difficulties. However, the Court has been able to get unofficial information from lawyers and parties involved in some cases. The statistics on compliance with/enforcement of the judgments of the Court, which the Court has compiled from such sources as at 16 March, 2023, shows that a total of eight (8) Member States have complied in varying degrees with some judgments of the Court.⁷⁹⁷

⁷⁹⁵The Green Tree Agreement stipulated that Nigeria will unconditionally hand over the Bakassi Peninsula to Cameroun. On 14th August 2006, Nigeria pulled out its military from the Bakassi Peninsula and the Cameroonian flag was hoisted there. Two years later, the rest of the Nigerian Police and other administrative presence pulled out of Bakassi Peninsula.

⁷⁹⁶Article 24(2) of Supplementary Protocol A/SP.1/01/05 relating to the Community Court of Justice, ECOWAS

ECOWAS Institutions	-	7 judgments
Burkina Faso	-	1 Judgment
Republic of Liberia	-	2 judgments
Republic of the Gambia	-	1 Judgment

It equally shows, that although some Member States that have not yet determined the appropriate national authority for the enforcement of the judgments of the Court, they have in several cases complied with the judgments of the Court.⁷⁹⁸ It must however be noted that, a majority of the judgments of the Court are yet to be complied with or enforced. The statistics of the Court shows that out of one hundred and forty-one (141) enforceable decisions delivered by the Court against Member States and ECOWAS Institutions, since the adoption of the Supplementary Protocol on the Court, only thirty-four (34) of the said decisions have been complied with.

The above statistics clearly show that the status of compliance with/enforcement of decisions of ECOWAS Court of Justice by Member States and Institutions of the Community is not satisfactory because it shows a less than thirty percent (standing at approximately 24.1%) compliance rate. It is noteworthy that apart from the case of *Chude Mba v. Ghana*,⁷⁹⁹ where an effort was made to enforce the judgment of the ECCJ before a national court, the judgment enforcement mechanism of the Court has not been well tested before the national courts of Member States.

However, the efforts that were made in some cases to enforce the judgments of the ECCJ before national courts and the ECOWAS Court of Justice failed woefully because of the failure by Member States to domesticate the ECOWAS Revised Treaty and Protocols on the Court, lack of good faith by Member States in complying with their Treaty obligations and design faults in the judgments enforcement Mechanism of the Court.⁸⁰⁰

Republic of Niger	-	3 judgments
Republic of Mali	-	1 judgment
Federal Republic of Nigeria	-	14 Judgments
Republic of Sierra Leone	-	1 Judgments
Republic of Togo	-	2 judgments
Individuals/Companies	-	3 Judgments

⁷⁹⁸See (2) Report on compliance/enforcement of the decisions of the Community Court of Justice

⁷⁹⁹(2013) CCJLER, 335

⁸⁰⁰*Chude Mba v. Ghana* (2013) CCJLER, 335; *FIDC v. Liberia*, Suit No. ECW/CCJ/APP/08/15, Judgment No. ECW/CCJ/JUD/23/18; *Alhaji Samuel Sam Sumana v. Sierra Leone* Suit No: ECW/CCJ/APP/38/16/ENF; *Rose Mbatomon Ako v. West Africa Monetary Agency* Suit No. ECW/CCJ/APP/33/17. Judgment No. ECW/CCJ/JUD/05/20

Member States have transplanted their bad national habits of disobedience to court judgments to the regional level, while the hands of the national courts and the ECOWAS Court of Justice have been tied in the implementation of the judgments of the Court due to several factors. Consequently, the ECOWAS Court of Justice has repeatedly held that it has no power to enforce its own judgment.

The Court is therefore facing a lot of challenges in the enforcement of its judgments. It is not in doubt that most international courts and tribunals have challenges in the enforcement of their judgments but some fare better than the others. The ECCJ like other international courts, does not have any direct coercive power over non-compliant Member States. This paper therefore, highlights the judgment compliance/enforcement statistics of the ECCJ and reviews the judgment enforcement mechanism of the Court, the challenges militating against it, with a comparative analysis of the enforcement mechanism of other regional courts, and finally explores ways and means of improving compliance or strengthening the enforcement mechanism in accordance with international best practice.

1. Judgment Compliance/Enforcement Statistics of the ECOWAS Court of Justice

The official statistics of the Court, as contained in the revised report of the committee⁸⁰¹ set up by the Court, regarding the rate of compliance with/enforcement of the judgments of the Court by Member States or Institutions of the Community, reveal that the compliance/enforcement rate is less than thirty percent (24.1%). It is noteworthy that no Member State or Institution of the Community has rendered returns on compliance/enforcement to the Court. Ideally, the competent national authority of each Member State ought to render returns to the Court on compliance/enforcement.⁸⁰² Only eight Member States out of fifteen Member States of ECOWAS, have appointed the competent national authority, and seven out of the eight that have been appointed are yet to render returns. The statistics of the Court have therefore been compiled from the information furnished by counsel/parties, to the enquiries made by the Court on compliance/enforcement.

⁸⁰¹Report of the Committee on the Status of Enforcement and Compliance with the Judgments of the Court dated 16th March, 2023

⁸⁰²Article 24(4) of the Protocol on the Court as amended

The statistics reveal the total number of judgments⁸⁰³ delivered by the Court since 2004, the number of enforceable judgments⁸⁰⁴ which excludes the cases dismissed or withdrawn or declaratory reliefs⁸⁰⁵ (unenforceable judgments), the number of enforceable judgments complied with /enforced⁸⁰⁶ and the number of enforceable judgments not complied with/enforced.⁸⁰⁷ The statistics also reveal the above information in respect of the Member States and some Institutions of the Community.

The records of the Court show that between 27 April 2004 when the Court delivered its first judgment in *Olajide Afolabi v. Nigeria*⁸⁰⁸ and 16 March, 2023, the Court has delivered a total of three hundred and forty-nine (349) judgments. The statistics of the Court show that out of this number, only one hundred and forty one (141) are enforceable judgments and two hundred and eight (208) judgements are not enforceable. Out of the enforceable judgments, only thirty four (34) judgments have been complied with/enforced and one hundred and seven (107) judgments are yet to be complied with/enforced. The report of the Committee shows that the Committee was able establish contact and receive feedback from lawyers/parties in ninety - seven (97) of these judgments but was unable to establish contact in eighteen (18) judgments. The statistics of the Court shows further that eight Member States have complied with the judgments of the Court in varying degrees. The Member States are Burkina Faso, Gambia, Ghana, Liberia, Mali, Nigeria, Sierra Leone and Togo. Nigeria, presently has the highest rate of compliance out of these eight Member States

2. Overview of the Method of Enforcement of the Judgments of the ECOWAS Court of Justice

2.1 Basic Principle of Pacta Sunt Servanda

The basic principle governing the enforcement of judgment of international courts is *pacta sunt servanda*, which can be construed as meaning that every treaty in force is binding upon the parties and must be performed by them in good faith.

⁸⁰³349 Judgments

⁸⁰⁴141 Judgments

⁸⁰⁵208 Judgments

⁸⁰⁶34 Judgments

⁸⁰⁷107 Judgments

⁸⁰⁸(2004 – 2009) CJJELR, 1

This Latin phrase, which may be literally translated as 'treaties shall be complied with', describes a significant general principle of international law—one that underlies the entire system of treaty-based relations between sovereign States.⁸⁰⁹ State practice over the centuries has recognised the fundamental significance of *pacta sunt servanda* as a principle or rule of international law.

The good faith element of this principle suggests that States should take the necessary steps to comply with the object and purpose of the treaty. States may not invoke restrictions imposed by domestic law as good reason for not complying with their treaty obligations. The foregoing is in line with Article 27 of the Vienna Convention on the Law of Treaties which provides that a State '*may not invoke the provisions of its internal law as justification for its failure to perform a treaty*'.

In the 2009 Judgment of *Mexico v. the United States of America*,⁸¹⁰ the International Court of Justice held that 'considerations of domestic law' hindering the implementation of international obligations could not 'relieve' the relevant state of its obligation. Attempts by state parties to a treaty to withdraw from its obligations under the said treaty under the guise of the treaty being incompatible with their domestic laws, can be likened to a company choosing to rescind a valid contract on the grounds of concerns raised by its board of directors that the said contract was in contradiction with the company's charter, which justification cannot be allowed to stand in law.

The doctrine of *pacta sunt servanda* in public international law originated due to the need to put an end to the prevalent wars between sovereign States that occurred during the mid- seventeenth century, specifically between 1618 -1648. The principle has many definitions but what is common to all the said definitions is that the principle is premised on the need for state parties to an international treaty, to abide by the provisions of the treaty in good faith. This principle of customary international law was codified in the Vienna Convention on the Law of Treaties (1969). Article 26 of the Vienna Treaty provides that 'every treaty in force is

⁸⁰⁹See Article 26 of the Vienna Convention on the Law of Treaties of 23 May, 1969

⁸¹⁰*Mexico v. United States of America* (Apr. 2009), The American Journal of International Law, vol. 103, No. 2, pp. 362-364

binding upon the parties to it and must be performed by them in good faith'.⁸¹¹ The Vienna Treaty also provides for the exceptions to this principle, which are as follows:

1. where the state relies on the impossibility of performance as a ground for terminating treaty obligations⁸¹²
2. Where the state relies on fundamental change of circumstances as a ground for terminating treaty obligations.⁸¹³

The International Court of Justice in the *Nuclear Tests Case of 1974* expanded the scope of the application of the customary international law principle of *pacta sunt servanda*, where it held that unilateral declarations could have the effect of creating legal obligations on state parties. In the words of the Court:

when it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.⁸¹⁴

The Court further held that:

Just as the law of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus, interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.⁸¹⁵

The ECOWAS Community texts that provide that the judgments of the Court are binding have their basis in the maxim “*Pacta Sunt Servanda*” as enunciated in Article 26 of the Vienna Convention on the Law of Treaties of 23 May, 1969, in respect of implementation of decisions, which provides that every treaty in force is binding on parties to the treaty and must be executed in good faith. The treaty requires that States meet their obligations in good faith.

⁸¹¹<<http://historyhub.ie/pacta-sunt-servanda-once-again-the-story-of-greece-and-ireland>> (assessed on 8th November, 2018); http://historyhub.ie/wp-content/files_mf/1436861849PatrickHealy_WP14.pdf (assessed on 8th November, 2018)

⁸¹²Article 61 of the Vienna Treaty

⁸¹³Article 62 of the Vienna Treaty

⁸¹⁴1974 I.C.J. Rep. 253, para. 43

⁸¹⁵1974 I.C.J. Rep. 253 para 46

It is therefore expected that Member States will implement the ECOWAS Revised Treaty and the Protocol on the Court which are binding on them in good faith in accordance with the principle of *pacta sunt servanda*. Secondly, the Member States also have an obligation to comply with the decisions of ECCJ since they amount to their treaty obligations, in accordance with the framework of the Revised Treaty, Protocol on the Court and the Supplementary Act on Sanctions Against Member States that Fail to Fulfill their Obligations to ECOWAS.⁸¹⁶

2.2. Judgments of the ECCJ are Binding Obligations on Member States

The ECOWAS Revised Treaty provides that judgments of the ECOWAS Court of Justice are binding on Member States, Institutions of the Community, individuals, and corporate bodies.⁸¹⁷ The Supplementary Act on Sanctions Against Member States that Fail to Honour Their Obligations to ECOWAS also has a similar provision.⁸¹⁸ The initial Protocol on the Court also provides⁸¹⁹ that the decisions of the Court shall be final and immediately enforceable. The Protocol further provides that Member States and institutions of the Community shall take immediately all necessary measures to ensure execution of the decisions of the Court.⁸²⁰ These provisions are founded on the principle of *pacta sunt servanda*. Article 24 of the Protocol on the Court as amended prescribed for the first time, the method of enforcement of the judgments of the Court. However, an intriguing dimension was introduced by Article 24(1) which provides that: '*Judgments of the Court that have financial implications for nationals of Member States or Member States are binding*'.

It was not clear why this distinction between judgments that have financial implications and judgments that do not have financial implication was made. Does this presuppose that the judgments of the Court that do not have financial implications for nationals of Member States or Member States are not binding?

⁸¹⁶See Article 2(3) Supplementary Act on Sanctions against Member States that fail to Honour their Obligations to ECOWAS (2012)

⁸¹⁷Article 15 (4) of the ECOWAS Revised Treaty, 1993. Article 5 and 6 of the Supplementary Act on Sanctions, 2012

⁸¹⁸Article 2(3) The Supplementary Act on Sanctions against Member States that Fail to Honour Their Obligations to ECOWAS

⁸¹⁹Article 19(2), Protocol A/P1/7/91 on the Community Court of Justice, ECOWAS.

⁸²⁰Article 22 (3) now 23 (3)

This provision is unnecessary and should otherwise have been redundant in view of the provisions of Article 15 (4) of the Revised Treaty that provides that judgments of the Court shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies. Fortunately, this unnecessary distinction between judgments with financial implications and those without financial implications was removed by Article 5 of Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS, which provides that:

The Community Court of Justice shall deliver Judgments which include but not limited to financial sanctions against Member States in application of Article 24, paragraph 1 of the Protocol relating to the Community Court of Justice as amended by Article 6 of Supplementary Protocol A/SP.1/01/05 of 19th January, 2005 when it notices that they have failed to honour their obligations as stated in the Community texts.⁸²¹

2.3 Method of Implementation of the Judgments of the Court

Under the Protocol on the Court as amended, Member States are given the responsibility of executing the judgments of the Court in accordance with their Rules of Civil Procedure, specifically, Article 24(2) of the Protocol on the Court provides as follows:

Execution of any decision of the Court shall be in the form of a 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 that Member State.

The Protocol also provides that 'upon the verification by the appointed authority of the recipient Member State that the writ is from the Court, the writ shall be enforced'.⁸²² Furthermore, that 'all Member States shall determine the competent national authority for the purposes of receipt and processing of execution and notify the Court accordingly'.⁸²³

⁸²¹Articles 5 & 6 of the Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS

⁸²²Article 24 (3) Supplementary Protocol A/SP.1/01/05 (2005) amending the Protocol A/P1/7/91 relating to the Community Court of Justice, ECOWAS

⁸²³Article 24 (4) Supplementary Protocol A/SP.1/01/05 (2005) amending the Protocol A/P1/7/91 relating to the Community Court of Justice, ECOWAS

Although, 'The writ of execution issued by the Court may be suspended only by a decision of the Community Court of Justice'.⁸²⁴ In essence, the writ of execution remains valid and binding on Member States and can only be set aside by an order of the ECOWAS Court of Justice.

Notwithstanding the above provisions, enforcement of the decisions of the Court still remains a major challenge. As stated earlier, since the adoption of the Supplementary Protocol in January 2005, only Seven (7) Member States; Guinea,⁸²⁵ Nigeria,⁸²⁶ Mali,⁸²⁷ Burkina Faso,⁸²⁸ Togo,⁸²⁹ Ghana,⁸³⁰ and Cote d'Ivoire⁸³¹ have appointed the competent national authority for the enforcement of the judgments of the Court as stipulated by Article 24 (4) of the Protocol.⁸³²

It however appears that the provisions of Article 24 of the Protocol do not go far enough as there are obvious shortcomings. According to Kamara:

The lack of sufficient provisions in Community Instruments to ensure the enforcement of the decisions of the court and the fact that Articles 20 and 24 of the Protocol on the court as amended and Article 77 of the ECOWAS Revised Treaty, are regrettably insufficient to ensure that decisions of the court are enforced, as the enforcement of said decisions are still dependent on authority of Member States.⁸³³

The 2012 Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS was an important addition to the enforcement mechanism of the Court. It provided for political and judicial sanctions against Member States or their leaders that fail to honour their obligations to the community,⁸³⁴ including the judgments of the Court.

⁸²⁴Article 24 (5) Supplementary Protocol A/SP.1/01/05 (2005) amending the Protocol A/P1/7/91 relating to the Community Court of Justice, ECOWAS

⁸²⁵2006

⁸²⁶2011

⁸²⁷2015

⁸²⁹2016

⁸³⁰2018

⁸³¹2020

⁸³²2022

⁸³³Guinea , Nigeria , Mali , Burkina Faso , Togo , Ghana , and Cote d'Ivoire

J Kamara, 'The Law and practice of the ECOWAS Community Court of Justice' (2006),

< <http://www.carl.sl.org/home/articles/132-the-law-and-practice-of-the-ecowas-community-court-of-justice>> (assessed on 20 June, 2021).

⁸³⁴Article 3(1) of Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS

Although the details of the political sanctions were provided in the said Supplementary Act,⁸³⁵ there were no details of the judicial sanctions. Some stakeholders see this as a drawback but others are of a different view, as it gives the Court discretion to impose whatever judicial sanctions it deems fit. For instance, the Court could follow the precedence of the European Court of Justice, which imposes lump sum or day to day sanctions until compliance.

Confronted with the problem of non-compliance with the judgments of the European Court of Justice, the EU Member States added with the Treaty of Maastricht a new provision to the EC Treaty which seeks to secure respect for ECJ judgments. The new procedure according to Article 228 of the EC Treaty is a special judicial procedure for the enforcement of judgments that provides for the imposition of penalty payments or lump sums by the ECJ on a Member State which fails to comply with an earlier judgment of the ECJ that a Member State is in breach of its obligations under Community law.⁸³⁶ For instance, the European Court of Justice ordered Sweden to make a lump sum payment of 3 Million Euro for failing to comply with a decision of the Court within the time limit for adopting the laws, regulations and administrative provision, necessary to comply with a Directive. The Commission had brought a subsequent action asking the Court to order Sweden to pay a daily penalty for each day that Sweden delays in complying with the judgment. However, following the adoption by the Swedish Parliament of measures to comply with the Directive, the Commission withdrew the request for a daily penalty payment but maintained its claim regarding the payment of a lump sum. The Court held that it was necessary to order Sweden to make a lump sum payment as it had failed to fulfil its obligations under EU law.⁸³⁷

It should be noted that the Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS also provides that 'the sanctions defined in Article 5 to 11 of the Supplementary Act shall be enforced in increasing order of severity'.⁸³⁸ Obviously, the said Supplementary Act adds to the options available to the Court.

⁸³⁵Article 5 & 6 of Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS

⁸³⁶Memo/05/482, Brussels, , Financial Penalties for Member States who fail to comply with Judgments of the European Court of Justice: European Commission clarifies rules, 14 December 2005

⁸³⁷<<https://www.insideprivacy.com/data-security/sweden-hit-with-3m-penalty-payment-fo...>> assessed on 27/03/2021

⁸³⁸Article 13 of Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS

The continued non-compliance with the decisions of the Court by some Member States and attempts by others to narrow the Court's jurisdiction, constitute an existential threat to the ECCJ. Sometimes, the hostile human rights posture of a Member State could change if a human rights friendly government ascends to power. A typical example of this is The Gambia, after the ousting of the government of Yahyah Jammeh. This is evident in the letter to the Court by Femi Falana, SAN in 2018, where he stated as follows:

I am delighted to inform you that recent political developments in the region and our pressure have changed the attitude of some governments with respect to compliance with the judgments of the Court. Pls find below our progress report:

1. The current government in The Gambia has pledged to pay the damages awarded by the Court in the cases of Ebrima Menneh and Musa Saidykhan. I have been in touch with the Attorney-General of the country on the matter.
2. The government of Sierra Leone negotiated the damages awarded to El Tayib- Bah and eventually paid him \$150,000.
3. The Attorney-General of Nigeria has arranged a meeting with us to negotiate the sum of N80 billion damages awarded to the victims of bombs and mines in the South East. I will give you a report next week on the rate of compliance with other judgments of the Court by the Government of Nigeria.
4. I am going to meet the President of Ghana in Accra after the Easter holiday to press for the payment of the \$250,000 damages awarded in favour of Mr. Oguikwe whose 15-year old son was killed in Ghana.
5. The two leading political parties in Sierra Leone are discussing with ex-VP Sam Sumana on their readiness to comply with the judgment of the ECOWAS court. The picture will become clear by next week after the rerun election.⁸³⁸

⁸³⁹Email from Femi Falana, SAN to the Chief Registrar of the ECOWAS Court of Justice dated 25 March, 2018 at 7:00am

2.4 The Role of Member States in the Enforcement of the Judgments of the ECOWAS Court of Justice

Article 24 of the Protocol on the Court specifies the role of Member States in the enforcement of the judgments of ECCJ. The Protocol gives Member States the responsibility to enforce the judgments of the Court in accordance with their Rules of Civil Procedure. The Court amplified the role of Member States in its declaration of the Community legal order,⁸⁴⁰ in *Jerry Ugokwe v. FRN*,⁸⁴¹ where it made it clear that the Court relies on the national courts of Member States for the enforcement of its decisions. In the words of the Court:

...the distinctive feature of the Community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law. And if the obligation to implement the decision of the Community Court of Justice lies with the national courts of Member States, the kind of relationship existing between the Community Court and these National Courts of Member States are not of a vertical nature between the Community and the Member States, but demands an integrated Community legal order.⁸⁴²

The Court reaffirmed the Community legal order in *Bakary Sarre & 28 ORS v. Republic of Mali*,⁸⁴³ in the following words:

Now, in its Judgment No ECW/CCJ/JUD/03/05 of 7 October 2005 (paragraph 32), relating to Suit No ECW/CCJ/APP/02/05, *Jerry Ugokwe v. Nigeria and Christian Okeke*, the Court stated that cases made against decisions of national courts of Member States do not form part of its jurisdiction, the specific nature of the Community legal order of ECOWAS being that it sanctions a judicial monism without necessarily endorsing the primacy of the Community law; if the obligation to enforce the decisions of the Community Court of Justice is binding on the domestic

⁸⁴⁰*Jerry Ugokwe v Federal Republic of Nigeria*, ECW/CCJ/JUD/03/05 and *Bakary Sarre v Republic of Mali* ECW/CCJ/JUD/03/11

⁸⁴¹(2004 -2009) CCJELR 37

⁸⁴²Paragraph 32 of the judgment

⁸⁴³(2011) CCJELR 57

Courts of the Member States, that obligation does not imply a hierarchy in the judicial order between the Community and Member States, but requires an integrated Community legal order. The Court of Justice of ECOWAS is not an appellate Court or a Court of cassation over the national Courts.⁸⁴⁴

The combined effect of the community legal order as declared by the Court and Article 24 of the Protocol on the Court as amended, is that the judgments of the ECOWAS Court of Justice are to be enforced by the national court of Member States in accordance with their municipal rules of civil procedure. However, a majority of the Member States (8) have not taken the initiative to appoint a competent national authority for the enforcement of the judgments of the Court in accordance with Article 24 of the Protocol on the Court as amended. This ought to be the first step taken by every Member State to actualise their role in the judgment enforcement mechanism of the Court. The statistics of the Court on the status of compliance with/enforcement of the judgments of the Court clearly shows that the rate of compliance with the judgments of the Court by the Member States is not very satisfactory. Even the Member States that are willing to comply have legal constraints, arising from the non-domestication of ECOWAS Revised Treaty and the Protocol on the Court and the absence of an enabling legal framework for the enforcement of the judgments of the Court in their countries. These and several other challenges are militating against the enforcement of the judgments of the Court by the national courts of Member States and will be discussed in latter part of this paper.

The judgment enforcement mechanism of the ECOWAS Court of Justice was tested for the very first time in the case of *Chude Mba v. Republic of Ghana*⁸⁴⁵ and it barely survived. Following the judgment of the ECOWAS Court of Justice in the above case on the 6th day of November, 2013, the Plaintiff/ Applicant who was the successful party in the case before the ECOWAS Court of Justice, brought an application before the Accra High Court for the enforcement of the judgment of the ECOWAS Court of Justice in the above mentioned case. The Application for enforcement before the Accra High Court failed. It must be noted that as at the time of the Application in 2016,

⁸⁴⁴Paragraph 29 of the Judgment

⁸⁴⁵(2013) CCJELR, 335

the Republic of Ghana had not yet appointed a competent national authority for the enforcement of the judgments of the Court⁸⁴⁶ but this was not even the reason for the failure of the application, which was mainly on the ground of non-domestication of the ECOWAS Revised Treaty and Protocols in the Republic of Ghana. According to Hon. Justice Suurbaareh, of the High Court of Accra:

From the schedules to L11575 of 1993, the ECOWAS Community Court is not stated as one of the Courts to which the legislation applies as submitted by learned counsel for the respondent. It is true that Protocols of ECOWAS Community Court have been ratified as can be seen from Exhibit "NAA 2" but does this alone make the orders of the Court enforceable by this Court? Since Ghana is a dualist state, after the ratification of treaties by Parliament, the position of municipal law will not be altered until they are incorporated into municipal or Ghanaian law by legislation. Without legislation making the orders of the ECOWAS Community Court binding on or enforceable by our Courts, the mere ratification of Protocols will not make them have the force of law. DATE-BAH JSC. IN THE REPUBLIC VRS HIGH COURT (COMMERCIAL DIVISION) ACCRA; (NML CAPITAL LTD & ANO – INTERESTED PARTIES); CIVIL MOTION NO J5/10/2013 delivered on the 20th day of June, 2013, held that the mere fact that a treaty has been ratified by Parliament in one of the ways provided by the Constitution 1992, does not of itself mean that it has been incorporated into Ghanaian law. In the view of the learned Judge, a treaty may come into force and regulate the rights and obligations of the State on the international plane without changing the rights and obligations under municipal law. The learned Judge went on to state that the need for legislative incorporation of treaty provisions into municipal law before domestic Courts can apply them, was not only reflective of the dualist stance of the Commonwealth Common Law Courts, but was also backed by a long line of authorities (some of which he proceeded to refer to) and concluded that this Common Law position is not

⁸⁴⁶Ghana became the 6th ECOWAS Member State to appoint a competent national authority when it appointed on 11th June 2020 the Attorney general and Minister of Justice as the competent national authority for the purpose of enforcement of judgments of the ECOWAS Community Court of Justice (Court) in the Republic of Ghana

altered by the directive principles of state policy and to the Executive contained in articles 40 and 73 respectively of the Constitution 1992 as they cannot be interpreted to alter the dualist stance of Ghanaian law and do not authorize Courts to enforce treaty provisions that change rights and obligations in the municipal law of Ghana without legislative backing.

From the foregoing, as it is not in doubt that Parliament has not enacted any legislation incorporating the ECOWAS Community Court Protocols into municipal law and that the ECOWAS Community Court is not stated in the schedules to LI1575, it means that its orders cannot be enforced by this Court. The application therefore fails and the same is dismissed. I make no order as to cost.⁸⁴⁷

The Plaintiff/Applicant having failed to enforce the said judgment of the ECOWAS Court of Justice before the Accra High Court, returned to the ECOWAS Court of Justice with another application for enforcement of the judgment against Ghana and the fourteen other Member States of ECOWAS, the President of ECOWAS Commission and the Chairman of the Authority of Heads of State and Government of ECOWAS. But before the hearing of the application for enforcement of the judgment before ECOWAS Court of Justice, the Plaintiff/Applicant went back to another Accra High Court, for the enforcement of the judgment and this time, a consent judgment was entered by the Court based on the terms of settlement filed by the parties. The judgment of the ECOWAS Court of Justice was eventually enforced by the Accra High Court based on its consent judgment. The application for the enforcement of said judgement before the ECOWAS Court of Justice, eventually failed.

3. New Trend: Timeframe for Report on Implementation of Judgments

In an attempt to circumvent the structural weakness in the judgment enforcement mechanism of the ECOWAS Court of Justice, since the Court lacks the power to supervise and monitor the implementation of its judgments, or power to enforce its judgments, the Court has adopted a new innovative approach since October 2020, by stipulating in its judgments a timeframe for the liable Member State to report to the Court on the implementation of the judgment. The timeframe usually varies between three and six months.

⁸⁴⁷Page 7 and 8 of the Ruling

This is a new trend by the ECCJ and it has been consistent in including the reporting stipulation in its judgments since it adopted this novel approach. It has done this in a large number of its recent judgments. However, no Member State has so far complied with the requirement to report on the implementation of the judgment of the Court as contained in the judgments. Information from the registry of the Court as at 16th March 2023, shows that the Court has delivered twenty-five (25) judgments, with a time frame for reporting back on the implementation.

4. Comparative Analysis of the Methods of Enforcement of the Judgements of other Regional Courts

Enforcement of the decisions of international courts is a systemic problem in the regional international human rights systems. Due to the fact that some human rights treaties provide for only rudimentary enforcement procedures, they experience challenges in the enforcement of their judgments. This could be attributed to lack of adequate legal and institutional framework and good faith that are necessary for the implementation of the judgments. Every regional system has a method of enforcement of its judgments that is peculiar to it and some have a better rate of compliance than others. In order to benefit from international best practice, and learn from the experience of others, it is desirable to conduct a comparative analysis of the different methods of enforcement of the judgments of some regional courts.

Currently, there are three major regional systems. These are: the African human rights system, the Inter-American system, and the European system. The key features of the methods of enforcement of their judgments are discussed hereunder:

4.1 The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights is a continental court established by African States to ensure the protection of human and peoples' rights in Africa. The Court reinforces and compliments the African Commission on Human and Peoples' Rights. Articles 29, 30, and 31 of the Protocol on the Court provide the method of enforcement of the judgments of the Court.

The Protocol provides that 'Parties to a case should be notified of the judgments of the Court and the said judgment is to be further transmitted to Member States of the OAU and the Commission'.⁸⁴⁸ The Protocol further provides for the 'Council of Ministers to be notified of the judgment and monitor its execution on behalf of the Assembly'.⁸⁴⁹ State Parties to the Protocol also undertook 'to comply with the judgment in any case to which they are parties within the time stipulated by the Court and they are to guarantee the execution of same'.⁸⁵⁰

Also, 'the Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgment'.⁸⁵¹ In the same vein, the Rules of the African Court on Human and Peoples Rights provide that 'the judgment of the Court shall be binding on the parties'⁸⁵² and that 'the Executive Council shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly'.⁸⁵³ Furthermore, the Protocol contains similar provisions on the binding nature of judgments similar to those in the Protocol on ECCJ. It clearly provides that 'the decision of the Court shall be binding on the parties and that subject to the provisions of paragraph 3, Article 41 of the present Statute, the judgment of the Court is final'.⁸⁵⁴

Also, 'the parties must comply with the judgment made by the Court in any dispute to which they are parties. This compliance is expected to be within the time stipulated by the Court and shall guarantee its execution'.⁸⁵⁵ 'Where a party has failed to comply with the judgment, the Court shall refer the matter to the Assembly, which shall decide upon measures to be taken to give effect to that judgment'.⁸⁵⁶ 'The Assembly may impose sanctions by virtue of paragraph 2 of Article 23 of the Constitutive Act'.⁸⁵⁷ The various provisions above are clear on the method of enforcement of the Court's decisions. It provides for 'the Court to refer matters to the Assembly where parties fail to comply with judgments and decisions of the Court.

⁸⁴⁸Article 29(1) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights

⁸⁴⁹Article 29 (2) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights

⁸⁵⁰Article 30 of the Protocol on the Establishment of the African Court on Human and Peoples' Rights

⁸⁵¹Article 31 of the Protocol on the Establishment of the African Court on Human and Peoples' Rights

⁸⁵²Rule 61(5), Rules of the African Court on Human and Peoples' Rights

⁸⁵³Rule 64(2), Rules of the African Court on Human and Peoples' Rights

⁸⁵⁴Article 46(1) of the Protocol on Statute of the African Court on Human and Peoples' Rights

⁸⁵⁵Article 46(3) of the Protocol on Statute of the African Court on Human and Peoples' Rights

⁸⁵⁶Article 46(4) of the Protocol on Statute of the African Court on Human and Peoples' Rights

⁸⁵⁷Article 46(5) of the Protocol on Statute of the African Court on Human and Peoples' Rights

The Assembly in turn, is empowered to decide upon measures to be taken to give effect to that judgment'.⁸⁵⁸

The ECCJ does not have a similar provision in its Protocol that allows it to notify and transmit judgments and decisions to Member States and to the ECOWAS Commission or to monitor the implementation of the judgments. Furthermore, the Council of Ministers of ECOWAS are not empowered to monitor the enforcement of the Court's judgments, unlike that of the African Court, where both the Council of Ministers and Executive Council, monitor the execution of judgment on behalf of the Assembly. Nothing empowers the ECCJ to refer defaulters that fail to comply with its judgments to the ECOWAS Commission, the Council of Ministers or the Authority of Heads of States and Government. The African Court system shows active political involvement in the implementation mechanism and therefore rests within the political realm.

5. The Inter-American Human Rights Court

Under the Inter-American Human Rights system, the Inter-American Commission on Human Rights is vested with the power to request for state report from Member States regarding their human rights situation. The Commission is vested with broad powers in relation to country reports. Article 65 of the American Convention establishes the obligation of the court to submit an annual report to the General Assembly of the Organization of the American States (OAS) concerning the work of the Court and this report has to specify the cases in which a State has not complied with the court's judgments.⁸⁵⁹ The Inter-American Convention also provides that to each regular session of the General Assembly of the Organization of American States, the court is to submit, for the Assembly's consideration, a report on its work during the previous year. The report is to specify, in particular, the cases in which a state has not complied with its judgments and make recommendations.⁸⁶⁰

However, several annual reports that have been submitted to the General Assembly on cases in which the State Parties had failed to comply with the judgments of the Inter-American Court on Human Rights (IACtHR), were never attended to by the General Assembly.

⁸⁵⁸ Article 46 (1), (2), (3), (4) and (5) Protocol on The Statute of The African Court of Justice and Human Rights

⁸⁵⁹ Article 65, American Convention on Human Rights

⁸⁶⁰ Article 65 of the American Convention (Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969)

It soon became apparent that the General Assembly lacked the political will to support the Court. Hence, the IACtHR had to derive from the American Convention on Human Rights (ACHR), a proper monitoring procedure of its judgments. Although it was initially challenged by the Republic of Panama, but it has now become a generally acceptable practice and has also been incorporated into the rules of the IACtHR. The first step taken by the IACtHR towards establishing a monitoring mechanism for its judgment, was under the presidency of Hon. Judge Cançado Trindade. He advocated through several mediums that Article 65 of the ACHR should be amended to include a new sentence according to which reports of cases of non-execution that are submitted by the IACtHR to the Assembly were presented to the Committee on Juridical and Political Affairs of the Permanent Council, for it to study the matter and inform the Assembly. This was in a bid to guarantee the permanent supervision of the compliance of judgments of the Court. However, this proposal was not supported within the Community.

The Court again had the opportunity to establish a proper monitoring program for the compliance with the judgments of the Court in the 2002 case between *Beena Ricardo et al v. Panama*,⁸⁶¹ where the Court declared that it had competence to monitor its decisions.⁸⁶² The Court based its decision on the fact that in order to be able to inform the OAS General Assembly, it was necessary for the Court itself to know the degree of compliance with its decisions. The IACtHR conducted its first hearing on monitoring of judgments in 2007 with the case of *Bulacio v. Argentina*.⁸⁶³ Subsequently, it also conducted hearings on monitoring in *Sawhoyamaya Indigenous Community v. Paraguay*.⁸⁶⁴ Since 2010, the IACtHR has regularly convened public and private hearings on monitoring of its decisions.⁸⁶⁵

The procedure for monitoring compliance with the judgments and other decisions of the court requires the submission of reports by the State and observations to those reports by the victims or their legal representatives.

⁸⁶¹IACHR Series C No 72, [2001] IACHR 2, IHRL 1455 (IACHR 2001), 2nd February 2001, Inter-American Court of Human Rights [IACtHR]

⁸⁶²<https://www.researchgate.net/publication/270412162_The_Execution_of_Judgments_of_the_European_and_Inter-American_Courts_of_Human_Rights> assessed on 16/09/2021

⁸⁶³Case 11.752, Inter-Am. C.H.R., Report No. 29/98, OEA/Ser.L/V/II.102, doc. 6 rev. (1998)

⁸⁶⁴IACtHR, Annual Report of the Inter-American Court of Human Rights 2009, p. 65

⁸⁶⁵<https://www.researchgate.net/publication/270412162_The_Execution_of_Judgments_of_the_European_and_Inter-American_Courts_of_Human_Rights>assessed on 16/09/2021

In turn, the Commission presents observations to the State's reports and to the observations of the victims or their representatives. Interestingly, the Court may require from other sources of information, relevant data regarding the case in order to evaluate compliance. To that end, the Court has been authorized to request the expert opinions or reports that it considers appropriate. In case of a finding of non-enforcement, additional, more detailed obligations may be imposed upon the State in order to ensure compliance.⁸⁶⁶

The ECCJ is not vested with similar powers by its Protocol to submit a report to the Council of Ministers or the Authority of Heads of State and Government on its work during the previous year and the cases in which a State has not complied with its judgments. Although, the ECCJ submits its annual report to the ECOWAS Commission for inclusion in the President of the Commission's annual report, it does not include the status of implementation of its judgments.

5.1 The European Court of Human Rights

The European system is set up on the auspices of the Council of Europe. The principal Convention of the system is the European Convention on Human Rights and Fundamental Freedoms which entered into force in 1953. The method of enforcement of the decisions of the ECCJ is remarkably different from the method of execution of judgment of the European Court on Human Rights which is more result oriented. Before the establishment of the current system, the European system had both a Commission and a Court. The Committee of Ministers is a body of the Council of Europe entrusted with the tasks of supervising the implementation of the decisions of the European Court of Human rights. The Committee of Ministers has developed its own rules for exercising its task of supervising the implementation of the decisions of the court of human rights. Monitoring and ensuring execution of judgments of the European Court on Human Rights (ECHR) is done through one of the most advanced treaty-based systems in the field of human rights.⁸⁶⁷

⁸⁶⁶Article 69 (2) of the Rules of Procedure of the Inter-American Court; CC Naddeo, '*The Inter-American System of Human Rights: A Research Guide*' <http://www.nyulawglobal.org/globalex/Inter_American_Human_Rights.html> (assessed on 16 September 2021).

⁸⁶⁷D Shelton, *The Oxford handbook of International Human Rights Law*, (2013) Oxford: Oxford University Press, 356

As soon as a judgment is delivered by the ECtHR against a Defendant State, the judgment is transmitted to the Committee who then prepares an agenda for the DH/HR (DIRECTORATE GENERAL OF HUMAN RIGHTS AND LEGAL AFFAIRS) meetings. Judgments are treated on the basis of their urgency. The Committee has adopted a dual approach to its monitoring and supervision procedure, by sorting cases in accordance to their importance into a standard or enhanced category. Judgments which require urgent measures, pilot judgments, judgments identifying major structural or complex problems, or interstate cases are placed under the enhanced category. While those that do not fit into any of the abovementioned groups shall be placed under the standard category. It should however be noted that Member States and the Secretariat of the Council of Europe may propose that a judgment be placed under the enhanced procedure.

Applicants are not allowed to participate in the monitoring process. However, an Applicant can forward his submissions to the Committee during the supervision stage, intimating the Committee on the status of execution of its judgment. NGOs and national institutions may also make submissions during the supervision and monitoring process but they are barred from participating in the Committee's sessions as the sessions are generally held in private. Action plans or reports, which are documents that show the measures taken by the Defendant State to comply to the Court's judgment, are relied on by the Committee to monitor or supervise the implementation of its decisions. The Committee requires that the abovementioned documents are forwarded to it within six months after the judgment of the court has been delivered. The Committee's authority under the standard procedure is limited to confirmation of receipt of the reports or action plans. When an action report has been received by the Committee, the Defendant State may apply for the conclusion of the supervision process at the next DH/HR meeting or within six months from the presentation of the report. After the report is received by the Committee, the Department of Execution of the Secretary to the Committee, will make a preliminary evaluation of the action plan and measures proposed therein at the next DH/HR meeting or no later than six months after submission of the plan. If the report is acceptable by the Committee, the Defendant State is then obligated to keep the Committee updated on the implementation of the proposed measures in the report.

⁸⁶⁶The Committee is the Council of Europe's decision-making body.

When the Defendant State has adopted all the proposed measures in its report, the State Party then presents a final action report and requests that the case be closed.

When a case is placed in the enhanced supervision category, the Execution Department usually works closely with the Defendant State to adopt the measure required for the implementation of the judgments. It provides assistance to the Defendant State in the preparation and implementation of action plans. The Execution Department also provides expert opinions on the types of measures envisaged and the bilateral/multilateral cooperation programmes, on complex and substantive issues. Unlike the standard procedure, there is no need to debate the case at the DH/HR meeting, only in exceptional circumstances where there is a need to present developments in the case or outline shortcomings to the public. Both supervision methods adopted by the Committee are not exclusive and could be applied in a flexible manner depending on the progress of the case.

Enhanced supervision procedure is thus adopted where the Defendant State fails to submit its action plan for the implementation of the judgments of the court or when there is a variance in opinion between the Defendant State and the Department of Execution of the Secretariat General.⁸⁶⁹ Two basic provisions govern; Article 46 of the ECHR, which provides for the supervision of the ECHR judgments, and Article 39 of the ECHR, which provides for the supervision of the terms of friendly settlements. Article 46 entrusts the task of monitoring the States parties' implementation of the Court's judgments to the Committee of Ministers (CM). The European system is generally recognised as having the highest level of compliance with decisions on individual complaints, in particular with regard to monetary compensation.

The judgment of the Court is transmitted to the Committee of Ministers, which supervises its execution. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it could refer the matter to the Court for a ruling on the question of interpretation. Where the Committee of Ministers considers that a party refuses to abide by a judgment in a case to which it is a party, it may, after serving formal notice on that party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation.

⁸⁶⁹<https://www.researchgate.net/publication/270412162_The_Execution_of_Judgments_of_the_European_and_Inter-American_Courts_of_Human_Rights>(assessed on 12 November 2018)

If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken.⁸⁷⁰ The ECtHR Committee of Ministers has an Execution Department staffed by lawyers.

Unlike the European System, where the Convention provides for the Committee of Ministers to monitor compliance with the judgments of the European Court of Human Rights, the ECOWAS Court of Justice Protocol, does not have any provision similar to that. The role of the ECOWAS Council of Ministers in the enforcement mechanism of the ECOWAS Court's decisions is yet to be defined like in the case of the European Court of Human Rights. Furthermore, the ECOWAS Court of Justice judgment enforcement mechanism lacks the robust monitoring and supervision structure in the European Court of Human Rights judgment enforcement mechanism.

6. Challenges in the Judgment Enforcement Mechanism of the ECOWAS Court of Justice

6.1 Non-Appointment of Competent National Authorities

Eight Member States⁸⁷¹ of ECOWAS are yet to be appoint the competent national authority as required under Article 24(4) of the Protocol on the Court. The failure of these Member States to appoint a competent national authority despite repeated demands by the Court, is a breach of their treaty obligation, which is having an adverse effect on the enforcement of the judgments of the Court by their national courts. The importance of the competent national authorities cannot be over emphasised because they are responsible for receiving, verifying and processing the Writ of Execution from the Court and for rendering returns on enforcement to the Court.⁸⁷² In other words, they are responsible for the enforcement of the judgments of the Court before the national courts of the Member States, in accordance with their Rules of Civil Procedure. Therefore, the competent national authorities constitute the link between the ECOWAS Court of Justice and the national courts of Member States. Failure to appoint the competent national authorities is a huge handicap.

⁸⁷⁰Article 46, European Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950

⁸⁷¹Benin, Cape Verde, Guinea Bissau, Liberia, Niger, Sierra Leone, Senegal & The Gambia

⁸⁷²Article 24(2), (3) & (4) of the Protocol on the Court as amended.

6.2 Lack of Implementing Legislation for the Enforcement of the Judgments of ECCJ by National Courts

Another challenge the national courts of Member States may have in respect of the enforcement of the judgments of the ECOWAS Court of Justice is the absence of domestic legislation or legal framework enabling or empowering them to recognise, receive and enforce the judgments of ECCJ. The national courts do not have domestic legislation which specifically mentions the judgments of the ECOWAS Court of Justice and the specific method of enforcement on which to anchor applications for enforcement of the judgments of ECCJ. Scholars have debated this point at length. According to Enabulele:

The need for a complete synergy between the Community Court Protocol and the laws of Community States is further stressed by the fact that Article 24 of the Protocol relies on the institutions of the Community States in line with the relevant Civil Procedure Rules for the enforcement of its judgment. In this regard, the relevant Constitutions of Community States must be obliged by their municipal law to receive and enforce the judgment of a non-forum Court. This underscores, the enactment of legislation permitting the recognition and enforcement of foreign judgments to give legal backing to forum Courts to recognize and enforce same.

Unless a strong regime of enforcement mechanism anchored on municipal law, and having international consequences for violating countries is fashioned out, the Community Court, like its sister Courts in Africa, will exist only in name and structure without any effective contribution to individual well-being within the sub region. In this wise, it is important for Community States to take a cue from their European Communities (EU) and Council of Europe counterparts in respectively creating a Court that will drive the desired integration, as did the European Court of Justice (ECJ) and one that provides an effective mechanism for human rights enforcement, as the European Court of Human Rights (ECEHR)⁸⁷³

⁸⁷³AO Enabulele, 'Reflections on ECOWAS Community Court Protocol and the Constitutions of Member States', (2010), *International Community Law Review* 12 111- 138 at page 113

6.3 Failure to Domesticate the Revised Treaty and the Protocol on the Court by Member States

Another challenge militating against the enforcement of the judgments of the Court is the non- domestication of the Revised ECOWAS Treaty and Protocols on the Court by Member States in accordance with the Revised Treaty. Article 5(2) of the Revised Treaty provides as follows:

Each Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty.

Failure to domesticate the Revised Treaty and the Protocol on the Court as required by the above provision, constitutes a major challenge for the enforcement of the judgments of ECCJ by national courts of Member States, especially for the dualist common law countries, since the ECOWAS Community texts do not have the force of law without domestication. For such countries, international law does not confer enforceable rights on individuals within the state until the international law has been domesticated, no matter how beneficial the treaty is to the nationals.⁸⁷⁴ Scholars have dwelt at length on this issue. In the words of Enabulele:⁸⁷⁵

This is because it is an established principle acted upon by Courts of dualist countries, that unimplemented treaties cannot have the force of law. In *Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors v. Medical and Health Workers Union of Nigeria*, both the Nigerian Court of Appeal and the Supreme Court held that the International Labour Organization Convention, not having been domesticated by the National Assembly, cannot be applied in Nigeria.

In *Dow v. Attorney General of Botswana*, the Botswana Court of Appeal held that international Human Rights instruments do not have automatic application in Botswana's domestic law, unless incorporated by legislation. In the Swaziland's case of *Professor Dlamini v. The King*, it was held that the provisions of the African Charter on Human and Peoples' Rights, cannot be enforced by the domestic Courts unless Parliament has by legislation incorporated them into the municipal law of Swaziland.

⁸⁷⁴(2001) AHRLR 172 (NgSC 2000)

⁸⁷⁵Enabulele, n 81 above.

On the other hand, the Nigerian Court of Appeal and the Supreme Court had no problem enforcing the African Charter on Human and People's Rights in Nigeria in the case of *Abacha v. Fawehinmi*, the said treaty having been passed into law by the National Assembly as “The African Charter on Human and People's Rights (Ratification and Enforcement) Act.

The negative impact of non-domestication was recently highlighted by the decision of a High Court in Accra, Ghana,⁸⁷⁶ in *Chude Mba v Republic of Ghana*. The High Court refused to enforce the judgment of ECCJ in the above case on the ground that the Protocol on the Court had not been incorporated into the domestic law of Ghana. The decision of the Ghana High Court has grave implications for the continued existence of the ECOWAS Court of Justice. It is therefore expedient that urgent measures be taken by all Member States to domesticate the ECOWAS Revised Treaty and the Protocol on the Court in accordance with the provisions of the Revised Treaty.

6.4 Non-involvement of ECOWAS Political Authorities

It has been noted that the Revised Treaty and Protocol on the Court do not provide any roles or involvement of the ECOWAS political authorities in the implementation of the judgment of the Court like the political authorities in some regional systems. This is a handicap because political authorities are better suited to provide the necessary monitoring and supervisory roles for the implementation of the judgments of the Court. They are also better suited to provide the political will that is required for compliance or enforcement. The ECOWAS Council of Ministers and the Authorities of Heads of State and Government of ECOWAS ought to be involved in the enforcement of the judgments of the Court, in order for the enforcement mechanism to have the necessary bite.

The mere fact of naming and shaming defaulting Member States before the Council of Ministers or the Summit of Heads of State and Government, will spur some of them to comply. For instance, there is an effective involvement of the political authorities in the implementation of the judgments of the European Court of Human Rights, the African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights.

⁸⁷⁶In Suit No:HRCM/376/15 (2/02/2016). *Chude Mba v Republic of Ghana*

6.5 ECCJ plays no role in the enforcement of its judgments

It is also a challenge that the Revised Treaty and the Protocol on the Court do not provide any role for the ECOWAS Court of Justice in monitoring and supervising the implementation of its judgments. Under the current enforcement mechanism, once the Court pronounces its judgment, it has no powers to monitor and supervise the implementation of the judgments, like some other regional courts e.g. the African Court on Human and Peoples' Rights, the European Court of Human Rights, and the Inter-American Court.

The jurisprudence of the ECOWAS Court of Justice shows very clearly that the Court does not have jurisdiction to enforce its own judgments or that of the national courts of Member States. This was succinctly captured by the Court in *Dr. Rose Mbatomon Ako v. The West African Monetary Agency*⁸⁷⁷ in the following words:

Again, assuming the Plaintiff is bonafide vested with a final judgment from the High Court of Sierra Leone, it has been unequivocally established by the jurisprudence of this Court that it lacks the competence to enforce judgments generally and by implication from national Courts. In the decided case of FINANCE INVESTMENT & DEVELOPMENT CORPORATION v. THE REPUBLIC OF LIBERIA (General List No. ECW/CCJ/APP/08/15 and Judgment No. ECW/CCJ/JUD/23/18, this Court reviewed its earlier decisions on the issue and ruled that; “this Court lacks the jurisdiction to sit on appeal over decisions of national Courts. Furthermore, this Court not being an enforcing body for decisions of national Courts of Member States, lacks the capacity to compel enforcement of decisions of national Court”.

Besides the absence of jurisdiction in cases seeking the enforcement of the Court's judgments as decided by this Court in many cases, the texts of the Court give the enforcement of its judgments to the national Courts. It would be incongruous on the part of this Court to turn round purporting to enforce judgments from the national Courts. In fact this Court has no known judicial mechanisms for the enforcement of judgments generally, including its own and that of any national Court.⁸⁷⁸

⁸⁷⁷Suit No. ECW/CCJ/APP/33/17. Judgment No. ECW/CCJ/JUD/05/20

⁸⁷⁸Paragraph ⁵² of the Judgment

This was the position of the Court in many other cases.⁸⁷⁹

However, since the Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS gives the Court power to impose judicial sanctions,⁸⁸⁰ it could be argued that on an application by a judgment creditor, the Court could impose whatever judicial sanctions it deems fit. A Member State that fails to comply with the judgments of the Court may in addition be liable to political sanctions in accordance with the provisions of the above Supplementary Act.

It however appears that it is impossible for judgment creditors to take advantage of the provisions of the 2012 Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS, in respect of political and judicial sanctions because it is only the Member States or the President of the Commission that can trigger the sanctions regime under the Act. In a recent decision of 13th March, 2023, the ECOWAS Court of Justice refused the claim for judicial sanctions by the Applicant, who attempted to enforce the decision of the Court in *Alhaji Samuel Sam Sumana v. Republic of Sierra Leone*⁸⁸¹ on the grounds that the Applicant lacked locus, since the sanctions regime under the Act can only be triggered by a Member State or the President of the Commission.

It is therefore obvious that judgment creditors cannot derive any benefit from the 2012 Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS, unless individuals and corporate bodies are given power to trigger the sanctions regime under the Act. It is therefore necessary to amend the 2012 Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS to grant individuals and corporate bodies, powers to trigger the sanctions regime under the Act.

⁸⁷⁹*Aziagbede Koukou & 33 Ors Etc; v. Republic of Togo* Judgment No: ECW/CCJ/JUD/07/13, *Les Etablissements Vamo & Ors v. Benin*; Suit No. ECW/CCJ/APP/12/15, *FIDC v. Liberia*, Suit No. ECW/CCJ/APP/08/15, Judgment No. ECW/CCJ/JUD/23/18

⁸⁸⁰Article 6, 7, 8, 9, 10, 11 & 12 of Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations

⁸⁸¹Suit No: ECW/CCJ/APP/38/16/ENF

6.6 Dilemma: Are ECCJ Judgments Foreign judgments or Community Judgments directly applicable in Member States in the Context of ECOWAS Community Law

There is a challenge arising from the uncertainty as to how the national courts of Member States should recognise and receive the judgments of ECCJ. The question is, should national courts of Member States receive and enforce the judgments of ECCJ as foreign judgments in accordance with the Rules of enforcement of foreign judgments or are the judgments directly applicable in Member States as the judgments of community court that is supranational in nature? It has been contended in some quarters that the judgments of the Court could be enforced by Member States as foreign judgments.⁸⁸² Some Member States therefore view the judgments of the Court as foreign judgments. The simple justification for this viewpoint is that they are not the judgments of the national courts but that of a non-forum court and must therefore be foreign judgments. Secondly, there already exists domestic legislation for the recognition, reception and enforcement of foreign judgments, especially for common law countries in the form of Foreign Judgments Enforcement Act. In their view, the judgments of ECOWAS Court of Justice neatly fall into this pigeon hole and should therefore be enforced by the national courts of Member States as foreign judgments.

On the other hand, it has been contended that in the context of ECOWAS community law, the judgments of ECCJ cannot be viewed as foreign judgments because they ought to be directly applicable in Member States, in accordance with the integrated community legal order as declared by the Court. According to Enabulele:

It has been argued that the decisions of the ECCJ should be directly applicable in Member States because its basis is community law, which ought to be of superior weight to decisions of national courts.

That the national courts are required by provisions of the 1991 Protocol on the ECCJ to execute decisions of the ECOWAS Court. It has been advocated for the decisions of the ECCJ to be enforced by the Supreme Courts of Member States in order to reinforce the fact that the judgment of the ECCJ becomes automatically part of the national law and the highest precedential value. Also, that the ECCJ ought to enforce provisions of the Revised Treaty on Member States, through its decisions.

⁸⁸²Enabulele, n 81 above.

The basis of this argument is that ECOWAS is a supranational authority and ECOWAS Court of Justice is a supranational Court, therefore the Regulations of ECOWAS and judgments of ECCJ are directly applicable in Member States in the context of ECOWAS community law. In the words of ECCJ in *Musa Saidykhan v. Republic of the Gambia*:⁸⁸³

... ECOWAS is a supra national authority created by the Member States wherein they expressly ceded some of their sovereign powers to ECOWAS to act in their common interest. Therefore, in respect of those areas where the Members States have ceded part of their sovereign powers to ECOWAS, the rules made by ECOWAS supersede rules made by individual Member States if they are inconsistent. The Revised Treaty of ECOWAS was ratified by all the Member States of ECOWAS, including the Defendant/Applicant herein. This Court is the offspring of the Revised Treaty; and this Court is empowered by the Supplementary Protocol on the Court of Justice, which is part of the instruments of implementation of the Treaty and has the same legal force as the Treaty, to adjudicate on issues of human rights arising out of the Member States of ECOWAS.

Therefore, it is untenable for a Member State of ECOWAS to claim that a matter is essentially within its domestic jurisdiction when it had expressly or by necessary implication granted ECOWAS powers to act solely or concurrently with national jurisdiction in respect of that matter. Defendant/Applicant herein, being bound by both the Revised Treaty and the Supplementary Protocol on the Court of Justice which granted jurisdiction over human rights causes are matters essentially within their domestic jurisdiction and for which reason this Court ought not to interfere with them.

Article 2 of the United Nations Charter, which seeks to prevent interference in the domestic affairs of sovereign States is not applicable here. Article 2 of that Charter applies to matters that are essentially domestic in nature and over which the state in question has not acquired any international obligation in respect thereof. When a sovereign state freely assumes international obligations and is being held accountable in respect of those obligations, that state cannot renounce those obligations under the pretext that the matter in question is one that falls essentially within its domestic jurisdiction.

⁸⁸³(2010) CCJELR 139

Defendant/Applicant, being a Member State of ECOWAS, is bound by the obligations that it has assumed under the Revised Treaty and the Protocols thereof. Consequently, Article 2 of the United Nations Charter does not enure to the benefit of Defendant/Applicant in this case.⁸⁸⁴

Member States guard their sovereignties jealously but it must be pointed out that in agreeing to establish a supranational authority like ECOWAS, they must necessarily cede part of their sovereignty to ECOWAS to act on their behalf in areas of common interest. Furthermore, the new legal regime of ECOWAS⁸⁸⁵ envisages the direct application of Regulations made by the Community in the Member States. The need for Member States to recognise that they have ceded part of their sovereignty in the areas of common interest and therefore subsume their municipal law in areas of common competences to the overriding competence of ECOWAS was emphasised by Ebobrah in the following words:

The amalgamation of diverse sovereignties into ECOWAS with shared and exclusive competences cannot be achieved without huge cost to national competences which have either been ceded to, or have to be shared with ECOWAS. By the integrative nature of its provisions, the Revised Treaty stands upon an undertaking that Member States would align to, and subsume their municipal law in areas of coincident competences to the overriding competence of ECOWAS. It is by no means possible for a subject to be regulated by two different systems of law when each claims superiority.

This is even as ECOWAS consists of 15 sovereignties whose national interests and policies do not always coincide, so that it is not an option to allow each to take unilateral policies or actions in the area of competence of ECOWAS. Such would only amount to inventing centrifugal forces that would pull the organization in diverse directions.⁸⁸⁶

⁸⁸⁴(2010) CCJELR 139 (Paragraphs 48, 49 and 50 of the Ruling of the Court of 30th June 2009 in *Musa Saidu Khan v. The Republic of the Gambia*, ECW/CCJ/APP/11/07)

⁸⁸⁵New Article 9 of the Revised Treaty Supplementary Protocol A/SP.1/06/06

⁸⁸⁶ST Ebobrah, 'Enforcement of Judgments of the ECOWAS Court of Justice: Matters Arising' (2016)

6.7 Lack of Political Will

A common challenge amongst Member States in the implementation of the judgments of the ECCJ is the lack of political will, coupled with a culture of disobedience to court orders and judgments. Consequently, the determination or intention by political leaders in Member States to achieve the desired outcome is sometimes lacking. The ECOWAS Court of Justice has therefore been impacted by this lack of political will, the most obvious being the lack of political will to comply with/enforce the judgments of the Court. The most obvious manifestation is the failure by some Member States to designate the competent national authority for the enforcement of the judgments of the Court consistent with the extant Protocol on the Court, eighteen years after the provision was made in 2005, and the low compliance rate of less than thirty percent (24.1%). The lack of political will is also evident in the failure of Member States to domesticate the Revised Treaty and other ECOWAS Community texts that would have given the Revised Treaty and the Protocol on the Court, the force of law in dualist Member States.

Member States have also not demonstrated the political will to Institute actions or sanctions against defaulting Member States that fail to fulfil their Community obligations of complying with /enforcing decisions of the ECCJ. Equally, the ECOWAS Commission has also exhibited lack of political will in failing to initiate procedures for sanctions against defaulting Member States in accordance with the provisions of the Supplementary Act on Sanctions Against Member States that fail to Fulfill their Community Obligations to ECOWAS.

Compliance with the judgments of the ECOWAS Court of Justice is a community obligation for all Member States, for which failure can be punished with sanctions but the Authority of Heads of States and Government has equally not demonstrated the necessary of political will to sanction defaulting Member States in accordance with Article 77 of ECOWAS Revised Treaty.

7. Re-Design of the Judgment Enforcement Mechanism of the Court

The future prospects of the Court will increase dramatically if the low compliance rate with the judgments of the Court is reversed. The rate of compliance with / enforcement of the judgments of the Court will increase, if the mechanism for the enforcement of judgments of the Court is re-designed in accordance with international best practice.

This will take into account mechanism of the ECOWAS Court of Justice with a view to incorporating useful measures in the judgment enforcement mechanism of other regional courts.

2. Domestication of the Revised Treaty, Protocols on the Court and other ECOWAS texts by Member States (incorporation into the domestic laws of Member States) in accordance with Article 5(2) of the Revised Treaty.
3. Enactment of implementing legislation for the enforcement of judgments of ECCJ by all ECOWAS Member States to enable national courts of Member States to recognize and enforce the judgments of ECOWAS Court of Justice.
4. Involvement of the ECOWAS Commission and ECOWAS political authorities, like the Council of Ministers and Authority of Heads of States and Government in the judgment enforcement mechanism of the ECOWAS Court of Justice.
5. A Committee of Ministers should be constituted to monitor and supervise the enforcement of the judgments and decisions of the Court like in the European Court system enforcement mechanism.
6. The Court should be empowered to send its own Annual Report to the ECOWAS Council of Ministers and/or the Authority of Heads of State and Government on the status of compliance of its judgments like in the African Human Rights System and Inter-American Court of Human Rights enforcement mechanism.
7. Upon delivery of a judgment, a copy should be sent to the President of ECOWAS Commission and all the Member States, notifying them of the decision of the Court in order to ensure that steps are taken towards enforcing same.
8. A Unit should be established at the ECOWAS Commission for the purpose of monitoring the enforcement of judgments of the Court. The Unit should be given the mandate to follow-up, investigate and verify the level of compliance with the decisions of the Court, in collaboration with the Registrar, Appeals, Arbitration and Enforcement Division of the Court. ECOWAS Court of Justice should also carry out a study on the compliance/

enforcement of its judgments by Member States.

9. The Court should be empowered by its Protocol, to include specific time-limits or general guidelines for compliance with its decisions and judgments. After the expiration of such time or on the initiative of the judgment creditor, the winning party could reapply unilaterally for a declaration of non-compliance.
10. The powers of the Court under the 2012 Supplementary Act on Sanctions against Member States that Fail to Honour Their Obligations to ECOWAS, should be amended to expressly empower the Court to impose judicial sanctions for non-compliance with its judgments in the form of day to day or lump sum monetary penalty.
9. The ECCJ should also be empowered to monitor and supervise the execution of its judgments.
10. The Protocol on the Court should be amended to strengthen its judgment enforcement mechanism. Also, Article 77 of the Revised Treaty and the 2012 Supplementary Act on Sanctions against Member States that Fail to Honour Their Obligations to ECOWAS should also be amended in order to grant individuals and corporate bodies powers to trigger the sanctions regime the Act.

9. Conclusion

The rate of compliance by Member States with the judgements of the Court is currently very low and the judgment enforcement mechanism of the Court is not very satisfactory. Although the ECCJ enjoys the respect of ECOWAS Community citizens and ECOWAS Member States as its decisions are not summarily dismissed by any Member State, the non-compliance with the decisions of the ECCJ by some Member States, can erode confidence in the Court. Therefore, the continued non-compliance with the Court's decisions by Member States may give rise to loss of confidence by the public. The key selling points of the Court are its independence, boldness and impartiality. In the administration of justice, there is a corollary between the speedy dispensation of justice by a Court, its independence, impartiality, boldness and effectiveness and public trust and confidence. In the West African sub-region, the Community Court of Justice, ECOWAS has gained credibility for its bold judicial pronouncements. There is therefore a need to

strengthen the enforcement mechanism of the Court in order not to render the Court a toothless bull dog.

The Court, like other international tribunals relies on the cooperation of States to comply with its decisions in good faith. The Court can only provide effective legal remedies when its judgment are complied with by Member States in accordance with the principle of *Pacta Sunt Servanda*. The judgments of the Court are binding and Member States have an obligation to comply. However, where Member States fail to voluntarily comply with decisions of the Court, the importance and relevance of an effective judgment enforcement mechanism cannot be over emphasised. The review of the judgment enforcement mechanism of the ECOWAS Court of Justice has therefore become imperative.

The prospects of the ECOWAS Court of Justice must be viewed in the light of the purpose of its establishment, how well it has fulfilled this role and the possibility of playing a more effective role in the integration process and more importantly, the effectiveness of its judgment enforcement mechanism. The Court can only remain credible or maintain public trust and confidence, only if its judgments are respected and complied with by Member States.

In the final analysis, there is an urgent need to re- design the judgment enforcement Mechanism of the Court for greater effectiveness, and for Member States to domesticate the ECOWAS Revised Treaty and Protocols on the Court and exhibit greater willingness to comply with the judgments of the Court in good faith.

**AN APPRAISAL OF THE JUDGMENT ENFORCEMENT
MECHANISM OF THE ECOWAS COURT OF JUSTICE
BY
PROF. MUHAMMED TAWFIQ LADAN (PhD)**

DIRECTOR GENERAL, NIGERIAN INSTITUTE OF ADVANCED LEGAL STUDIES, ABUJA

1. Introduction

The ECOWAS Community Court of Justice (ECCJ) is an integral key component and an organ of the regional economic integration body in West Africa as clearly enshrined in the 1991 Protocol, which came into force in 1996. Having provided for an ECOWAS Court, the 1991 Protocol mandated it to resolve disputes between ECOWAS Member States, interpret Community Rules and issue advisory opinions to the Member States and institutions. The ECOWAS Revised Treaty of 1993 also provided for the establishment of the ECOWAS Court, the judgements of which are to be binding on all Member States, Community institutions, individuals, and corporate bodies. It also provided that a related protocol would set out the modalities for the functioning of the court. The ECCJ was established by virtue of Article 6 of the Revised Treaty of ECOWAS, 1993 and the Protocol (A/P1/7/91) on the Community Court of Justice 1991, as amended by the Supplementary Protocol of 2005, with a four-fold mandate as a Community Court, an Administrative Tribunal, an Arbitration Tribunal and a Human Rights Court.

The amendment of the 1991 Protocol by the 2005 Supplementary Protocol, expanded the jurisdiction of the Court to adjudicate on cases of human rights violations that occur within the jurisdiction of the Member States, which has enabled the Court to utilise its powers to ensure the protection of the human rights of ECOWAS Citizens. Furthermore, the Protocol, as amended by the 2005 Supplementary Protocol, has eliminated the limiting requirement of the exhaustion of local remedies as is required in most international tribunals / courts, thereby facilitating the timely dispensation of justice to victims of human rights violations in the West African region.

⁸⁸⁷Protocol A/P1/7/91 on the Community Court of Justice, July 6 of 1991, entered into force on 5 November 1996.

⁸⁸⁸As above, Article 9 (2-3).

⁸⁸⁹As above, Article 10 (1).

⁸⁹⁰Revised ECOWAS Treaty, 1993, Article 15 (4)

⁸⁹¹As above, Articles 6 and 15 (2).

⁸⁹²MT Ladan, (2021): - ECOWAS Community Court of Justice as a Supranational Court and Engine of Regional Integration in West Africa: - Achievements, Challenges and Prospects. Being a Paper Presented at the ECOWAS Court of Justice International Conference on 20 Years of ECCJ: - Achievements, Challenges and Prospects. Organised by the ECCJ, Abuja. 22 - 25 November 2021, at Lomé, Togo.

⁸⁹³Article 4 amending Article 10 of the 1991 Protocol on the Court, op. cit.

⁸⁹⁴Ladan, n 6 above.

It is in the above context that the ECCJ has a critical role to play in upholding the Rule of Law as a Supranational Court of ECOWAS, to enthrone participatory democracy in West Africa and to support the community within its judicial mandate to put an end to the era of unconstitutional governments firmly in its past and to ensure appropriate sanction of any unconstitutional change of government, consistent with the Community law, particularly, the 2001 ECOWAS Protocol on Democracy and Good Governance, a Supplementary instrument to the 1999 Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.⁸⁹⁵

It is against this background that this paper seeks to achieve the following objectives: -

- i. Clarify the meaning of, and mechanisms for, implementation, compliance, monitoring and enforcement of ECCJ and African Human Rights Court decisions/judgements in a comparative context;
 - ii. Underscore the fact that judgements of ECCJ are **supranational judgements, NOT foreign judgements**;
 - iii. Assess the effectiveness criteria of ECCJ judgements; and
 - iv. Identify challenges and propose the way forward in strengthening ECCJ's Enforcement mechanism.
- 2. Clarifying the Meaning of, and Mechanisms for, Implementation, Compliance, Monitoring and Enforcement of ECCJ AND African Human Rights Court's Decisions⁸⁹⁶ / Judgements⁸⁹⁷**

2.1 Clarification of key terms: - Implementation, Monitoring, Compliance and Enforcement

Implementation: - Implementation of a supranational Court's decisions/judgements refers to the process by which individual or collective measures are taken (through legislation, judicial decisions, administrative action, executive decree or other steps)

⁸⁹⁵Concept Note (2023): - ECCJ International Conference on ECOWAS' Zero tolerance for unconstitutional change of Government. 22 to 25 May, 2023, Banjul, The Gambia.

⁸⁹⁶Refers to any determination of issues of a judicial or quasi-Judicial nature arrived at by a Court or some other tribunal

to settle or in the course of settling a controversy or dispute or to determine Liability after due consideration of facts and law. It may mean judicial judgement, ruling, or order, or administrative or ministerial act. See SI Nchi, (1996), *The Nigerian Law Dictionary*, Zaria: Tamaza Publishers, 97.

⁸⁹⁷As above, 185: - Judgement is the formal decision of a court in a Legal proceeding and the reasoning leading to the decision.

legislation, judicial decisions, administrative action, executive decree or other steps) to give effect to an adverse judgement or decision.⁸⁹⁸ Implementation refers to the actual steps or measures taken by a State to give effect to the decisions of the Court. It is also about adherence to the judgement of the Court.⁸⁹⁹ Implementation can be partial or full. Implementation is partial⁹⁰⁰ when a state gives effect to some but not all aspects of the decision of Court, and full when a State ensures that all aspects of the decision are satisfied.⁹⁰¹

The implementation of ECCJ and other international courts' judgements is the central measure of a **court's efficacy**. Without it, the situation of those who should be helped by the court's decision does not improve. Even the best and most profound jurisprudence may **be deemed ineffective if not implemented, and the very legitimacy** of the court itself may fall into question.⁹⁰² The commitment to abide by a court's judgement is crucial to the **integrity** of any legal system, domestic or international. In fact, an assessment of challenges facing the ECCJ, African Human Rights Court, the European and the Inter-American human rights Courts revealed, that implementation of judgements is **the acid test of any judicial system, important for enhancing the interpretative authority and impact of the Court's case law, as well as the system's authority and credibility.**⁹⁰³ Implementation also underscores the distinctiveness of the above regional Courts, highlighting the dichotomy between the unique hope that they represent for their jurisdiction and the Courts' lack of enforcement authority. These judicial bodies are notable in international order precisely because they have the authority to bind national governments but, at the same time, they generally lack recourse to power of enforcement of their orders.

⁸⁹⁸Council of Europe (2018): - The Implementation of Judgements of the European Court Human Rights, 1- 65

⁸⁹⁹As above.

⁹⁰⁰See D Hawkins and W Jacoby (2008): - 'Partial Compliance: - A Comparison of the European and Inter-American Courts for Human Rights', <https://www.researchgate.net/publications/265122119>.

⁹⁰¹As above.

⁹⁰²See T Mutangi, 'Enforcing Compliance with the Judgements of the African Court on Human and Peoples Rights:- Prospects and Challenges. In Compliance with International Human Rights Law in Africa' in A Adeola (ed), Essays in Honour of Frans Viljoen, (2023), Oxford: Oxford Academic University Press.

⁹⁰³As above.

Consequently, most often, must rely on the cooperation of their Member States, by such moral and other influence as countries are prepared. to exert on non-compliant states.⁹⁰⁴

I. Compliance: - Unlike implementation, compliance is a status that is attained if and when a State's law and practice are in line with the requirements of the Court's judgement or decision. Thus, compliance is understood as the outcome of implementation: - a State implements a judgement/ decision in order to ensure that it is in compliance with its obligations under a treaty or the ruling or both.⁹⁰⁵ Compliance pertains to the outcome of the measures a State needs to adopt in order to fully implement the decision of the Court. The Vienna Convention on the Law of Treaties (VCLT) defines "Compliance" as implementation of orders in good faith.⁹⁰⁶ Compliance is seen as the litmus test for the effectiveness of a judicial body and its remedies,⁹⁰⁷ and is also considered one of the means of building institutional legitimacy, credibility and effectiveness.⁹⁰⁸ Tracking States' compliance with decisions of the Court is critical for evaluating observance of rule of law within the African, European, Inter-American and ECCJ regional Judicial Systems.⁹⁰⁹

II. Monitoring: - Monitoring implementation of regional courts' decisions can be viewed as **reactive**, for example, receiving information on the extent to which the State has implemented any court orders; and it can also be viewed as **proactive**, for example, going out and seeking information where it is lacking, cross-checking that evidence and validating what has been said; and then also making assessments on whether this is sufficient or not, based on some **clear criteria of what is satisfactory implementation**.⁹¹⁰ Monitoring therefore is a process by which periodic reviews are done to measure progress made and steps taken to implement decisions of the Court.

⁹⁰⁴See Council of Europe Strasbourg (2023): - Implementation of ECHR Judgements: - Latest decisions of the Council of Ministers. Portal, Directorate General, Human Rights and the Rule of Law. Dated, 10-03-2023.

⁹⁰⁵As above.

⁹⁰⁶Article 26 of VCLT.

⁹⁰⁷Y Shany, *Assessing the Effectiveness of International Courts*, (2014), Oxford: Oxford University Press, 117.

⁹⁰⁸Y Shany, 'Compliance with decisions of International Courts as indicative of their effectiveness: A goal-based analysis', (2010) In SSRN Electronic Journal, (October 2010), 5.

⁹⁰⁹See B Kingsbury, B. 'The Concept of Compliance as a function of competing conceptions of international law', (1998) 19 Mich. J. Int'l, 348.

⁹¹⁰See R Murray, D Long, V Ayeni and A Some 'Monitoring Implementation of the decisions and Judgements of the African Commission and Court on Human and Peoples' Rights', (2017) 1 African Human Rights Yearbook, 150 – 166, <http://doi.org/10.27053/2523-1367/2017/Vinia8>.

III. It is a strategic aspect of ensuring implementation. Firstly, it helps to track the effort made by a State and the steps to perform specific action steps set out in the court's judgement. Secondly, it ensures specific orders made are not only implemented but are aligned with the specific objective of giving the litigant the remedy requested from and granted by the court. Thirdly, monitoring helps to ensure that implementation is done within time limits set and hence that the set schedule is observed. Fourthly, monitoring allows for corrective action, namely to ensure that where decisions are not implemented, steps can be taken to force the state to comply.⁹¹¹

IV. **Enforcement** of judgement is to cause the decision of the court to take effect or to compel obedience to it. Enforcement arises where non-compliance has occurred. It entails the use of a series or set of compulsory measures designed to ensure that a State against which a judgement stands, and which has failed or refused to comply with the judgement voluntarily, does so, under sanctions. The object of enforcement is to execute or yield full implementation of the judgement of the court against the wishes of the State concerned.⁹¹²

2.2 Legal Obligation and Mechanisms for Implementation, Compliance, Monitoring and Enforcement of Judgements: - ECCJ and Other Regional Courts' Law and Practice

The first legal obligation under international law applicable to all the regional courts is the **Principle of 'Good Faith' (Pacta Sunt Servanda)** which as a rule of international law requires that States must implement their treaty obligations, including the decisions of courts in full, and in **GOOD FAITH**, and must not invoke domestic technicalities to justify non-compliance with international treaty obligations - Articles 26 -27 of the Vienna Convention on the Law of Treaties.

⁹¹¹As above.

⁹¹²See V Kessler, 'A Judgement is important: -Enforcement Even more so!:-A Comparison of Regional Human Rights Courts, (2020) *Reuters*, No. 18, January 2020.

⁹¹³Articles 26-27 VCLT.

⁹¹⁴As above.

Under the ECOWAS Community Law,⁹¹⁵ the legal regime relating to implementation, compliance and enforcement of ECCJ's judgements or decisions are consistent with the principle of Good Faith enshrined in the Vienna Convention on the Law of Treaties (VCLT). Article 15(4) of the ECOWAS Revised Treaty of 1993 provides that judgements of the ECCJ are **binding** on Member States, institutions of the Community, individuals and corporate bodies.⁹¹⁶ The initial protocol on the ECCJ provides under Article 19(2) that the decisions of the Court shall be final and immediately enforceable.⁹¹⁷ That Member States shall take all necessary measures to ensure the execution of the decisions of the Court.⁹¹⁸ Article 24(2) of the 2005 Supplementary Protocol on the Court gave each Member State the responsibility for the execution of ECCJ's judgements in accordance with its national rules of civil procedure.⁹¹⁹ Although, Article 24(3) of the Supplementary Protocol on the Court obligates each Member State to appoint a National Authority for the purpose of processing of reception and execution of the ECCJ's decisions, only six Member States have so far complied.⁹²⁰ The above methods of enforcement of ECCJ's judgements are consistent with Article 15 (4) of the Revised Treaty of ECOWAS, 1993, which renders redundant and unnecessary, the provision of Article 24(1) of the Protocol of the ECCJ as amended. According to the said Article 24(1), 'Judgements of the Court that have financial implications for nationals of Member States or Member States are binding'.⁹²¹ More importantly, is the removal of this unnecessary distinction between judgements with or without financial implications by Article 5 of the ECOWAS Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations, which is to the effect that: -

The Community Court of Justice shall deliver judgements which include but not limited to financial sanctions against Member States in application of Article 24, paragraph 1 of the Protocol relating to the Community Court of Justice as amended by Article 6 of Supplementary Protocol A/SP.

⁹¹⁵MT Ladan, *Introduction to ECOWAS Community Law and Practice*, (2008), Zaria: Ahmadu Bello University Press Ltd.

⁹¹⁶The Revised Treaty of ECOWAS, 1993.

⁹¹⁷Article 24 (2) of Supplementary Protocol A/SP.1/01/05 relating to the Community Court of Justice, ECOWAS.

⁹¹⁸Articles 19(2) and 22 (3) now 23(3) Protocol of 1991.

⁹¹⁹As above.

⁹²⁰MT Ladan, 'ECOWAS Integration Model', A paper presented at the ECOWAS Court of Justice International Conference, held at Cape Verde, Praia, 9th - 12th May, 2022.

⁹²¹Article 24(1) ECCJ Protocol.

1/01/05 of 19th January 2005 when it notices that they have failed to honour their obligations as stated in the Community texts.⁹²²

Article 13 of the ECOWAS Supplementary Act on Sanctions also provides that 'the sanctions defined in Articles 5 to 11 of the Supplementary Act should be enforced in increasing order of severity'.⁹²³ This adds to the viable options available to the ECCJ in addressing the perennial problem of non-compliance with the court's judgements.⁹²⁴

Under the ECOWAS Community Law, the mechanism for enforcement of ECCJ's judgements lies in the critical role of Member States and their domestic implementation procedure. While the primary responsibility for executing the judgements of the ECCJ lies with Member States, Article 24 (2) of the 2005 Supplementary Protocol, 2005 provides that 'Execution of any decision of the Court shall be in the form of a writ of execution, which shall be submitted by the Chief Registrar of the Court to the relevant Member State for the execution according to the Rules of Civil procedure of that Member State'.⁹²⁵ It also provides that 'upon the verification by the appointed authority of the recipient Member State that the writ is from the Court, the writ shall be enforced'.⁹²⁶ Further, that 'all Member States shall determine the competent national authority for the purposes of receipt and processing of execution and notify the Court accordingly'.⁹²⁷ It is worth noting that 'the writ of execution issued by the Court may be suspended only by a decision of the Community Court of Justice'.⁹²⁸

Interpreting all the above legal instruments on the role of Member States *vis-à-vis* their relationship with the ECCJ, the Court reiterated Member States' legal obligation under the Community law and its reliance on the relevant national authorities to enforce the Court's decisions / judgements. That the binding nature of the obligations to enforce the decisions of ECCJ on domestic courts of Member States, does not imply a judicial hierarchical order but an integrated Community legal regime, wherein the ECCJ is neither an appellate court nor a court

⁹²²Supplementary Act on Sanctions Against Member States that Fail to Honour their obligations to ECOWAS, A/SP.13/02/12, (2012), Articles 5 and 6.

⁹²³As above.

⁹²⁴Ladan, n 6 above.

⁹²⁵Article 24 (2) Supplementary Protocol, A/SP.1/05/2005, amending the 1991 ECCJ Protocol

⁹²⁶As above, Article 24(3)

⁹²⁷As above, Article 24(4).

⁹²⁸As above, Article 24(5)

of cessation over the national courts: - *Bakary Sarre and 28 ors v. Republic of Mali*⁹²⁹ and *Jerry Ugokwe v. Federal Republic of Nigeria*.⁹³⁰

Compared with the ECCJ, the legal regime relating to implementation of decisions of the African Human Rights Court (AfCtHR) are mainly the African Charter on Human and Peoples Rights and the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples Rights, 1998, which established the AfCtHR, 2006, with the mandate to complement and reinforce the functions of the African Human Rights Commission in terms of its protection mandate.⁹³¹ The Court was also setup to increase the effectiveness of the African human rights system taking into account the non-binding nature of decisions of Commission.⁹³² Hence Article 1 of The African Charter obligates African Union (AU) Member States to 'recognise the rights, duties and freedoms enshrined in the Charter', and to 'adopt legislative or other measures to give effect to them'.⁹³³ Article 30 of the African Court Protocol obligates the Respondent State to 'comply with the judgement ... within the time stipulated by the court and to guarantee its execution'. The obligation to comply under Article 30 means that the State must implement the orders in full;⁹³⁴ in good faith,⁹³⁵ and not invoke domestic technicalities to justify non-compliance with international obligations.⁹³⁶

Like the ECCJ, the African Court does not seem to have any role in the implementation of its decisions. However, it can play a facilitating role in the process. For instance, in accordance with Article 29 (1) of its Protocol, the Court must first transmit the decision to the parties in a suit before the Respondent State is expected to implement it. Besides, the court may undertake to clarify its findings. and orders upon request by the Respondent State on the ground that vagueness of such orders are hampering implementation. In certain circumstances, it may be helpful to involve the victims as members of a committee in charge of implementation.⁹³⁷

⁹²⁹(2011) CCJELR 57.

⁹³⁰(2004-2009) CCJELR 37.

⁹³¹See R. Murray et.al, (2017) n 24 above.

⁹³²As above.

⁹³³Emphases in connection with the earlier definition given of the term Implementation.

⁹³⁴Murray et al, (2017) n 24 above.

⁹³⁵Article 26 VCLT.

⁹³⁶As above, Article 27

⁹³⁷See Open Society Justice Initiative (2010), From Judgement to Justice:- Implementing International and Regional Human Rights Decisions. Open Society Foundation, New York, USA.

Unlike the ECCJ, the Protocol on the African Human Rights Court also provides for a mechanism by which implementation is supervised through monitoring by the African Union Executive Council (formerly known as the Council of Ministers). Under Article 29(2) of the African Court Protocol, the Court must notify the AU Executive Council of any judgement for the Council to 'monitor execution on behalf of the AU Assembly of Heads of States and Government (AHSO)'.⁹³⁸ Apparently, the Council has been discharging its monitoring mandate mainly based on information provided to it by the Court. The African Court does so in compliance with its obligations under Article 31 of the Protocol to submit an annual non-compliance report to the AHSO at each of the latter's ordinary session. The African Court has been reporting non-compliance to the Council through its annual reports and follow-up letters and statements during various meetings held with AU officials. This practice is captured in the annual activity report of the Court,⁹³⁹ despite the fact that there is no information published by AU Policy Organs indicating that they have taken any step subsequent to non-compliance reports by the Court.⁹⁴⁰ According to the Communique on the 2021 International Conference on the implementation and Impact of Decisions of the African Human Rights Court,⁹⁴¹ in the year 2020 under review, the level of full Compliance with the Court's judgements stood at only 7%. In the 18% of the Applications there was partial compliance with the court's judgements and in 75% of the Applications there was non-compliance with the Court's judgements. Furthermore, there has been 10% compliance with the Court's rulings on provisional measures.⁹⁴²

Further, whereas the existing AU legal framework expressly provides for mechanisms for ensuring compliance with binding decisions of the AU,⁹⁴³ decisions of the African Court are not expressly mentioned as decisions of the AU, which can be enforced through the AU mechanisms. Be that as it may, a purposive interpretation of the AU legal framework admits the conclusion that decisions of

⁹³⁸Article 29(2) African Human Rights Court Protocol.

⁹³⁹See Activity Report of 2013 on the Case of African Commission (Saif Gadafi v. Libya).

⁹⁴⁰See African Union (2021): - The Dares Salaam Communique of the Conference on the implementation and Impact of Decisions of the African Court on Human Rights. 3 November 2021.

⁹⁴¹As above.

⁹⁴²As above.

⁹⁴³Articles 9 (1) (e) and 4(m) AU Constitutive Act and Rule 4 (1)(g) Rules of Procedure of the AU Assembly read together with Article 23 of the AU Act

the African Court are AU decisions as long as it is accepted that the Court is an Organ of the AU and was empowered by the AU through the Court Protocol to make binding decisions ostensibly on behalf of the AU.⁹⁴⁴

The proposed monitoring approach under the African Court Protocol is that a monitoring process that is meant to be primarily, if not solely, political under the law has been judicial and administrative so far. This is not proper as the choice of the nature of monitoring mechanisms is informed by peculiar demands as experience of the European and Inter-American regional human rights Systems reveal.⁹⁴⁵ With the current monitoring mechanism, even if the AU Council activated its monitoring function, the non-compliance reporting duty of the Court will lead to duplication or a mixed monitoring process, involving political and judicial / administrative supervision concomitantly.⁹⁴⁶

At the European Union (EU) level, implementing the judgements of the European Court of Human Rights is integral to the role and added value of the Council of Europe. It is a matter that involves all of the Organisation's institutions, including the Parliamentary Assembly. Even though the Committee of Ministers is responsible primarily for monitoring the implementation of the Court's judgements, the Assembly has an important role to play, particularly with regard to national parliaments. It has been following the execution of judgements for over twenty years.⁹⁴⁷

As laid down in Article 46 of the European Convention on Human Rights, each State Party is required to implement the judgement of the European Court of Human Rights. The resolution adopted by the Parliamentary Assembly of the Council of Europe on 29 June 2017 calls on States to submit the necessary action plans to the Committee of Ministers, to pay also particular attention to cases that have been pending for over 10 years and to strengthen the role of civil society organisations and national human rights institutions in the process of implementing the Court's judgements. The recommendation adopted on the same day highlights the need to make frequent use of interim resolutions, to work towards greater transparency of supervising implementation of court's judgements and to give civil society a greater role in the process.⁹⁴⁸

⁹⁴⁴See Article 29 of the African Court Protocol, *op. cit.*; also see Article 9 (1) (e) AU Constitutive Act.

⁹⁴⁵Kessler, n 26 above.

⁹⁴⁶As above.

⁹⁴⁷Council of Europe (2018).

⁹⁴⁸As above.

The monitoring of the implementation of ECtHR judgement is on the agenda of the EU Committee of Ministers four times a year. Effectiveness and the political pressure can be increased primarily when the judgements recur on the agenda and are discussed.⁹⁴⁹ The overriding principle of the monitoring procedure is constant dialogue and exchange of information, which also follows from the nature of the judgements. The primary task of the enforcement procedure is to support the Member State in question in identifying both, the causes of the violations and possible measures for correcting them. **Coercion in the sense of true enforcement cannot be exercised.**⁹⁵⁰ Member States are called to upon to submit an action plan within 6 months of the judgement and, once the plan has been fully implemented, to submit an action report. After the six months deadline has expired, reminders are generally sent to the responsible parties. If there is no reaction to the reminders, the Committee of Ministers can consider referring the matter back to the ECtHR once again with the question of whether the parties have fulfilled their obligations in carrying out the judgement. After such a hearing, the court can interpret its judgement anew, and require additional measures. Only when the Committee of Ministers is convinced that the judgement has been fully implemented will the monitoring procedure be concluded with a final resolution, which requires a two-thirds majority.⁹⁵¹

In contrast to the African and European systems, there is no independent monitoring organ in the Inter-American Human Rights System. The Inter-American Court of Human (IACHR) monitors the implementation of its judgements itself. It has been dogged by repeated complaints of insufficient implementation. However, the figures for concluded cases by themselves say little about implementation. An IACHR judgement that is 60% implemented can be much more far reaching than a fully implemented proceeding in the European or African System. **It makes more sense to measure non-implementation on quality rather than quantity.** Responsibility for the implementation of judgements lies first and foremost with the Respondent State itself. The State within a time frame is required to submit a report to the Court about its case-related activities aimed at implementing the judgement. If the report indicates implementation deficits, the Court may issue further requirements for the State and organise hearings at its seat or in the State concerned.

⁹⁴⁹Ibid.

⁹⁵⁰Open Society (2010), n 51 above.

⁹⁵¹As above.

A division of the Court, created since 2015 for monitoring judgement implementation, accompanies each case individually until it has been fully implemented; it also assists in procedures involving other comparable cases affecting same state. **The division ultimately decides when a judgement has been completely implemented.** The public is regularly informed of events. Hence monitoring is based on detailed check-ups through ongoing dialogue. From the Court's standpoint, this increases control over the process, enabling it to react more quickly and effectively to difficulties, and to advance proceedings.⁹⁵²

3. Decisions / Judgements of ECCJ and Other International/Regional Courts in Africa, Europe and The America are Supranational Judgements, not Foreign Judgements

A judgement of the ECCJ like those of African Human Rights Court, the European and inter-American courts of Human Right, must be distinguished from a foreign judgement; in fact it is not a foreign judgement.⁹⁵³ When the Court, whose decisions are in nature binding, renders its judgement, the State involved has to implement the judgement and cannot invoke its domestic legal processes for its failure to comply with a Treaty obligations.⁹⁵⁴ The State cannot subject the judgement for review before its domestic courts as may be the case with foreign judgements or refuse to recognise them. By merely being bound by the provisions of the Protocol that sets up the Court, the state is also bound by the decisions of the Court, as the institution mandated to interpret that Protocol.⁹⁵⁵

The basis for this argument is first, foreign judgements are judgements rendered in one jurisdiction for which recognition and enforcement is sought in another jurisdiction. Foreign judgements may be recognised unilaterally by a State based on its own national law provisions, or through bilateral or multilateral understandings, which expressly provide for the recognition of such judgements. Usually, recognition of foreign judgements take place when the court of one State take steps to enforce the foreign judgement of the other state through proceedings

⁹⁵²Inter-American Court of Human Rights (2023): - Learn About The Monitoring Compliance with Judgement. San Jose, Costa Rica.

⁹⁵³See Sections 81-83 of the Ghana Courts Act of 1993, Act 459. Also see section 11 of the Tanzanian Reciprocal Enforcement of Foreign Judgements Act, Cap. 8 R.E. 2002.

⁹⁵⁴Article 27 VCLT

⁹⁵⁵As above.

recognised under the enforcing State's domestic law without substantially departing from the terms of the original judgement and without rehearing of the original lawsuit.⁹⁵⁶

Second, it is worth noting that the procedures and requirements for enforcement of foreign judgements are largely guided by the principle of reciprocity, that do not apply to the judgements of ECCJ because such judgements are **Supranational Judgements**, resulting from the fact that ECOWAS is a Supranational authority and the ECCJ is also a Supranational Court. Hence like the ECOWAS Regulations, so are the judgements of the ECCJ directly applicable in Member States consistent with the ECOWAS Community legal order and trend of case law.⁹⁵⁷ It would be fallacious to equate such judgements with judgements⁹⁵⁸ of national courts of foreign states as such. It is apparent that national requirement of a specific legislative instrument to give effect to the agreement between a Member State and that seeking Country in execution of foreign judgements **need not apply to the ECCJ due to its supranationality**. However, domestication of the Court's Protocol by all member states is a necessary step to forge a harmonious relationship between ECCJ and member States, especially their national courts.

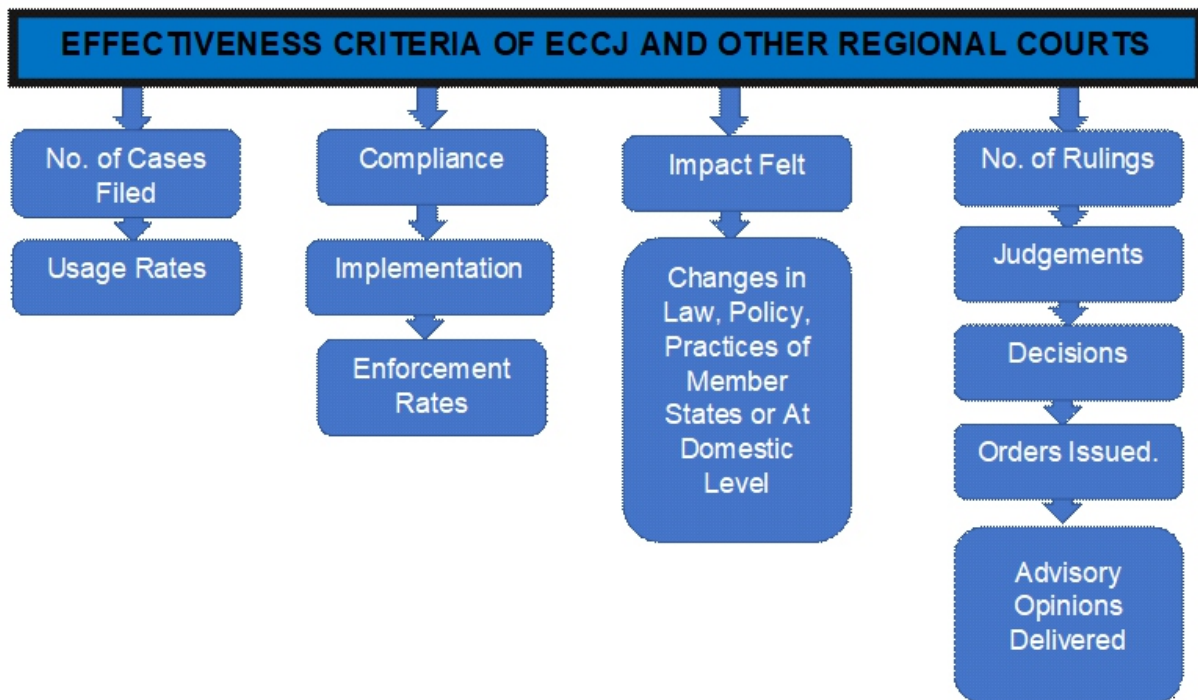
4. Effectiveness Criteria of The ECCJ'S Judgements/Decisions

The question here is, what are the effectiveness criteria to measure the success or performance of an international court like the ECCJ?

⁹⁵⁶See Tanzanian Act, n 67 above.

⁹⁵⁷*Musa Saidykhan v. Republic of the Gambia* (2010) CCJELR 139.

⁹⁵⁸See Ghanaian Courts Act, n 67 above.



Is it about the number of cases filed, rulings, orders and judgements delivered or about compliance / implementation / enforcement and usage rates, or about impacting Member State and society with its decisions? Experts have warned against the tendency 'to equate international Court impact with compliance with Judgements usage rates or impact on State conduct'.⁹⁵⁹ That a low aiming court, issuing minimalist remedies, may generate high level of compliance but have little impact on the State of the world. That using compliance as the only metric to measure the impact of international Courts, minimises the other goals served by human rights litigation, such as incorporating the court into a 'broader strategy of political mobilization',⁹⁶⁰ or changed policies and practices in domestic spheres, or deploying leverage to mount political pressure on governmental actors to comply with the decisions of these courts.⁹⁶¹ **Hence 'the real effectiveness test is not compliance alone, being just only one element** or means of appreciating the domestic impact of international courts'.⁹⁶²

So far, only six of the fifteen member states namely Burkina Faso, Guinea, Ghana, Mali, Nigeria and Togo have appointed the required national authority for the enforcement of the ECCJ judgement,

⁹⁵⁹Shany, n 21 above.

⁹⁶⁰As above.

⁹⁶¹L Helfer and E, Voeten, 'Inter-national Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', (2014), 68 Int'l Org. 77.

⁹⁶²As above.

indicating a lack of preparedness to comply with the ECCJ's decisions.⁹⁶³ It must be noted, however, that some States that have failed to designate a national authority, such as Niger, have still complied with some of the court's decisions.⁹⁶⁴ It is common knowledge that as of 2021, the rate of compliance with the judgements of the ECCJ 'is embarrassingly low', at 30% unsatisfactory rate of compliance.⁹⁶⁵ Lower than that of 2018 data, wherein 13 out of 15 Member States complied in varying degrees with some judgements of the court. That only 35 out of 64 enforceable decisions delivered against ECOWAS Member States and institutions have been complied with since 2005. Representing about 55% compliance rate across West Africa, although not excellent, but indicates as of 2018, there had been more compliance than non-compliance with ECCJ's judgements.⁹⁶⁶

The most well-known instance of compliance is the relatively speedy and full compliance of the Government of Niger Republic with the ECCJ's decisions in the famous case of *Hadijatou Mani Koraou v. Republic of Niger*⁹⁶⁷ on the prohibition of modern slavery and the payment of ten million CFA francs as compensation to the victim by the government of Niger for the harm suffered. More recently, the Government of Gambia paid half of the sum that the ECCJ awarded to two journalists⁹⁶⁸ who were unjustly detained and later killed by the former ruling military regime. Though the amount came belatedly, a year and two months after the new government came into office. All the four Gambian Journalists won monetary compensation awards from the ECCJ in 2018, but were not paid until May 2019, when 25,000 dollars were eventually paid to each by the Gambian government.⁹⁶⁹ The Government of Sierra Leone also paid 150,000 dollars of out of 250,000 USD awarded by the ECCJ to a wrongfully dismissed police officer, El-Tayyib Bah.⁹⁷⁰

The above captures the reality that poorer Member States may find it difficult to comply with Court orders to pay out large monetary sums to those who have successfully litigated against them, **and such compliance has a profound impact within the country.**

⁹⁶³Ladan, n 6 above.

⁹⁶⁴As above.

⁹⁶⁵F Falana, 'ECOWAS Court: Achievements, Challenges and Prospects'. Paper presented at the International Conference of the ECCJ, Lomé, Togo, 22- 24 November 2021.

⁹⁶⁶AM Tony, 'Enforcement of the Judgement of the ECOWAS Court of Justice', (2018) 1(1) *NILDS Journal of Law Review*, 71-96.

⁹⁶⁷Suit No. ECW/CCJ/APP/08/08, October 27, 2008.

⁹⁶⁸See Saidykhan, n 71 above.

⁹⁶⁹*Manneh v. The Republic of Gambia*, No. ECW/CCJ/JUD/03/08, June 5, 2008.

⁹⁷⁰*El-Tayyib Bah v. Republic of Sierra Leone*, No. ECW/CCJ/JUD/11/15, Decision, May 4, 2015.

Similar notable compliance evidence by the government of Sierra Leone, in the right to education of pregnant girls;⁹⁷¹ by Burkina Faso in the political opposition banned to participate CDP case;⁹⁷² by Nigeria in the **Jerry Ugokwu case**;⁹⁷³ where the government complied with the ECCJ's interim order not to seat a person who had been declared the winner of an election to Nigeria's federal legislature; and by Nigerian Government in the **Alimu Akeem case**,⁹⁷⁴ where a Nigerian soldier who had been detained without trial for two years was released from detention.

Table 1 below reveals Judicial Statistics of the ECCJ from 2003 to 24th March 2023, with a total of 641 cases filed, 135 rulings and 347 Judgements delivered, and 26 decisions on revision, 52 orders as well as 6 advisory opinions issued by the ECCJ out of its 1,312 sessions, leaving only 174 cases pending.⁹⁷⁵ Obviously, there was an increase in the number of cases filed from 55 for the year 2020, to 72 and 62 in 2021 and 2022 respectively. Judgements delivered also rose from 30 in 2020, to 41 each in 2021 and 2022. While year 2017 witnessed an the highest number of orders issued at total of 15, subsequent years witnessed a decrease to an average of 3 per year: - 2018 to 2022. While the first quarter of the year 2023 alone witnessed a sharp increase to 5 orders issued by the court.⁹⁷⁶

⁹⁷¹*Women Against Violence and Exploitation in Society v. the Republic of Sierra Leone*, No. ECW / CCT/ JUD / 37 / 19, December 12, 2019

⁹⁷²*Congrès pour la Démocratie et le Progrès v. Burkina Faso*, No. ECW/CCJ/JUD/16/15, July 13, 2015.

⁹⁷³No. ECW/CCT/JUD/03/05, October 7, 2005.

⁹⁷⁴Case No. ECW/CCJ/ JUD/01/14, January 28, 2014.

⁹⁷⁵Source: ECCJ, Abuja, (2023), Judicial Statistics from 2005 to 24 March 2023, as at 24th March 2023.

⁹⁷⁶As above.

Table 1: **-JUDICIAL STATISTICS OF THE COMMUNITY COURT OF JUSTICE, ECOWAS FROM 2003 TO DATE (24TH MARCH, 2023)**

STATISTICS & YEAR	CASES FILED	RULINGS DELIVERED	JUDGMENTS DELIVERED	COURT SESSIONS	APPLICATION FOR REVISION/SUPP	DECISIONS ON REVISION	ORDERS	ADVISORY OPINIONS	PENDING CASES
2003	1	-	-	-	-	-	-	-	1
2004	1	-	1	5	-	-	1	-	1
2005	6	-	4	26	-	-	2	1	2
2006	21	1	3	31	-	-	-	-	21
2007	12	4	5	41	-	-	-	-	27
2008	12	3	5	26	1 JUDGMENT	-	-	1	29
2009	14	12	4	34	1 JUDGMENT	1	-	-	20
2010	17	11	8	71	1 JUDGMENT	1	-	-	23
2011	30	11	9	74	5 JUD, 1 RUL	1	-	-	40
2012	25	19	18	105	1 JUDGMENT	4	2	-	39
2013	27	15	11	71	1 JUDGMENT	3	1	1	41
2014	31	6	18	48	4 JUDGMENTS	2	-	-	52
2015	39	10	28	105	2 JUDGMENTS	3	4	1	59
2016	45	8	29	105	2 JUDGMENTS	3	6	1	63
2017	47	4	19	79	-	-	15	-	89
2018	61	2	31	85	2 JUDGMENTS	-	4	-	108
2019	52	10	38	96	3 JUDGMENTS	-	3	-	119
2020	55	7	30	101	12 JUDGMENTS	1	4	-	140
2021	72	7	41	127	4 JUDGMENTS	6	3	1	167
2022	62	3	41	79	3 JUDGMENTS	1	2	-	180
2023	11	2	6	4	-	1	5	-	174
TOTAL	641	135	347	1312	39	26	52	6	174

From table 1 above, Judicial statistics shows that the admirable performance of the Court, in delivering 30 judgements in 2020 slightly lower than 31 delivered in 2018 and 38 in 2019, despite the COVID-19 pandemic, is attributable to the implementation of the virtual session initiated by the Court under the leadership of the Court's President, Honourable Justice Edward Amoako Asante. The attendant advantages are in the areas of cost and energy savings for both lawyers and litigants who would otherwise have wasted several hours travelling to the seat of the Court for the sessions held.

The above judicial statistics sounds very impressive in terms of performance or success rate, but the ECCJ's effectiveness should not be measured solely by the number of judgements, rulings and orders delivered. As such an approach comes with the risks of an unsustainable caseload and may dwarf other key elements of effectiveness, such as its impact on changed behaviour at the domestic level.⁹⁷⁷ In fact, poor or non-compliance rate does not automatically translate to failure or lack of effectiveness of the Court. As recent finding rightly observed, international courts' rulings with high compliance rates may be entirely ineffective, whereas those with low compliance rates may be quite effective, if they engender some modification of State behaviour, as demonstrated in the following cases involving Nigeria: - the ECOWAS Court's rulings: - in the SERAP Environmental Rights case⁹⁷⁸ contributed significantly to the government's increased attention to ending and cleaning up of oil pollution in the Niger Delta region; in SERAP Basic Education case,⁹⁷⁹ has had significant impact on Nigeria's National Human Rights Commission, by shaping the content of its Draft National Human Rights Action Plan it finally produced.

⁹⁷⁷Laban, n 6 above.

⁹⁷⁸*SERAP V. Federal Republic of Nigeria*, No. ECW/ CCJ/JUD/18/12, December 14, 2012.

Also see Murray, op. cit.

⁹⁷⁹*SERAP & Federal Republic of Nigeria and UBEC*, No. ECW/CCJ/JUD/07/10, Nov. 30, 2010.

5. Addressing the Challenges of Enforcement/Compliance with ECCJ's Judgements

The challenges of judgement enforcement or compliance have been aptly summarised as: - failure to appoint competent national authorities by nine Member States for receiving, verifying and processing the Writ of Execution for the ECCJ and for rendering returns to the Courts;⁹⁸⁰ lack of domestic legislation for the enforcement of the ECCJ judgements by national courts;⁹⁸¹ failure to domesticate the Revised Treaty of ECOWAS, 1993 and the Protocol on the Court by Member States,⁹⁸² to avoid the negative impact of non-domestication recently highlighted by the decision of the Accra-based High Court of Ghana in *Chude Mba v. Republic of Ghana*;⁹⁸³ non-involvement of ECOWAS political authorities in the implementation monitoring of the ECCJ's judgements as has been practised at to the African Union and European Union levels;⁹⁸⁴ and ECCJ plays no role in the enforcement of its judgements⁹⁸⁵ as is the practice with the Inter-American Court of Human Rights earlier observed.⁹⁸⁶ These challenges necessarily constitute a huge handicap in the optimal performance of the ECCJ, and they apparently seek to undermine the credibility in the effectiveness and added value of the ECCJ to the African human rights system through its growing unique human rights jurisprudence in west Africa.⁹⁸⁷

Addressing the above challenges, the following suggestions are made: -

⁹⁸⁰Tony, n 80 above.

⁹⁸¹As above.

⁹⁸²Laban, n 6 above.

⁹⁸³Suit No. HRCM/376/15 (2-02-2016).

⁹⁸⁴Open Society Initiative, n 51 above.

⁹⁸⁵Tony, n 80 above.

⁹⁸⁶Inter American Court of Human Rights, n 66 above.

⁹⁸⁷Laban, n 34 above.

- Member States to ensure immediate and effective implementation of decisions rendered by the ECCJ to ensure compliance with their treaty obligations under the Community Legal order, earlier outlined;
- Member States need to develop initiatives to increase their capacity to effectively execute ECCJ's decisions, including cooperation with other ECOWAS Governance Architecture platform members to offer technical assistance where necessary;
- Relevant stakeholders, including the academia, need to adopt a holistic approach to assessing compliance with the ECCJ's decisions, taking into account the different changes in the overall governance framework in the Member States concerned;]
- The ECCJ need to draw up an action plan with timelines and deliverable outputs in Liaising with the ECOWAS Commission and Parliament for engagement with national authorities on the implementation of its judgements, decisions and orders; it is imperative for the ECCJ to clearly determine its role in deciding the specificity of its judgements and the extent to which it will interact with other actors to ensure implementation of its decisions;
- ECCJ needs to develop a more effective mechanism of tracking and monitoring implementation of its decisions, including continuing dialogue with the Member States' Attorneys General and Chief Judges, which could help in hastening implementation of its judgements as Supranational decisions, not foreign judgements;

- National Bar Associations, Law faculties/schools and national legal research institutes need to mobilise resources to promote continuing legal education and Judicial education On the ECOWAS Community law and practice as well as the Jurisprudence of the Court;
- ECCJ to encourage national human rights institutions and other national legal research institutes to make relevant submissions as **amicus curiae**; to help follow up on the implementation of the Court's decisions; to disseminate information about the Court's Jurisprudence; and to ensure harmonization between national human rights strategies and the work of the Court;
- Finally, in collaboration with relevant stakeholders, ECCJ may wish to develop an implementation guidelines of ECCJ judgements for national judiciaries and bar associations for possible consideration in addressing some of the challenges of general implementation of ECCJ's decisions at domestic level.

GENERAL REPORT

ECOWAS COMMUNITY COURT OF JUSTICE



**INTERNATIONAL CONFERENCE OF THE ECOWAS COMMUNITY
COURT OF JUSTICE**

THEME:

**ECOWAS ZERO TOLERANCE FOR UNCONSTITUTIONAL CHANGE
OF GOVERNMENT**

GENERAL REPORT

**HELD AT THE SIR DAWDA KAIRABA JAWARA INTERNATIONAL
CONFERENCE CENTRE
BANJUL, THE GAMBIA**

22 TO 25 MAY 2023

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I. INTRODUCTION

a. Background

1. The ECOWAS Court of Justice organises international conferences annually as part of its flagship programmes in collaboration with a selected Member State. The international conference provides a forum for the Court to examine important and topical thematic issues of concern together with scholars, jurists, practitioners and stakeholders from within the Member States. In the past two years, there have been Unconstitutional Changes of Government (UCG) in three Member States of ECOWAS, following the military coups in the Republic of Mali, the Republic of Guinea and Burkina Faso.
2. These unfortunate developments were a huge setback to the gains registered by ECOWAS since its creation in 1975, in establishing and consolidating constitutional order, democratic governance and rule of law in all ECOWAS Member States including the adoption of binding legal instruments. It was against this backdrop that the Court chose “ECOWAS Zero Tolerance for Unconstitutional Change of Government” as the theme for the 2023 International Conference. This was to give the Court the opportunity to address this urgent and grave issue of concern within the ECOWAS Community legal landscape with a view to complementing and contributing to the measures taken by ECOWAS in finding a lasting solution to this phenomenon.
3. The conference focused on many thematic and sub-thematic areas and their linkages with each other namely: the need for participatory democracy and constitutional order in all ECOWAS Member States and in particular, the ECOWAS policy of Zero Tolerance for Unconstitutional Change of Government, the rule of law and the duty of Member States to respect, protect and fulfil human rights in their territories; the underlying factors for political instability, terrorism and insecurity in the sub region; failure by Member States to fulfil their obligations to ECOWAS; weak institutions of Member States and the lack of political will for the implementation of community obligations. The conference also examined the mandate of the ECOWAS Court of Justice in facilitating the integration process of the community and in holding Member States accountable for their treaty obligations; the roles of the national courts of Member States and the ECOWAS Court of Justice in upholding and sustaining the rule of law and constitutional democracy in the sub region; the ECOWAS Community Law

and the challenges of enforcement of the judgements of the ECOWAS Court of Justice. These issues were deliberated upon through presentations and panel discussions and recommendations made for action.

b. Objectives

4. The overall objective of the international conference was to contribute to the strengthening of constitutional order, democratic governance, rule of law, protection of human and peoples' rights and the realisation of the ECOWAS integration objectives. The specific objectives were to critically appraise the phenomenon of unconstitutional change of Government, the ECOWAS Response Policies and Mechanisms, the role of National Courts and the ECOWAS Court of Justice in sustaining democratic governance, rule of law and protection of human rights and the challenges to implementation of ECOWAS Court judgments and make recommendations for action.

c. Participation

5. **The international conference brought together over three hundred (300) participants drawn from Member States of the Community;** Government Officials, the Judiciary, National Bar Associations, National Human Rights Institutions (NHRIs), ECOWAS Community Court of Justice, other ECOWAS Institutions and Agencies, ECOWAS Representation Offices in Member States, Regional Tribunals, Diplomatic Missions, Civil Society Organisations (CSOs), Universities and Academia, International Development Partners and the Media.

II. OPENING CEREMONY

6. The opening ceremony was graced by the Vice President of the Republic of The Gambia, H.E. Muhammed B.S. Jallow, who represented the President of the Republic of The Gambia, H.E. Adama Barrow, the Chief Justice of the Republic of The Gambia. Hon. Justice Hassan B. Jallow, the Attorney General & Minister of Justice, Hon. Dawda A. Jallow, the Minister of Trade, Industry, Regional Integration and Employment, Hon. Boubacarr Ousmaila Joof, Senior Officials of the Government of the Republic of The Gambia, the ECOWAS Resident Representative to The Gambia, Ms. Miatta Lily French, representing the President of the ECOWAS Commission, H. E. Dr. Omar Alieu Touray, the Speaker of the ECOWAS Parliament, the ECOWAS Auditor General, the Director General of GIABA, the Secretary General of

EBID, Hon. Attorney General of the Republic of the Cape Verde and Deputy Attorney General of the Republic of Ghana, Representative of the Minister of Justice of Côte d'Ivoire, Chief Justices and Supreme Court Justices of Burkina-Faso, The Gambia, Ghana, Liberia and Sierra Leone, Hon. Justices of the Community Court of Justice, Presidents of Regional Courts, Heads of ECOWAS National Offices in the Member States; Members of the Diplomatic and Consular Corps, Chairpersons of National Human Rights Institutions, Presidents of Bar Associations, International Development Partners, Members of CSOs, Members of the Academia, distinguished Resource Persons and Participants, Staff of the ECOWAS Community Court of Justice and the Media.

7. In his welcome address, the President of the ECOWAS Community Court of Justice, Hon. Justice Edward Amoako Asante, welcomed the distinguished guests and participants and thanked them for honouring the Court's invitation despite their busy schedules as well as the host Government for hosting the event and the warm hospitality extended to participants. He recalled the objectives of ECOWAS to promote cooperation and economic integration to among others, raise the living standards of citizens of the Community which can only be achieved in a democratic and stable political environment. He also highlighted the importance of the theme of the conference and the issues to be discussed, as well as the negative impact of unconstitutional changes of government on the gains made over time by ECOWAS in restoring democratic governance and culture, rule of law, protection of human rights and promotion of the regional integration agenda. He called on Member States to work collectively to prevent unconstitutional changes of government and punish perpetrators. He then urged the participants to take advantage of this important regional convergence to exchange ideas and proffer effective solutions for the benefit of the Community.
8. In his goodwill message, the Speaker of the ECOWAS Parliament, Hon. Dr. Sidie Mohamed Tunis noted that the Court and the Parliament are indispensable partners in the program of regional integration, and this is why the ECOWAS Parliament is aligned with the Court on the theme of the Conference. He also stated that despite the legal framework on UCG, there is a resurgence of military interventions in politics in West Africa and these are violations of the Protocol on Democracy and Good Governance. He further highlighted that perpetrators of UCG often blame violations of

national constitutions by incumbents, bad governance, insecurity, lack of free and fair elections as justifications for their actions. He called for addressing of the root causes of UCG by nurturing the right political governance, ensuring separation of powers and independence of institutions. He concluded by reiterating the commitment of the ECOWAS Parliament to work with the Court in addressing the problem.

9. The Secretary General of EBID, Mr. Moctar Coulibaly representing the President of EBID, noted in his goodwill message that UCG have a contagious effect and the main causes of it in the subregion are problematic legislative framework, economic instability and security concerns. He also highlighted that UCG exacerbate economic inequality, affects the lives of vulnerable populations and derail regional integration.
10. The Director General of GIABA, Mr. Edmond W. Harris stated that GIABA has aligned with the ECOWAS Court on the theme of the Conference and that GIABA plays its role towards the achievement of democracy and good governance in the subregion by fighting money laundering, terrorism financing and proliferation of arms. He also emphasised that economic growth is essential in the process of strengthening democracy and political stability.
11. The ECOWAS Auditor General, Dr Joao A.M. Fadia noted in his goodwill message that there has been instability including terrorism and UCG in the subregion recently. However, ECOWAS has been firm in fighting these incidents of instability including UCG. He further noted that democracy is not only about elections, but about how the government supports the people. Therefore, good governance, transparency and accountability are crucial for economic development. He called for the fight against corruption and ensure that institutions are effective and functional for political stability. He concluded by reiterating the commitment of his office to work in a transparent manner and ensure that ECOWAS resources are used on what they are meant for.
12. In her statement, the Special Resident Representative of the President of ECOWAS Commission to The Gambia, representing the President of the ECOWAS Commission, reiterated the ECOWAS Commission's commitment to the policy on zero tolerance for UCG within the Community. She however noted that ECOWAS is expending enormous

resources that could have been used in other areas for the benefit of the Community, to restore democracy in Member States that have experienced UCG. She indicated that undertaking practical preventive measures is therefore necessary to address UCG. She commended the holding of the conference as an opportunity to brainstorm on these issues and make recommendations.

13. The Attorney General and Minister of Justice of The Gambia, Hon. Dawda A. Jallow noted the important responsibility lawyers have as protectors of the rule of law, justice, human rights, and the constitutional order. He highlighted the transitional process of the Gambia and the commitment as a country to continue in the part of democracy and constitutional governance. He also highlighted the need to leverage on the opportunity of the conference to learn from one another and exchange ideas to improve democracy and good governance in the subregion to prevent UCG. He finally called on everyone to join hands and work together for a peaceful Africa.
14. The Minister of Trade of The Gambia, Hon. Boubacarr O. Joof noted that the Conference demonstrates ECOWAS' commitment to regional peace and stability as UCG and issues of election related violence are setbacks for the subregion's agenda of democracy. That they negatively impact economic development, deter investments, promote corruption, create refugees and IDPs, expose children to exploitation as child soldiers and leads to elite capture of national resources and destruction of the economy which bring untold hardships to the ordinary people. He also highlighted the efforts made at the continental and regional level through the adoption of norms. He concluded that development cannot take place without peace and stability and invited the conference to discuss the issue dispassionately and proffer ideas for dealing with the problem of UCG.
15. In his statement, the Chief Justice of the Republic of The Gambia, His Lordship Hassan B. Jallow noted that the Sahel region which covers most of West Africa is now beset with conflict, terrorism and insecurity with dire consequences for populations. He noted however, that bad governance is not an excuse for UCG and violence but provides a fertile ground for same. He also highlighted the need to nurture good governance and accountability as a well as restore constitutional order in the sub-region as they are the strong foundations for peace, stability and economic development. Finally,

he called for the respect and fulfilment of human rights treaties and constitutional provisions by those in power or aspiring to obtain power.

16. Professor Chidi Anselem Odinkalu in delivering the keynote address provided a historical perspective to unconstitutional changes of government (UCG), its negative impact on development in Africa in the post-independence era and the evolution of the development of the normative framework against UCG. He however identified four challenges to the effective implementation of the norms against UCG namely, lack of effective coordination between regional systems, that is, the UEMOA, ECOWAS and African Union, negative and controversial effect of sanctions imposed which sometimes undermine the protection of human rights, inconsistency in the implementation of sanctions for UCG around the continent and the uncertainties around the meaning of UCG, particularly within the context of popular uprisings. He also highlighted the five factors that have been observed to predispose countries to UCG. These include integrity of elections, diversity management and human rights, constitutional order and state legitimacy, economic governance and public sector accountability, popular uprising, militarisation and terrorism. He concluded that the emergence of the norm against UCG in Africa demonstrated significant changes in regional inter-governmental and governance norms over time, however, there are shortcomings in the implementation of regional norms on good governance and prohibition of UCG as evident through popular uprisings and called for consistency in implementing the norm against UCG and regional supervision of elections.
17. In his Opening Statement, the Vice President of the Republic of The Gambia, H.E. Muhammad B.S. Jallow representing the President of The Gambia, H.E. Adama Barrow, welcomed the participants on behalf of the Government and people of The Gambia. He observed that The Gambia has experienced a period of UCG. However, the return to democracy brought about renewed commitment for respect for rule of law in the country. He further noted that democracy is about respecting the constitution even when it is not convenient, respect for human rights and the opportunity for all to be heard. He also noted that the ECOWAS zero tolerance for UCG sends a message that democracy is a must. It should not be a mere slogan but a means for real civic engagement with the citizens. He called for the Strengthening of the legal framework and institutions to guarantee constitutional order and formally declared the international conference open.

III. SUMMARY OF THE SEVEN SUB-THEMES

18. During the conference, various panel discussions moderated by Honourable Judges of

the ECOWAS Community Court of Justice and other Community Judges and Jurists were held under the seven subthemes, followed by extensive plenary discussions, which identified the issues, challenges and proposed recommendations.

Sub-theme 1 - Rule of Law, Democracy and Good Governance: ECOWAS Constitutional Convergence Principles in Perspective

19. Dealt with Rule of Law, Democracy and Good Governance: ECOWAS Constitutional Convergence Principles; Application, Sanctions and Legal Implications of the Policy on zero tolerance for UCG and their linkages with building strong institutions and democratic culture as well as the role of the Military in a Democracy. The panellists highlighted the existence of the normative framework at the continental and subregional level to ensure democracy, rule of law and good governance but identified some key factors as a challenge to compliance with these norms. These include impunity, abuse of human rights, corruption, poverty, bad governance, electoral malpractices, lack of independence of the judiciary, uneducated population, insecurity, division along political, cultural and religious lines, failure of the AU and ECOWAS leadership, lack of political will and use of pseudo-laws to perpetuate leaders' hold on to power. Recommendations were proposed at the end of this session.

Sub- theme 2 - ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security

20. This sub-theme covered the ECOWAS mechanism for conflict prevention, management, resolution, peace keeping and security. The panellists provided the historical background to the establishment of ECOWAS, examined the ECOWAS peace and security architecture, dispute resolution, the sanctions regime and highlighted their strengths and weaknesses. They also examined the linkages between political instability, insecurity and migration and made recommendations.

Sub-theme 3 – Human Rights as a Factor for Democracy, Peace and Security: Duty of Member States, to Respect, Protect and Fulfil Human Rights

21. It dealt with Human Rights as a factor for democracy, peace and security; and the duty of Member States to respect, protect and fulfil their human rights obligations. Panellists examined the concept of human rights, the fundamental principles and the obligations of States as duty bearers. They also highlighted the importance of the human rights instruments, the ECOWAS mechanisms and institutions such as the Court, as well as the justiciability and enforcement of human rights to enhance the promotion of democracy, peace and security within the Community. They also proffered recommendations at the end of the session.

Sub-theme 4 – Lack of Free, Fair and Transparent Elections as a Key Source of Conflict: Holding Member States Accountable for their Treaty Obligations and the Sanctions Regime

22. This sub-theme covered the lack of free, fair and transparent elections as a key source of conflict and the holding of Member States accountable for their treaty obligations and the sanctions regime in place. Panellists examined the parameters for free, fair and transparent elections and election monitoring under the ECOWAS legal regime/framework and highlighted the strengths which include; regular and timely organisation of elections, the guarantee of basic rights relating to political participation, prohibition of obtaining or maintaining power by unconstitutional means, intervention and sanctions mechanisms when the democratic order is threatened weaknesses as well as the weaknesses such as non-compliance with the constitutional convergence principles by Member States, non-removal of root causes to UCG in Member States and limitations in the implementation of the sanctions regime. They also examined the factors responsible for undermining free, fair and credible elections, constitutional democracy, accountability of Member States and the sanctions regime and made concrete recommendations at the end of the session.

Sub-theme 5 – The Role of National Courts of Member States and the ECOWAS Court of Justice in Upholding Human Rights, Rule of Law and Democracy

23. It dealt with the role of national courts of Member States and the ECOWAS Community Court of Justice in upholding human rights, rule of law and constitutional democracy. The panellists examined the role of these two institutions individually and collectively as an effective mechanism in protecting human rights, rule of law and constitutional democracy as well as the challenges of these Courts in the execution of their functions nationally and at the regional level including applicability of treaty obligations at the national level, hierarchy of competences/jurisdiction, enforcement of judgments and protection of their independence. Recommendations also emanated from the session.

Sub-theme 6 – The Enabling Legal Environment for ECOWAS Integration: ECOWAS Community Law in Perspective

24. This sub-theme covered the enabling legal environment for ECOWAS integration. The panellists examined the existing Community Law and how it can promote the realisation of regional integration, the challenges

encountered in achieving this objective, such as applicability within national systems, dualism and community law and supranationality and community law. They also examined the role of the ECOWAS Court and Member States in the integration process and made recommendations **Sub-theme 7 – An Appraisal of the Judgment Enforcement Mechanism of the ECOWAS Court of Justice**

25. This sub-theme covered an appraisal of the judgment enforcement mechanism of the ECOWAS Court of Justice. The panellists' agreed that the lack of an effective enforcement mechanism of ECOWAS Community Court of Justice has not enabled the effective implementation of its judgments. That efforts that were made in some cases to enforce the judgments of the Court before national courts and the ECOWAS Court of Justice failed woefully because of the failure by Member States to domesticate the ECOWAS Revised Treaty and Protocols on the Court. That based on the principles of *pacta sunt servanda*, it is expected that Member States implement in good faith, the ECOWAS Revised Treaty and the Protocol on the Court which are binding on them. At the end of the session, recommendations were made.

IV. CONCLUSIONS AND RECOMMENDATIONS

26. From the various presentations and plenary discussions, conclusions were reached on the theme of the conference and recommendations made to the relevant stakeholders for action.

A. CONCLUSIONS

27. Some of the key conclusions include:

1. Political pluralism and the guarantee of free and fair elections are key factors in ECOWAS efforts to consolidate democracy, accelerate economic integration and promote stability in the region.
2. UCG due to subversion of the will of the people during elections inevitably leads to a setback in the development of the subregion.
3. The ECOWAS leadership has the obligation to take preventive and effective measures to sustain democracy and the rule of law.
4. The principles and values embodied by ECOWAS can only be effective with strong, credible and balanced institutions such as the Constitutional Courts and Electoral Commissions.

5. Democracy and good governance concepts are reflected in the constitutions of Member States to guarantee absence of dictatorship, arbitrariness, corruption, religious and ethnic division, and the respect for the rule of law.
6. Migration is a critical element in the sub-region's development agenda and resources should be provided in that regard.
7. ECOWAS has consistently activated the Sanctions Mechanism with a view to restoring constitutional order when violated. However, these have not been as effective as they should be.
8. Human rights are a critical factor in ensuring democracy, peace and security and therefore requires an astute legal regime, an independent judiciary and a robust Court system that recognises and applies international human rights norms.
9. Education and Information Technology are a catalyst to the proper enjoyment of human rights.
10. Credibility of, and confidence in the ECOWAS Community Court of Justice will be eroded if Member States do not comply with the judgements of the Court.
11. The progress made on the creation of norms to improve political governance did not address the root causes of UCG.
12. The achievement of the convergence principles would be more effective than the imposition of the sanctions regime.
13. In protecting human rights, the ECOWAS Court of Justice by extension, has a role to play in preserving constitutional democracy notwithstanding that it is not explicit in its normative framework.
14. The Courts remain guarantors of the constitutional democracy and stakeholders must provide support despite the apparent noncompliance with their decisions.
15. The ECOWAS Court is mindful of the fact that it is not an appellate court over national courts of Member States.

B. RECOMMENDATIONS

28. Some of the key recommendations addressed to various stakeholders include:
 - i. To Member States of the Community
29. Member States should:
 1. Demonstrate the political will to internalise a culture of democracy, rule of law and good governance and adopt preventive measures to ensure strict adherence thereof.
 2. Commit to the establishment of solid democratic ideals, the reenforcement of Protocols agreed upon and the promotion of the Rule of Law as specified by the various International Instruments such as the Protocol on Non-Aggression (1978); the Universal Declaration of Human Rights; the African Charter on Human and People's Rights and the Supplementary Protocol on Democracy and Good Governance (2001) which all Member States are signatories to.
 3. Conduct regular periodic elections in accordance with the extant constitutional laws of Member States in a free and fair manner without Political Parties and Government circumventing the electoral rules or guidelines.
 4. Address the poor economic conditions of the Citizens, by fulfilling the "social contract" entered into during the electioneering period and improve the high illiteracy level in the sub-region; maintain strict control of light arms proliferation; and general promotion of responsible democratic ethics.
 5. Encourage inter-regional trade and remove all barriers to the free movement of goods, persons and services.
 6. Strengthen the means of settling electoral disputes at the national level by enacting laws and set up mechanisms for independent adjudication of electoral disputes.
 7. Take ownership of the convergence principles, as contained in the Supplementary Protocol on Democracy and Good Governance at the national level for them to be effective.
 8. Guarantee the independence of judicial institutions and invest in them, as well as strengthen their capacity to render justice speedily and fairly and ensure stable constitutional order to prevent conflicts and instability.

9. Comply with their Treaty obligations including the provisions of the African Charter on Human and Peoples' Rights, through domestication and set up effective enforcement mechanisms of judgments from the ECOWAS Court of Justice and national courts.
10. Respect their constitutional laws and subregional norms of ECOWAS on democracy and good governance, consolidate democracy and allow national institutions to function independently, and act collectively to prevent UCG and sanction perpetrators.
11. Combat misinformation, disinformation and radicalisation, particularly of the youth, to prevent military interventions and creation of ethno-religious fundamentalists within the subregion.
12. Budget adequately to deal with migration as part of the region's development agenda.
13. Enhance the capacity of National Human Rights Institutions (NHRIs) to function effectively.
14. Muster the political will to hold their members accountable to their treaty obligations.
15. Eradicate poverty and distribute resources appropriately in line with Article 21 of the African Charter.
16. Domesticating ECOWAS Laws to enable citizens hold Member States accountable regarding the application of these laws at the national level.
17. Enhance and ensure strong and credible national institutions in Member States, through appointments by merit; adequate budget and effectiveness of the implementation of decisions as a panacea in curbing unconstitutional change of Government.
18. Ensure that armed forces remain apolitical in the affairs of State to guard against UCG
19. Combat corruption in public life as it undermines public confidence in state institutions and creates conditions for instability.
20. Strengthen internal institutions of Member States and sensitise citizens on their rights.

21. Work collectively and efficiently to improve the economic lives of the peoples of the sub-region.
- ii. To ECOWAS
30. ECOWAS should:
 1. Impose effective targeted sanctions against coup plotters and their collaborators to deter perpetrators and their collaborators so as to avoid adverse effects on Community citizens and amend the ECOWAS Supplementary Protocol on Democracy and Good Governance to that effect.
 2. Address the link between crisis and conflicts in West Africa and the poor socio-economic conditions of Community citizens through social dialogue.
 3. Ensure effective implementation of the Revised Treaty, Protocols, Supplementary Acts and other Community laws, and make compliance thereof a condition for retaining the membership of the sub regional block.
 4. Support National Electoral Institutions, in particular, its expertise in the establishment of biometric files and mobilise enough Observers during the elections.
 5. Take proactive measures through diplomacy, when governments take steps to extend their tenure before it is implemented.
 6. Commit to the implementation of recommendations from election observers.
 7. Disseminate the existing Community laws by publishing a compendium of laws for the benefit of the Community citizens, including digital databases.
 8. Utilise early warning tools and existing Protocols to recalibrate the regional peace and security architecture.
 9. Utilise proactive preventive diplomacy, mediation and results oriented conflict management strategies driven by consistency, neutrality and inclusivity to deal with management and resolution of conflict.
 10. Clarify and harmonise the legal framework of the Community to enable Member States fulfil their treaty obligations.

11. Strengthen the authority of Community norms, promote democratic rotation of power and collaboration between Member States.
 12. Abhor and criminalise altering of constitutions with the intention to elongate tenure to avoid UCG and put in place measures to ensure Member States that have term limits respect them.
 13. Include academia and the media as part of the larger community of CSOs with a view to contributing to the economic integration process of the Community.
 14. Ensure regular update on the status of execution of the Court's decisions by Member States, during statutory meetings of the Council of Ministers and the Authority of Heads of State and Government.
 15. Create an enforcement Unit at the Commission to follow up with Member States on compliance with the Court's decisions.
 16. Strengthen the competences and capacities of the ECOWAS Court of Justice.
 17. Increase the number of judges of the ECOWAS Court of Justice and stagger the expiration of their tenure in line with international best practice.
 18. Amend the Protocols on the Court to enable access to individual citizens in respect of violations of community laws/obligations including activating sanctions proceedings against Member States.
- iii. To the ECOWAS Community Court of Justice
 31. The Court of Justice should:
 1. Hold regular judicial dialogues with national courts for the effective defence of human rights and the rule of law.
 2. Take measures to enhance its relationship with national courts to develop the synergy between them.
 3. Monitor the enforcement of the Court's judgments.
 - iv. To the African Union
 32. The African Union should:
 1. coordinate its efforts with ECOWAS for a consistent implementation of regional norms governing elections and good governance.

2. Implement sanctions against unconstitutional changes of government.
 - v. To National Human Rights Institutions & Civil Society Organisations
33. NHRIs & Civil Society Organisations:
 1. NHRIs, Human rights organisations, including Bar Associations should disseminate the judgments of the Court and encourage decision-makers in Member States to execute them.
 2. CSOs should be supported to improve the democratic culture within the sub-region.
 3. Members of academia, civil society and the media should act responsibly and avoid defending and justifying unconstitutional changes in government.
 4. National Bar Associations and Law Faculties in Member States should mobilize resources for continuing legal education at the domestic level.

V. CLOSING CEREMONY

34. The Conference Report was considered and adopted by all the participants present. Thereafter, the Vice President of the ECOWAS Community Court of Justice, Hon. Justice Gberi-Be Ouattara delivered the Vote of Thanks. He conveyed the Court's gratitude to all the participants for attending the International Conference in person and remotely, and for their active participation during the deliberations. He then thanked the President, the Government, and people of the Republic of the Gambia for hosting the Conference and for the warm hospitality accorded to, and excellent facilities put at the disposal of all the participants. He also thanked the President of the ECOWAS Commission, heads of ECOWAS institutions and individuals that delivered goodwill messages, as well as other dignitaries who attended, presented or moderated sessions of the Conference. Finally, he thanked all those who have in their various capacities made the conference a success and wished everyone a safe trip back to their respective destinations.
35. The President of the ECOWAS Community Court of Justice, Hon. Justice Edward Amoako Asante, the Minister of Trade of The Gambia, Hon. Boubacar O. Joof and the Attorney General and Minister of Justice of The Gambia, Hon. Dawda A. Jallow delivered Closing Statements.

36. In his statement, the President of the Court thanked the Government and the people of The Gambia for hosting the Conference and facilitating its successful outcome. He also thanked the Vice President of the Gambia for gracing the Opening Ceremony and officially opening the Conference on behalf of the President of the Gambia. He recalled the various presentations and the rich and extensive panel discussions that took place during the Conference and how they have contributed to enriching the knowledge of participants.
37. He acknowledged the efforts of ECOWAS in restoring constitutional order in Mali, Guinea and Burkina Faso and reminded the Conference of the need for free, fair and transparent elections in order to avoid unnecessary conflicts and political instability in the sub- region. He also stressed that the economic integration agenda cannot be achieved without sustainable participatory democracy, rule of law and respect for human rights and called on Member States to fulfil in good faith, all their ECOWAS Treaty obligations including compliance with the judgements of the Court. He highlighted the important role of national courts of Member States and the ECOWAS Court of Justice in the promotion and protection of participatory democracy and human rights and in holding Member States accountable for their treaty obligations. Finally, he thanked all the resource persons, participants and other collaborators for their contribution towards the success of the Conference.
38. In his statement, the Minister of Trade expressed his appreciation to the Court for holding this important conference in The Gambia. He also expressed his satisfaction with the pertinent issues discussed and the recommendations made which should be sufficient to generate processes that would ultimately ensure the prevention of all forms of Unconstitutional Change of Government in the ECOWAS region. He concluded by assuring the Conference of the commitment of the Government of The Gambia to support ECOWAS efforts to guarantee peace and stability through democratic governance and respect for human rights.
39. The Attorney General and Minister of Justice in his closing remarks, acknowledged the wealth of knowledge, experience, insights, perspectives, and expertise that was shared during the Conference and how they have enriched the understanding of the participants about issues of unconstitutional change of government and contributed to strengthening the

resolve to fortify Member State's democratic values and institutions. He commended all the resource persons and participants for a successful conference and reiterated the Government of The Gambia's pleasure in hosting this important event as well as her readiness to host other ECOWAS Court conferences and external Court Sessions. He wished all the participants a safe trip back to their respective destinations and officially declared the conference closed.

VI. ANNEX
The Programme

ANNEX
COMMUNITY COURT OF JUSTICE, ECOWAS PROGRAM

**INTERNATIONAL CONFERENCE ORGANISED
BY THE ECOWAS COURT OF JUSTICE IN BANJUL, THE REPUBLIC
OF THE GAMBIA**

THEME
**“THEME: ECOWAS’ ZERO TOLERANCE FOR
UNCONSTITUTIONAL CHANGE OF GOVERNMENT.”**

VENUE: BANJUL, THE GAMBIA.

DATE: 22ND – 25TH MAY 2023

MONDAY 22nd MAY, 2023

8:30 am - 9:30 am	Registration of participants.
9:30am – 11:45 am	OPENING CEREMONY
9:30am - 9:35	am Anthems of the Republic of The Gambia and
ECOWAS.	
9:35am – 9:50 am	Welcome address by the President, ECOWAS Court of Justice, Hon. Justice Edward Amoako Asante.
9:50am – 9: 55am	Goodwill Message by the Hon. Speaker of ECOWAS Parliament
9:55am – 10:00 am	Goodwill Message by the D. G WAHO
10:00 am – 10:05 am	Goodwill Message by the President of EBID
10:05am – 10:10am	Goodwill Message by the DG GIABA
10:10am – 10:15 am	Goodwill Message by the Auditor General of ECOWAS Institutions
10:15am – 10: 25am	Statement by H.E. President of ECOWAS Commission
10:25 am – 10:35 am	Statement by the Hon. Minister of Justice of the Republic of The Gambia
10:35 am – 10:45 am	Statement by Hon. Minister of Foreign Affairs, International Cooperation, and Gambians Abroad.
10:45am – 10:55am	Statement by the Hon. Minister for Trade, Industry, Regional Integration and Employment of The Gambia
10:55 am – 11:05 am	Statement by the Chief Justice of the Republic of The Gambia
11:05 am- 11:30 am	Keynote Address by the Guest Speaker, Prof Chidi Anselem Odinkalu
11:30 am – 11:40 am	Statement and Official opening of the Conference by H.E, President of the Republic of The Gambia
11:40 am – 11:45 am	Group Photograph.
Moderator:	Hon. Chief Justice of the Gambia, Justice Abubakar Jallow Rapporteurs: Zoumana Camara and Christopher Nyinevi
11:45 am – 12:15 pm	Tea break.

DAY ONE

AFTERNOON SESSION

12:15 pm – 3:50 pm

SUB-THEME 1:

RULE OF LAW, DEMOCRACY AND GOOD
GOVERNANCE : ECOWAS
CONSTITUTIONAL CONVERGENCE
PRINCIPLES IN PERSPECTIVE.

Issues for consideration

- Democracy, Rule of Law and Good Governance: ECOWAS Constitutional Convergence Principles in focus.
- ECOWAS policy of Zero Tolerance for Unconstitutional Change of Government: Application, Sanctions and Legal Implications.
- Building Strong Institutions and a Democratic Culture.
- Role of the Military in a Democracy: Subjugating the Military to Civilian Political Control.

Moderator: Hon. Justice Dupe Atoki, Judge, ECOWAS Court of Justice.

Rapporteurs: Hajara Onoja and Duke Ekpenyong

12:15 pm – 1:35 pm **Presentations on Sub-Theme One**

Presenters:

- i. Femi Falana, Human Rights Activist and Senior Advocate of Nigeria.
- ii. Prof. Oumarou Narey, Professor of International and Constitutional Law, Abdou Moumouni University, Niamey, President of Audit Court, Republic of Niger
- iii. Diana Asonaba Dapaah, Deputy Attorney-General & Deputy Minister for Justice – Ghana
- iv. Hon. Justice (Dr.) Aboubakarr. M. Binneh-Kamara, Justice of the High Court of Sierra Leone, Assistant Dean, Faculty of Law, Fourah Bay College, University of Sierra Leone, Mount Aureol, Sierra Leone.

1:35 pm – 2:35 pm: **Lunch Break**

2:35 pm – 3:35 pm **DISCUSSIONS**

3:35 pm – 3:50 pm: **Tea Break**

TUESDAY 23rd MAY 2023

DAY TWO

MORNING SESSION

8:30 am – 1:15 pm

SUB-THEME 2: ECOWAS MECHANISM FOR CONFLICT PREVENTION, MANAGEMENT, RESOLUTION, PEACE KEEPING, AND SECURITY

Issues for consideration

- ECOWAS Peace and Security Architecture
- ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.
- Dispute Resolution under the Mechanism: Noninvolvement of the ECOWAS Court of Justice.
- Sanctions Regime under the Mechanism
- Desirability of the Community Intervening to restore constitutional order
- How insecurity and political instability trigger migration

Moderator: Hon. Justice Sengu M Koroma, Judge, ECOWAS Court of Justice

Rapporteurs: Oluwale Afolabi and Aboubakar Adam.

8:30 am – 9:30 am **Presentations on Sub-Theme Two.**

Presenters:

- I. Dr. Emmanuel Brasca Udo Ifeadi, Former Deputy Comptroller General, Nigerian Immigration Service, CEO Conflict Resolution and Migration Awareness Initiative. (PhD in Strategic Studies and PhD in International Relations)
- ii. Dr. Tony Elumelu, A.g Director, Private Sector and P.P.O Free Movement ECOWAS, Commission, Yakubu Gowon Way, Asokoro, Abuja. Nigeria.
- iii. Prof. Agoka Kossi Mawuli, Prof of Constitutional law, former member of the United Nations Disarmament Centre, Lomé, Former Director of WAEMU Commission Secretariat, Former Advisor to the African Union Commission in the Sahel.

9:30 am – 10:30 am: **DISCUSSIONS**

10:30 am – 11:00 am: **Tea Break**

11:00 am – 1:00pm

SUB-THEME 3: HUMAN RIGHTS AS A FACTOR FOR DEMOCRACY, PEACE AND SECURITY: DUTY OF MEMBER STATES, TO RESPECT, PROTECT AND FULFIL HUMAN RIGHTS

Issues for consideration

- Protection of Human Rights as a Core and Cardinal Value of the Community.
 - ECOWAS Human Rights Mechanism.
 - Duty of Member States to Respect, Protect and Fulfil Human Rights and Holding them accountable for their Treaty Obligations.
 - Human Rights Protection as a Factor for Democracy, Peace and Security.

Moderator: Dr. Helio Sanchez, Cape Verde.

Rapporteurs: Kuakuvi Anani and Cassandra O. M. Labor

11:00 am – 12:00 pm: **Presentations on Sub- Theme Three**

Presenters:

- i. Hon. Justice/Dr. Osei- Hwere, Hon. Judge of the High Court of Ghana
- ii. Prof. Joy Ngozi Ezeilo, SAN, OON [Ph.D. (Nig.), LLM (London), LL.B. (Nig.), BL, Diploma Peace & Conflict Res (Uppsala); Professor of Public Law; Dean Emeritus, Faculty of Law, University of Nigeria (UNN), Enugu Campus; Head of Department of Public Law, UNN
- iii. Mr. Salieu Taal, President of The Gambia Bar Association.

12:00 pm – 1:00 pm: **DISCUSSIONS**

1:00 pm – 2:00 pm: **Lunch Break**

AFTERNOON SESSION

2:00 pm – 4:20 pm

SUB-THEME 4: LACK OF FREE, FAIR AND TRANSPARENT ELECTIONS AS A KEY SOURCE OF CONFLICT: HOLDING MEMBER STATES ACCOUNTABLE FOR THEIR TREATY OBLIGATIONS AND THE SANCTIONS REGIME

Issues for consideration

- Parameters for Free, Fair and Transparent Elections under the Protocol on Democracy and Good Governance.
- Elections Monitoring and ECOWAS Assistance to Member States.
- Factors responsible for the undermining of Free, Fair and Transparent Elections.

- Factors Responsible for the subversion of Constitutional Democratic Order.
- How to Hold Member States accountable for their Treaty Obligations.
- Sanctions Regime for Unconstitutional Change of Government

Moderator: Her Honour Sie-A-Nyene G. Yuoh, Chief Justice of Liberia

Rapporteurs: Ghislain Agbozo and John Istifanus

2:00 pm – 3:20 pm: Presentations on Sub-Theme Four.

Presenters:

- Mr. Paul Ejime, International Media Specialist in ECOWAS Affairs/ War Correspondent
- Prof. Amos Enabulele, Professor of International Law, University of Benin, Edo State, Nigeria
- Hon Justice Diane Hassane, Secretary General National Council of Human Rights, Republic of Cote d'Ivoire
- Ms. Amie N.D. Bensouda, Managing Partner, Amie Bensouda and Co

3:20 pm – 4:20 pm DISCUSSIONS

4:20 pm – 4:50 pm Tea Break

WEDNESDAY 24th MAY 2023

DAY THREE

MORNING SESSION

8:30am – 1:30 pm

SUB-THEME 5: THE ROLE OF NATIONAL COURTS OF MEMBER STATES AND THE ECOWAS COURT OF JUSTICE IN UPHOLDING HUMAN RIGHTS, RULE OF LAW AND CONSTITUTIONAL DEMOCRACY.

Issues for consideration

- Role of National Courts of Member States in Protecting Human Rights and Upholding Rule of Law and Constitutional Democracy.
- Role of ECOWAS Court of Justice in Regional Protection of Human Rights and in Upholding Rule of Law and Constitutional Democracy in the Community
- Law as an Instrument in the Maintenance Regional Peace and

- Security: Treaty Supervision and Oversight functions.
Enhancing the Roles of National Courts of Member States and the ECOWAS Court of Justice in the Peace and Security Architecture of the Community.

Moderator: Hon. Justice Ricardo M. Goncalves. Judge, ECOWAS Court of Justice

Rapporteurs: Kouassi Fernand and Yusuf Danmadami

8:30 am – 9:50 am **Presentations on Sub-Theme Five.**

Presenters:

- Prof. Solomon Ebobrah, Prof of International Law, Niger Delta University, Bayelsa State, Nigeria
- Professor Raymond Atuguba, Professor of General Jurisprudence and Dean of the University of Ghana School of Law.
- Hon. Justice Kablan N'draman Fidèle Amilcar, Magistrate, Judge of the Abidjan Court of first instance, Côte d'Ivoire.
- Ms. Janet Sallah Njie, Hon. Commissioner, African Commission on Human and Peoples' Rights, Special Rapporteur on the Rights of Women in Africa, Former Solicitor General and Senior Legal Practitioner.

9:50 am – 10:10am: Tea Break

10:10am – 11:10am: DISCUSSIONS

SUB-THEME 6: THE ENABLING LEGAL ENVIRONMENT FOR ECOWAS INTEGRATION; ECOWAS COMMUNITY LAW IN PERSPECTIVE

Issues for consideration.

- The Enabling Legal Environment for ECOWAS Integration: An Integrated Community Legal Order.
- Challenges militating against the realisation of an integrated Community Legal Order.
- How to advance from an ECOWAS Regime of Laws to ECOWAS Community Law.
- Relevance of integrated Community Legal Order in the Maintenance of Regional Peace and Security.

Moderator: Justice Desmond B. Edwards Chief Justice, Sierra Leone

Rapporteurs: Oluwatosin Nguher and Zara Carew

11:10am– 12:10 pm Presentations on Sub-Theme Six.

Presenters:

- I. Prof (Justice) F. C. Nwoke, Professor of International Law, University of Jos, Nigeria and former Vice President of the ECOWAS Court of Justice
- ii. Prof. Ernest Kofi Abotsi, Dean of the University of Professional Studies, Accra, Ghana.

12:10 pm – 1:10pm **DISCUSSIONS**

1:10 pm – 2:10pm **Lunch Break**

AFTERNOON SESSION

2:10 pm – 4:10 pm

SUB-THEME 7: AN APPRAISAL OF THE JUDGMENT ENFORCEMENT MECHANISM OF THE ECOWAS COURT OF JUSTICE.

Issues for consideration

- The Judgement Enforcement Mechanism of ECOWAS Court of Justice.
- Pacta Sunt Servanda.
- Challenges of the Judgment Enforcement Mechanism.
- How to strengthen the Judgement Enforcement Mechanism.

Moderator: Hon. Justice Antonio Andre Lima, Vice-President of the Supreme Court of Guinea Bissau

Rapporteurs: Emiliana Mendes and Issah Tauheed

2:10 pm – 3:10 pm: Presentations on Sub-Theme Seven:

Presenters:

- i. Prof. M. T. Ladan, Director General, Nigeria Institute of Advanced Legal Studies, Abuja, Nigeria.
- ii. Mr. Anthony Anene-Maidoh, Former Chief Registrar, ECOWAS Court of Justice
- iii. Hon. Justice Ladislau Clemente Fernando Embassa, Justice of the Supreme Court of Guinea Bissau and UEAMOA Court of Justice, Burkina Faso

3:10 pm – 4:10 pm: **DISCUSSIONS**

4:10 pm – 4:30 pm: **Tea Break**

THURSDAY 25th MAY 2023

DAY FOUR

8:30 am – 1:00 pm Finalization of Report by Rapporteurs

1:00 pm – 2:00 pm Lunch Break

2:00 pm – 4:00 pm: Presentation and adoption of Report.

Rapporteur General – Mrs. Marie Saine Assistant Rapporteur
General – Ms Oluwatosin Nguher

4:00pm – 4:40 pm **CLOSING CEREMONY**

Moderator: Hon. Justice Edward Amoako Asante, President, ECOWAS
Court of Justice.

4:00pm – 4:05pm Anthems of Republic of The Gambia and ECOWAS.

4:05pm – 4:20pm Reading of the Communique by the Rapporteur General.

4:20pm – 4:30pm Vote of thanks by Hon. Justice Gberi-Be Ouattara, the Vice
President, ECOWAS Court of Justice.

4:30pm – 4:40pm Closing Statement by the Hon. President of the ECOWAS
Court of Justice, Hon. Justice Edward Amoako Asante.

4:40pm – 5:00pm: Tea Break Hon. Justice Edward Amoako Asante President
Community Court of Justice, ECOWAS Abuja, Nigeria

ATTENDANCE LIST

S/N	Names/ Noms/ /Nomes	Status/Fonction/ Funções	Email
<i>Judges of the Court</i>			
1	Hon. Justice Edward Amoako Asante	President	easante@courtecowas.org
2	Hon. Justice Gberi- Be Ouattara	Vice President	gouattara@courtecowas.org
3	Hon. Justice Dupe Atoki	Judge	datoki@courtecowas.org
4	Hon. Justice Sengu Koroma	Judge	skoroma@courtecowas.org
5	Hon. Justice Ricardo Goncalves	Judge	rgoncalves@courtecowas.org
<i>Attorney Generals and Minsters of Justice of Member States</i>			
6	Cllr. Frank Musah Dean, Jr.	Attorney General of Liberia	frankmdeanjr@gmail.com
7	Mr. Dawda A. Jallow	Attorney General of the Gambia	attorneygeneral@moj.gouv.gm
8	Madam Joana Gomes Amado	Attorney General of Cape Verde	Sandra.s.sousa@mj.gov.cv
9	Maitre Kokouvi Pius Agbetomey	Attorney General of Togo	minjustice@yahoo.fr
	Mr. Delbe Zirignon	Representing the Attorney General of Cote d'Ivoire	delbeconstant2020@gmail.com
<i>Chiefs Justices of Supreme Courts</i>			
10	Hon. Justice Hassan Bubacar Jallow	Chief Justice of The Gambia	hbjallow@gmail.com
11	Her Honor Sie-A-Nyene Gyapay Yuoh	Chief Justice of Liberia	sgyuoh55@gmail.com
12	Hon. Justice Desmond Babatunde Edwards	Chief Justice of Sierra Leone	cj@judiciary.gov.sl
13	Hon. Justice Antonio Andre Lima	Vice President of the Supreme Court of Guinea Bissau	chamandrasilva2000@gmail.com
14	Hon. Justice Konde Mazobe Jean	First President of the Court of Cassation of the Republic of Burkina Faso	courdecassationburkina@yahoo.com
15	Hon. Justice Cire Aly BA	First President of the Supreme Court of Senegal	marietall@coursupreme.sn
16	Mr. Armand Gounon	Magistrate, Director of Relations with Institutions and International Cooperation of the Supreme Court of Senegal	
17	Ms. Elsie M. Nyepflu	Special Assistant	enyeplu2003@yahoo.com
18	Attorney Jeuconte E. Berry	Law Clerck, serving as Secretary General	jeuconte@yahoo.com
19	Brig. Gen. Amos N. K. Dickson	Marshal – Supreme Court of Liberia	
<i>Presidents of Regional Courts</i>			
20	Mr. Mahawa Semou Diouf	President, UEMOA Court of Justice	msdiouf@uemoa.int
21	Mr. Hamidou Yameogo	Deputy Registrar, UEMOA Court of Justice	hayameogo@uemoa.int
22	Hon. Justice Yohane Bokobora Masara	Principal Judges, East African Court of Justice	ymasara@eachq.org
<i>Presidents of Bar Association of Member States</i>			
23	Ms. Edinna Swallow	President of Sierra Leone Bar Association	swallow596@gmail.com

24	Mr. Oumarou Sanda Kadri	President of the Niger Bar Association	oskadri@yahoo.fr
25	Maitre Papalaity Ndiaye	President of Senegal Bar Association	info@ordredesavocats.sn
26	Cllr. Sylvester D. Rennie	President of Liberian National Bar Association	office@lnba.org
27	Maitre Koffigoh Kokou Joseph	Representative of the President of the Togolese Bar Association	ordreavocat_tg@yahoo.fr
Guests			
28	Hon. Justice Paul Baffo-Bonnie	Justice of the Supreme Court of Ghana	paulbaffobonnie@yahoo.com
29	Ambassador Musa S. Nuhu	Permanent Representative of Nigeria to ECOWAS	msnuhuu@yahoo.com
30	Muhammed Sulaiman Isa	Minister Counsellor	isamuha@gmail.com
31	Barrister Kwaku Gyaw Baffour	National Secretary, Ghana Bar Association	nationalsecretary@ghanabar.org
32	Barrister Kwasi Amoako Adjei	Vice President, Ghana Bar Association	adjeilawconsult@yahoo.com
33	Dr. Felisberto Vieira	Former Mayor of Praia,	f.alvesvieira55@gmail.com
34	Dr. Helios Sanches	Lawyer and Legal Consultant, specialized in the field of private law, Achada Santo Antonio	sancheshe@yahoo.com
35	Prof. Philip Ebow Bondzi-Simpson	Founding Dean, Faculty of Law, University of Cape Coast, Emeritus Rector, Ghana Institute of Management and Public Administration	pbondzi-simpson@ucc.edu.gh
36	Hon. Justice Emmanuel E. Roberts, JSC	Justice of the Supreme Court of Sierra Leone, Director Judicial Training Institute and Tutor, Serra Leone Law School	robbieeku@yahoo.com
37	Prof. Kwamena Kwansah-Aido	Vice Chancellor, UNIMAC	kkwansah@unimac.edu.gh
Resource Persons			
38	Prof. Chidi Anselem Odinkalu	Professor of International Human Rights Law and Professor of Professor of Practice, Fletcher School, Tuff University, Boston USA	chidiao@hotmail.com
39	Prof. Agokla Kossi Mawuli	Professor of Constitutional Law, International Consultant on security sector reforms	kagokla
40	Hon. Justice Dr Osei-Hwere	Hon. Judge of the High Court of Ghana	oseihwherer@yahoo.com
41	Prof. Joy Ngozi Ezeilo	SAN, OON, Professor of Public Law, Dean Emeritus, Faculty of Law, University of Nigeria, Enugu Campus	ezeilojoy@yahoo.co.uk
42	Femi Falana	Human Rights Activist and Senior Advocate of Nigeria	falanafemi15@gmail.com
43	Prof. Oumarou Narey	Professor of International and Constitutional Law, Abdou Moumouni University, Niamey	O_narey@yahoo.com

44	Diana Asonaba Dapaah	Deputy Attorney-General & Deputy Minister of Justice, Ghana	diana.dapaah@mojagd.gov.gh
45	Hon. Justice Dr. Aboubakarr Binnéh-Kamara	Justice of the High-Court of Sierra Leone, Assistant Dean, Faculty of Law, Fourah Bay College	ab2087@sussex.ac.uk
46	Dr Emmanuel Brasca Udo Ifeadi	Former Deputy Comptroller General, Nigerian Immigration Service	ifeadibrasca@yahoo.fr
47	Dr. Tony Elumelu	Ag. Director, Private Sector and PPO Free Movement, ECOWAS Commission	
48	Mr. Paul Ejime	International Media Specialist	paulejime@outlook.com
49	Prof. Amos Enabulele	Professor of International Law, University of Benin, Nigeria	amos.enabulele@uniben.edu
50	Hon. Justice Hassane Diane	Secretary General of the National Council of Human Rights, Republic of Cote d'Ivoire	dianehassane2@gmail.com
51	Ms. Amie N. D. Bensouda	Managing Partner, Amie Bensouda and Co, Banjul, The Gambia	amie@amiebensoudaco.net
52	Prof. Solomon Ebobrah	Prof. of International Law, Former Dean Faculty of Law, Niger Delta University, Nigeria	solomon.ebobrah@ndu.edu.ng
53	Professor Raymond Atuguba	Professor of General Jurisprudence and Dean, University of Ghana School of Law	
54	Hon. Justice Kablan N'Draman Fidele Amilcar	Magistrate, judge of the Abidjan Court of First Instance, Cote d'Ivoire	kndraman@gmail.com
55	Ms. Janet Sallah Njie	Hon. Commissioner, African Commission on Human and People's rights	jsnjie@qanet.gm
56	Prof. F C. Nwoke	Professor of International Law, University of Jos, Former Vice President of the ECOAS Court of Justice	fridaychijioke@gmail.com
57	Prof Ernest Kofi Abotsi	Dean of the University of Professional Studies, Accra, Ghana	abotsi@axislegal.com.gh
58	Prof. M. T. Ladan	Director General, Nigerian Institute of Advanced Legal Studies, Abuja, Nigeria	mtladan@gamil.com
59	Mr. Anthony Anene-Maidoh	Former Chief Registrar, ECOWAS Court of Justice	tamaidoh@yahoo.com
60	Hon. Justice Ladislau Clemente Fernando Embassa	Justice of the Supreme Court of Guinea Bissau and UEMOA Court of Justice	
<i>Heads of ECOWAS institutions/Agencies</i>			
61	H. E. Dr. Omar Alieu Touray	President, ECOWAS Commission	
62	Rt. Honourable Sidi Mohamed Tunis	Speaker, ECOWAS Parliament	jazumah@parlecowas.int
63	Mr. Edwin W. Harris	Director General, GIABA	ewharris@giaba.org
64	Dr. Joao Alage Mamadu Fadia	Auditor General of ECOWAS Institutions	jfdia@ecowas.int
65	Mr. Moctar Coulibaly	Secretary General, EBID	bidc@bidc-ebid.org
<i>ECOWAS Parliament Delegation</i>			

66	Emmanuel Kwasi Bedzrah	Member of ECOWAS PArliamentekbedzrah@gmail.com	
67	Nguessan Jouao Yves	Committee Clerk	yvesnguessan@yahoo.fr
68	Mohamed Borsuason Rogers	Administrative Assistat to the Speaker	mboruason@gmail.com
69	Pascal Guinevi Komlam	Protocol Officer	Pascal228@gmail.com
	Fily Diallo	Protocol Assistant	fildiallo@gmail.com
<i>Heads of ECOWAS National Units</i>			
70	M. Armand Sounton	Head of ECOWAS National Office, Benin Republic	armandsounton@yahoo.fr
71	Dr. Yakubu A, Dadu	Head of ECOWAS National Office, Federal Republic of Nigeria	dadadu01@yahoo.com,
72	Mme Elisangela Andrade CARvalho	Head of ECOWAS National Office, Republic of Cape Verde	ecarvalho@mneec.gov.cv
73	M. Silla Minourou	Head representative of the Head of ECOWAS National Office of the Republic of Cote d'Ivoire	minourousilla@yahoo.fr
74	Ms. Neematu Ziblim Adam	Head of ECOWAS National Office, Republic of Ghana	neematu.adam@mfa.gov.gh
75	Mrs. Cristina da Silva Pedreira	Head of ECOWAS National Office, Republic of Guinea Bissau of the Republic of Liberia	cristinasilvapedreira@yahoo.com
76	Mr. Sumanu Othman Zinurine Alghali	Head of ECOWAS National Office, Republic of Sierra Leone	soza196631@gmail.com
77	Mrs Ndeye Tabara Touray	Head of ECOWAS National Office, The Gambia	nttouray@gmail.com
78	Mme Abdoyulaye Fatoumata Soumana	Head of ECOWAS National Office, Republic of Niger	
79		Head of ECOWAS National Office	
80	Mr. Amos Tubor	Deputy Head of ECOWAS National Office	atubor@mfdp.gov.lr
81	Mme EleonoreAdjoavi	Representative of the Head of ECOWAS National Office, Republic of Togo	rkbouare@gmail.com
<i>International Development Partners</i>			
82	Mr. Herve Kuate	Senior Liaison Adviser to ECOWAS, UNHCR	kuat@unhcr.org
83	Mr. Maurice Chukwu	Amnesty International	info@amnesty.org.ng
84	Mr. Mac-Ikemenjima Dabesaki	Ford Foundation	u.obike@fordfoundatopm.org
85	Mr Salieu Taal	President of the Gambia Bar Association	info@gba.gm
<i>President of African Bar Association</i>			
86	Mr. Hannibal Uwaifo	President, of the African Bar Association	Hannibal.uwaifo@afribar.org
<i>Commissioner For Human Rights</i>			
87	Mr. Joseph Akanjolenur Whittal	Commissioner For Human Rights and Administrative Justice (CHRAJ), Ghana	Joseph.whittal@chraj.gov.gh

Directors – ECOWAS Court			
88	Dr. Yaouza Ouro-Sama	Chief Registrar	yourosama@courtecowas.org
89	Dr. Athanase Atannon	DCR	aatannon@courtecowas.org
90	Dr. William D. Towah	DAF	wtowah@courtecowas.org
91	Dr. Ousmane Diallo	DRCD	odiallo@courtecowas.org
Legal Staff			
92	Mr. Apraku Nketiah	Principal Research Officer	napraku@courtecowas.org
93	Mr. Aboubacar Diakite	Court Registrar	adiakite@courtecowas.org
94	Mrs. Marie Saine	Court Registrar/(General Rapporteur)	msaine@courtecowas.org
95	Mr. Gaye Sowe	Court Registrar	gsowe@courtecowas.org
Rapporteurs			
96	Mr. Christopher Nyinevi	EA to the Hon. President	cnyinevi@courtecowas.org
97	Mr. M.E. Kouassi Fernard	EA to the Hon. Vice President	fme Kouassi@courtecowas.org
98	Mr. Oluwale S. Afolabi	EA to Hon. Justice Atoki	oafolabi@courtecowas.org
99	Mrs. Cassandra O. M. Labor	EA to Hon. Justice Koroma	clabor@courtecowas.org
100	Mrs. Emiliana M. S. B. Mendes	EA to Hon. Justice Goncalves	emendes@courtecowas.org
101	Mr. Kuakuvi Anani	Senior Reporter	akuakuvi@courtecowas.org
102	Mr. Yusuf Danmadami	Senior Reporter	ydanmadami@courtecowas.org
103	Mr. Ghislain Agbozo	Senior Research Officer	gagbozo@courtecowas.org
104	Mrs. Oluwatosin Nguher	Senior Research Officer, Assist. Rapporteur	onguher@courtecowas.org
105	Mr. Zoumana Camara	Reporter	zcamara@courtecowas.org
106	Mrs. Zara Carew Sabo	Assistant Registrar	zcarew@courtecowas.org
107	Mr. Duke Ekpenyong	Assistant Registrar	eduke@courtecowas.org
108	Mr. John Istifanus	Research Officer	jistifanus@courtecowas.org
109	Mr. Issah Tauheed	Assistant Registrar	tissah@courtecowas.org
110	Mr. Abubakar Adam	Research Officer	aadam@courtecowas.org
111	Mrs. Hajara Onoja	Legal Officer	honoja@courtecowas.org
Secretariat			
112	Mrs. Madeleine Abdulahi	Secretary	mabdullahi@courtecowas.org
113	Mrs. Nadia Innocencia Balley	Secretary	nballey@courtecowas.org
114	Mr. Nwoko Uche Daniel	Legal Assistant	unwoko@courtecowas.org
115	Mrs. Sonia Biaou	Secretary	sbiaou@courtecowas.org
116	Mrs. Vera Ego Obuekwe	Secretary	vobuekwe@courtecowas.org
117	Mrs. Felicitas Nwaojei	Secretary	fnwaojei@courtecowas.org
118	Mrs. Ndeye Ndamé Tall-Sy	Secretary	ntall@courtecowas.org
Accounts			
119	Mr. David Nzonzo	Chief Accountant	dnzonzo@courtecowas.org
120	Mrs. Blessing Banji	Accountant Officer	bbanji@courtecowas.org
121	Mrs. Anne Ogolekwu	Accountant Officer	aomirinde@courtecowas.org
IT			
122	Dr. Frederic Drabo	Consultant	fdrabo@courtecowas.org
123	Mr. Ernest Amoakwa-Boadu	Ag Head and IT	eamoakwa@courtecowas.org
124	Abiodun Omiridan	IT Assistant	aomidiran@courtecowas.org

Communication			
125	Mr. Sunny Ugoh	HOD Communication	sugoh@courtecowas.org
126	Mr. Felicien Hounkarin	Communication Officer	fhounkanrin@courtecowas.org
127	Mr. Koffi Kouchanou	Communication Officer	kkouchanou@courtecowas.org
128	Mr. Danladi Maji	Photographer	mdamnsagi@courtecowas.org
Language Services Division			
129	Mr. Daouda Sanfo	Head, Language Services Division	dsanfo@courtecowas.org
130	Mr. Issa Illiassou	Translator/Interpreter	lissa@courtecowas.org
131	Mr. Horouna Issaka	Translator	hissaka@courtecowas.org
132	Mr. Sani Omosun	Translator	somosun@courtecowas.org
Protocol Division			
133	Mr. Eric Akuete	Chief Protocol	eakuete@courtecowas.org
134	Mr. Ambo Aleyideino	Protocol Assistant	aaleyideino@courtecowas.org
135	Mr. Lasisi Ayoubu	Protocol Assistant	layoubu@courtecowas.org
136	Mr. Ezekiel Darason	Protocol Assistant	edarason@courtecowas.org
Freelance			
137	Mrs Piloto Dirce Verela		
138	Sidney Correia (Mr)		
139	Mrs. Venia Almeida		
140	Mrs. Sonia Gomes da Veiga		
141	Mr. Oyewale Robert Martins		
142	Mr. Francis Eke Metoho		
Journalists from Member States			
143	Mr. Amatijane Cande	Journalist, Guinea Bissau	amatijanecande@hotmail.com
144	Mr. Christian Akorlie	Journalist, Ghana	akorlie@gmail.com
145	Mr. Constant Bignon Adjahoungb	Journalist, Benin Republic	adconst25@gmail.com
146	Mr. Abdou Kogne Sall	Journalist, Senegal	abdoukogne@yahoo.fr
147	Mr. Adoba Echono	Journalist, Nigeria	adobaechono@yahoo.co.ouk
148	Ewaleifoh Wilfred Otatade	Journalist, Nigeria	
149	Babatunde, Hakeem Olumide	Journalist, Nigeria	
150	Lamin Cham	Journalist, The Gambia	
151	Jankey Touray	"	jaxsintouray196@gmail.com
152	Fanta Janteh	"	fantajanteh@gmail.com