

# MANUAL FOR LITIGANTS WHEN ACCESSING THE ECOWAS COURT OF JUSTICE

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THE ECOWAS COURT OF JUSTICE

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# TABLE OF CONTENTS

USER GUIDE.....	5
FOREWORD.....	6
FOREWORD.....	7
GLOSSARY OF TERMS .....	8
<b>I. THE ECOWAS COURT: MANDATE AND STRUCTURE .....</b>	<b>9</b>
<b>A. ESTABLISHMENT OF THE COURT .....</b>	<b>9</b>
1.1 The Economic Community of West African States – ECOWAS .....	9
1.2 ECOWAS Court: Statutes, and mission statement .....	10
<b>B. STRUCTURE OF THE COURT .....</b>	<b>11</b>
Organogram of the ECOWAS Court of Justice.....	11
1.3 Judges of the Court .....	12
1.4 The Registry Department.....	12
<b>II. ACCESS TO THE COURT JURISDICTION AND ADMISSIBILITY OF CASES .....</b>	<b>16</b>
<b>A. JURISDICTION .....</b>	<b>16</b>
2.1 Jurisdictional clause .....	16
2.2 General directives on jurisdiction .....	16
2.3 Jurisdiction <i>ratione personae</i> : Who can file a case before the Court? .....	16
2.4 Jurisdiction <i>ratione temporis</i> : When did the violations occur? .....	17
2.5 Jurisdiction <i>ratione materiae</i> : Is the Court competent to hear the case? .....	18
2.6 Jurisdiction <i>ratione loci</i> : Where did the violation occur? .....	20
<b>B. ADMISSIBILITY .....</b>	<b>21</b>
2.7 Statute of limitation or prescription of claims .....	21
2.8 Standing .....	21
2.9 Admissibility in respect of human rights cases .....	25
<b>III. PROCEEDINGS BEFORE THE COURT .....</b>	<b>29</b>
<b>A. CONTENTIOUS PROCEEDINGS .....</b>	<b>29</b>
3.1 The Written Procedure .....	29
3.2 Oral procedure.....	34
<b>IV. JUDGMENT .....</b>	<b>39</b>
<b>A. DELIVERY AND SERVICE .....</b>	<b>39</b>
4.1 Judgments.....	39
4.2 Default Judgment .....	39
4.3 Costs.....	40
4.4 Service of decisions.....	40
<b>B. OTHER PROCEEDINGS BEFORE THE COURT .....</b>	<b>41</b>
4.5 Appeals .....	41
4.6 Revision.....	41
4.7 Interpretation.....	42

<b>5. REMEDIES AND ENFORCEMENT .....</b>	<b>43</b>
<b>A. REMEDIES.....</b>	<b>43</b>
5.1 General principles on remedies .....	43
5.2 Reparations .....	43
5.3 Restitution .....	44
5.4 Monetary compensation .....	45
5.5 Administrative Orders .....	45
5.6 Legislative change .....	46
5.7 Interim measures.....	46
<b>VI. ENFORCEMENT OF JUDGMENTS.....</b>	<b>48</b>
<b>A. PROCEDURES FOR ENFORCEMENT .....</b>	<b>48</b>
6.1 Domestic implementation .....	48
6.2 Examples of domestic implementation .....	48
<b>B. ENFORCEMENT .....</b>	<b>50</b>
6.3 Framework for enforcement .....	50
6.4 Challenges to enforcement .....	51
<b>VII. INDEX OF CASES AND AUTHORITIES.....</b>	<b>53</b>
Journal Articles .....	53
Blog .....	53
Internet Ressources .....	53
Legislation .....	54
Cases.....	54

The Manual for Litigants Accessing the ECOWAS Court of Justice (the Manual) was initiated by the Pan African Lawyers Union (PALU) with the support of the Raoul Wallenberg Institute for Human Rights and Humanitarian Law (RWI). It is aimed at providing technical guidance to any person or entity involved in litigation before the Court of Justice of the Economic Community of West African State (ECOWAS).

PALU has engaged in initiatives to further the implementation of human rights commitments in Africa while encouraging gender inclusion and equality. PALU has committed to supporting and enhancing the ability of key actors to influence and improve the performance of the Court of Justice of the Economic Community of West African States (ECOWAS Court or ECCJ) through increasing awareness of the Court and its jurisprudence, while advocating for the implementation of its rulings and judgments. To this end, among other initiatives to increase visibility of the ECOWAS Court and access to its jurisprudence, PALU conducted an assessment of the status of implementation of the ECOWAS Court's decisions rendered under its human rights-related mandate from the inception of the Court up until 31 August 2018. PALU then developed a case matrix, clearly identifying the implementation status of the ECOWAS Court's decisions.

The purpose of the Manual is to further this initiative and to address the recurring problem of cases being struck out at admissibility stage due to incorrect litigation procedures. This has subsequently had the adverse effect of limiting access to justice through the ECOWAS Court.

The Manual provides an overview of the various litigation processes available at the ECOWAS Court. The objective is to not only increase awareness of the ECOWAS Court and correct litigation procedures, but also subsequently limit further dismissals. The Manual is intended to encourage and enhance effective litigation and, by doing so increase the number of cases that are decided on their merits and not struck out on admissibility.

In view of this background, and main mission of PALU and aim of this project, proceedings and processes included in the Manual focus on human rights litigation. However, contents of the Manual also extend to general law, community rules as they may apply to human rights cases.

The Manual is mainly directed at the primary litigants before the ECCJ that is applicants, respondent states, and their counsel or representatives. Its reach obviously extends to all other stakeholders taking part in proceedings before the Court which include *amici curiae*, interveners, experts and other witnesses that parties the Court may call to enlighten the Court in discharging its mandate.

The substantive scope of the Manual includes an overall introduction providing an overview of the ECOWAS region, the Court, its statutes, structure and operation. Subsequent sections cover processes relating to admissibility of cases, jurisdiction of the Court, contentious cases and advisory procedures to be followed in filing and pursuing a case both as a party or any other stakeholder in proceedings before the Court. The final sections are devoted to various remedies available before the Court and enforcement of its decisions. A glossary of terms is supplied in the introductory part of the Manual to make the document user friendly. An index of cases and authorities cited is placed at the end of the Manual for ease of reference.

The Manual is presented mostly in the form of full texts. However, some of the sections especially those relating to procedural steps are presented or summarised in bullet format, highlighted texts, or boxes. Organograms and graphs are included to provide an overview of the Court's structure.

## FOREWORD

The Community Court of Justice, ECOWAS ("the Court") has the primary responsibility to ensure the observation of law and justice in the interpretation and application of the provisions of the ECOWAS Revised Treaty 1993 and all other subsidiary legal instruments adopted by the Community. Since 2005, the Court has also obtained the jurisdiction to adjudicate human rights cases, making it an indispensable forum in the protection and promotion of human rights, the rule of law and good governance in the region.

With over 300 human rights cases received so far, the Court has witnessed a significant growth of its jurisprudence. This demonstrates a real opportunity to promote and uphold human rights within the region, establishing the Court as the primary organ of the Community responsible for ensuring that Member States comply with their international and regional commitments.

Notwithstanding the aforementioned achievement, it must be noted that the Court's experience has not been without challenges, particularly in the quality of pleadings filed by litigants. There appears to be a lack of knowledge regarding the Court's rules and procedures, leading to the striking out of some cases at the admissibility stage.

To address these challenges, the Pan African Lawyers Union (PALU), in collaboration with the Raoul Wallenberg Institute for Human Rights and Humanitarian Law (RWI), has developed the present Litigation Manual. Aimed at providing a clear understanding of the practical aspects of the composition, jurisdiction, and procedures of the Court, the Manual will enable litigants to engage with the jurisdiction of the Court and contribute to the development of its jurisprudence more effectively.

In interpreting the Court's Rules, both the text and prior decisions of the Court remain authoritative. Nevertheless, I am confident that anyone who reads this Manual will find it to be a valuable complement for gaining profound and practical knowledge about the practice and procedure of the Court.

I therefore commend the work of our partners, PALU and RWI, and express the Court's profound appreciation to everyone who contributed immeasurably through their expertise and knowledge to the successful drafting and publication of this Manual.

**Hon. Justice Edward Amoako Asante**

President, Community Court of Justice, ECOWAS

## FOREWORD

The Pan African Lawyers Union (PALU), with the generous support of the Swedish Development and Cooperation Agency (SIDA) through the Raoul Wallenberg Institute for Human Rights and Humanitarian Law (RWI), is proud to unveil a manual for litigants accessing the Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ). Since ECCJ started its operations, statistics show that most of the cases struck out at the admissibility stage were the result of procedural irregularities, adversely affecting access to justice of this important redress mechanism.

The present Manual aims at assisting current and prospective litigants with this challenge by breaking down the procedures and rules on how to access the Court. The Manual also highlights some of the jurisprudence developed on various areas of law over the years. With the above, the Manual will serve as a practical guide for legal practitioners, non-governmental organisations, and other bodies in accessing the Court.

I, therefore, wish to use this opportunity to thank Dr. Ségnonna Horace Adjolohoun for his expertise in developing and authoring this Manual. We are also grateful to the ECCJ for its support and continuous collaboration. Finally, we would like to express our gratitude to the Institute for Human Rights and Development in Africa (IHRDA), Ibrahima Kane, and Dr. Tarisai Mutangi for their valuable feedback during the final drafting phase.

**Donald Deya**

Chief Executive Officer – Pan African Lawyers Union (PALU)

## GLOSSARY OF TERMS

**Authority**, means the Authority of Heads of State and Government of the Community established by Article 7 of the Treaty.

**Chairman of the Authority**, means the current Chairman of the Authority of Heads of State and Government of the Community, elected in accordance with the provisions of Article 8.2 of the Treaty;

**Community**, means the Economic Community of West African States referred to under Article 2 of the Treaty;

**Court of Justice**, means the Court of Justice of the Community established under Article 15 of the Treaty;

**Council**, means the Council of Ministers of the Community established by Article 10 of the Treaty;

**Court**, means the Community Court of Justice (C.C.J) established by Article 15 of the Treaty;

**Executive Secretariat**, means the Executive Secretariat established under Article 17 of the Treaty;

**Executive Secretary**, means the Executive Secretary of the Community **Judge** or **Judges** or **Justice**, means Members of the Community Court of Justice;

**Judge – Rapporteur**, means a Judge nominated by the President to summarize or give a report on a case or issue

**Member of the Court** or **Members of the Court**, means a person or persons appointed as Judge or Judges in accordance with the provisions of Article 3 of the Protocol;

**Member State or Member States**, means Member State or Member States of the Community;

**Parliament**, means the community parliament established under Article 13 of the Treaty;

appointed under Article 18.1 of the Treaty;

**Protocol**, means the Protocol of 1991 relating to the Court of Justice of the Community;

**Supplementary Protocol**, means the Supplementary Protocol of 2005 relating to the Court of Justice of the Community

**Revised Treaty**, means the Revised Treaty of the Economic Community of West African States and includes protocol and conventions and annexure;



# I. THE ECOWAS COURT: MANDATE AND STRUCTURE

## A. ESTABLISHMENT OF THE COURT

### 1.1 The Economic Community of West African States – ECOWAS

1. The Economic Community of West African States (ECOWAS) is one of the many intergovernmental organisations established among African States.<sup>1</sup> Its membership includes 15 States all geographically located in West Africa, which are Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. ECOWAS is also one of the eight Regional Economic Communities (REC) recognised by the African Union (AU).<sup>2</sup>
2. ECOWAS was founded on 28 May 1975 with the initial aim of realizing collective self-sufficiency through economic integration. At the time, ECOWAS had very few human rights issues on its agenda and the advent of a Community Court with human rights mandate was no priority.<sup>3</sup>
3. Between 1975 and the 1990s, important events at regional, continental and international levels prompted subsequent normative and institutional developments. These events include, to name but a few, the socio-economic crisis in most countries of the region, internal conflicts in Sierra Leone and Liberia, and the fall of the Berlin wall followed with democratic revival in sub-Saharan Africa.
4. In response, ECOWAS Member States undertook a Treaty revision in 1993, which, in their words '... arose ... from the need to adapt to the changes on the international scene ...'.<sup>4</sup> In a bid to meet this commitment under the Revised Treaty, ECOWAS actively embarked on various reforms, which culminated in the June 2007 adoption of its 'Vision 2020' seeking to transform the Community from 'an ECOWAS of States' into an 'ECOWAS of people'.<sup>5</sup>
5. In pursuit of objectives stated in the Revised Treaty, ECOWAS included the African Charter on Human and Peoples' Rights as a pillar of its endeavours towards regional integration. The Community equally adopted several instruments which are of relevance to human rights including the 1993 Protocol on Free Movement,<sup>6</sup> the 1999 Protocol for Conflict Prevention,<sup>7</sup> the 2001 Protocol on Democracy and Good Governance, the 2012 Supplementary Act on

<sup>1</sup> <https://www.ecowas.int/memberstates/> The other RECs are Arab Maghreb Union (UMA); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Saharan States (CEN-SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Intergovernmental Authority on Development (IGAD); and Southern African Development Community (SADC).

<sup>2</sup> African Union, 'Regional Economic Communities' <https://au.int/en/organs/reccs> (accessed 30 December 2021).

<sup>3</sup> Of the protocols adopted by the Community, the following are of relevance: Non-Agression (April 1978), Free Movement of Persons, Residence and Establishment (May 1979), and Mutual Assistance on Defence (May 1981).

<sup>4</sup> See ECOWAS Revised Treaty, 24 July 1993, <http://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf> (accessed 30 December 2021).

<sup>5</sup> ECOWAS, 'Vision 2020' <https://www.ecowas.int/about-ecowas/vision-2020/> (accessed 30 December 2021).

<sup>6</sup> Protocol Relating to Free Movement of Persons, Residence and Establishment, 29 May 1979, A/P 1/5/79, available at: <https://www.refworld.org/docid/492187502.html> (accessed 30 December 2021).

<sup>7</sup> *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace- Keeping and Security, adopted on 10 December 1999.*

## 1.2 ECOWAS Court: Statutes, and mission statement

6. A crucial event in the 1990s era of reforms was the creation in 1991<sup>9</sup> of the ECOWAS Community Court of Justice (ECCJ).<sup>10</sup> The ECCJ was created to replace the Tribunal of the Community which existed under the 1975 founding Treaty but did not come into operation. The ECCJ was confirmed by 1993 Revised Treaty as the main judicial organ of ECOWAS with the mandate and jurisdiction to interpret and apply the Revised Treaty.<sup>11</sup>
7. Under this dispensation, only the Authority of Heads of State and Government and Member States could take cases to the Court.<sup>12</sup> Where the ECOWAS lawmakers allowed States to institute cases on behalf of their nationals, the subject matter was still limited to the interpretation and application of provisions of the Revised Treaty.<sup>13</sup> Although the ECCJ was established in 1991, the first Judges were not appointed until 30 January 2001, and the Court remained largely idle as it received only a handful of cases until 2004.
8. The ECCJ's operation witnessed a significant shift in 2005 when ECOWAS Member States adopted the Supplementary Protocol,<sup>14</sup> which expressly conferred a human rights mandate to the Court.<sup>15</sup> From a normative standpoint, the 2005 Supplementary Protocol empowered the Court to receive applications directly from individuals and hear cases relating to human rights violations.
9. In addition to its 1991 and 2005 Protocols, statutes of the ECCJ include its 2002 Rules of Procedure,<sup>16</sup> the 2012 Instructions to the Chief Registrar and Practice Directions,<sup>17</sup> and the 2020 Practice Directions on Electronic Case Management and Virtual Court Sessions to the Court's Registry.<sup>18</sup>
10. Pursuant to the provisions of Article 2 of its 1991 Protocol, the ECCJ is established as the principal legal organ of the Community under Article 11 of the Revised Treaty. Neither the 1991 and 2005 Protocols of the ECCJ expressly states the Court's mission. However, the preamble to the 1991 Protocol enunciates that Member States are aware that:

The essential role of the Community Court of Justice 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 responsibility for settling such disputes as may be referred to it in accordance with the provisions of Article 56 of the Treaty and disputes between States and the Institutions of the Community.

<sup>8</sup> See ECOWAS, Acte additionnel A/SA13/02/12 portant régime des sanctions à l'encontre des Etats membres qui n'honorent pas leurs obligations vis-à-vis de la CEDEAO' Abuja, 17 February 2012.

<sup>9</sup> Protocol A/P1/7/91 of 6 July 1991 on the Community Court of Justice.

<sup>10</sup> See generally, <https://www.ecowas.int/institutions/community-court-of-justice/>

<sup>11</sup> Art 9(1) of the 1991 ECOWAS Court Protocol.

<sup>12</sup> Art 9(2).

<sup>13</sup> Art 9(3).

<sup>14</sup> Supplementary Protocol A/SP.1/01/05 of 19 January 2005.

<sup>15</sup> See Supplementary Protocol, art 9(4).

<sup>16</sup> Adopted, 28 August 2002. Available at [http://www.courtecowas.org/wp-content/uploads/2018/11/Rules\\_of\\_Procedure\\_2002\\_ENG.pdf](http://www.courtecowas.org/wp-content/uploads/2018/11/Rules_of_Procedure_2002_ENG.pdf) (accessed 31 December 2021).

<sup>17</sup> Adopted, 4 June 2012. Available at [http://www.courtecowas.org/wp-content/uploads/2018/11/Instructions\\_Chief-Registrar\\_Practice\\_Directions\\_ENG.pdf](http://www.courtecowas.org/wp-content/uploads/2018/11/Instructions_Chief-Registrar_Practice_Directions_ENG.pdf) (accessed 31 December 2021).

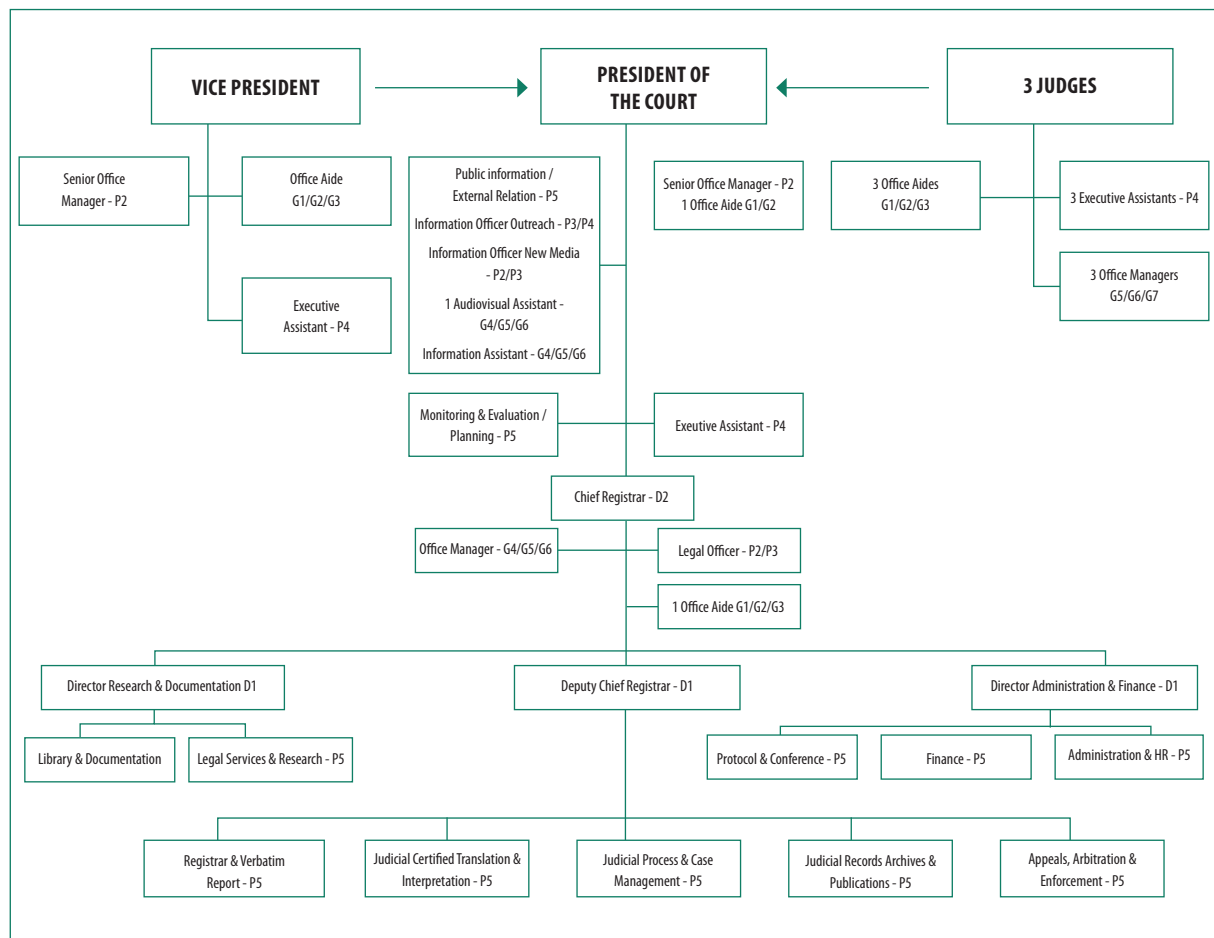
<sup>18</sup> Adopted, 22 May 2021. Available at [http://www.courtecowas.org/wp-content/uploads/2020/05/PD\\_ENG.pdf](http://www.courtecowas.org/wp-content/uploads/2020/05/PD_ENG.pdf) (accessed 31 December 2021).

11. This mission statement is reiterated in the preamble of the 2005 Supplementary Protocol where Member States recall the role that the Court of Justice can play in eliminating obstacles to the realisation of Community objectives and accelerating the integration process.

## B. STRUCTURE OF THE COURT

12. The ECCJ is a permanent court with five (5) Judges and several staff of the Registry working on a full-time basis, from the seat of the Court based in Abuja, Nigeria. It does not operate in chambers or sections but pursuant to the provisions of Article 22(3) of its Rules, the sittings of the Court shall comprise of an uneven number of Judges. The Court therefore operates on a panel of minimum three (3) Judges.
13. As a full-time court, the ECCJ can hold sessions at any time of the year and whose dates and times are fixed by the President in accordance with Article 27 of the Protocol. However, the Court may decide to hold sessions out of its seat as provided under Article 26(2) of the Protocol.

### Organogram of the ECOWAS Court of Justice



### 1.3 Judges of the Court

14. Judges of the ECCJ are selected and appointed by the ECOWAS Authority of Heads of State and Government from nationals of the Member States who are persons of high moral character, and possess the qualifications required in their respective countries for appointment to the highest judicial officers, or are jurisconsults of recognised competence in international law.<sup>19</sup>
15. Pursuant to provisions of the 1991 Protocol, the ECCJ was initially comprised of seven (7) Judges<sup>20</sup> appointed for a period of five (5) years renewable once.<sup>21</sup> The Judges will elect a President and Vice-President who will serve in that capacity for a term of three (3) years.<sup>22</sup>
16. Recent reforms undertaken by the ECOWAS Commission led to changes in the composition of the Court. The number of Judges was decreased from seven (7) to five (5). Their term of office was also reduced from a five-year renewable term to a single four-year term.<sup>23</sup>
17. The Court is presided over by a Bureau comprising of a President and a Vice-President elected by the Judges from among them. The Bureau is elected for a single three-year term. Provisions governing the composition and operation of the Bureau are found in Articles 3(2) and 4 of the 1991 Court Protocol as well as Articles 6 to 8 of the Rules of Court.
18. The Court has three Departments: the Registry Department, Research, Communication and Documentation Department and the Administration and Finance Department.

### 1.4 The Registry Department

19. The operation of the Registry and other departments is governed by the provisions of Articles 9 to 20 of the Rules of Court. Additional relevant regulations are found in the 2012 Instructions to the Chief Registrar and Practice Directions and the 2020 Practice Directions on Electronic Case Management and Virtual Court Sessions.

#### 1.4.1 Office of the Registrar

20. The Chief Registrar of the ECCJ is appointed by the Court for a six (6) year term renewable once.<sup>24</sup> The Chief Registrar assists the President and the Judges in all their official functions, and is also the custodian of the Seal of the Court and all judicial records of the Court.
21. The Registrar is responsible for the publications of the Court. He or she is the institutional memory of the Court and carries out other functions as specified in the Protocol on the Court, Rules of Procedure, Practice Direction and Instructions to the Chief Registrar.
22. The Registry Department is the engine room of the Court and its public face, as it is usually the first link between the public and the Court. The primary duty of the Registry Department is the receipt, processing and service of Court processes lodged before it.

<sup>19</sup> Art 3(1), 1991 Protocol.

<sup>20</sup> Art 3(2), 1991 Protocol.

<sup>21</sup> Art 4(1), 1991 Protocol.

<sup>22</sup> Art 3(2), 1991 Protocol.

<sup>23</sup> Information on the composition of the Court and Judges are found on the Court's website, and under the provisions of Articles 2 to 5 of the Rules of Court.

<sup>24</sup> Art 9(3) of the Rules.

23. The Department also assists the Judges with caseload management. The Registry Department is the custodian of the judicial records of the Court and is responsible for the production of verbatim reports, translation of Court processes and interpretation during Court proceedings. The department is headed by the Deputy Chief Registrar.
24. Operationally, the department comprises of five (5) Divisions namely: Judicial Process & Case Management; Judicial Certified Translation & Interpretation; Verbatim Reports; Judicial Records, Archives & Publications and Appeals, Arbitration & Enforcement.

#### **1.4.2 Judicial Process & Case Management Division**

25. As the title indicates, the Division plays a dual role of being responsible for the receipt, processing and service of court processes as well as assisting the Judge Rapporteur with case management. The Division also performs other related tasks as may be assigned by the Judge Rapporteur, the Chief Registrar and/or the Deputy Chief Registrar.

#### **1.4.3 Judicial Certified Translation & Interpretation Division**

26. This Division is responsible for the translation of court processes into English, French and Portuguese, the three working languages of the Court. Similarly, it also provides simultaneous interpretation during court sessions, Judges' deliberations and other official meetings.

#### **1.4.4 Verbatim Report Division**

27. Recordings of Court proceedings, transcription and production of verbatim reports are the main responsibilities of this Division.

#### **1.4.5 Judicial Records, Archives & Publications Division**

28. This Division is responsible for the custody, maintenance, preservation and archiving of judicial records and other relevant documents of the Court. It is also responsible for the publications of the Court under the supervision of the Chief Registrar.

#### **1.4.6 Appeals, Arbitration & Enforcement Division**

29. Created only in 2018, the Division comprises three (3) Sections as indicated in its title – Appeals, Arbitration and Enforcement – each headed by a Registrar.

##### ***i. Appeals Section***

30. At its 56th Ordinary Session in June 2006, the Council of Ministers of ECOWAS, recognized the need for an Appellate Chamber for the Court following requests by litigants. This section was, therefore, created prior to the establishment of the Appellate Chamber.

##### ***ii. Arbitration Section***

31. Article 16 (1) of the Revised Treaty had sought the establishment of an Arbitration Tribunal of the Community, even though this section is yet to be operational. The 2005 Supplementary Protocol on the Court, which amended the 1991 Protocol, handed the Arbitration jurisdiction to the ECOWAS Court of Justice, pending the establishment of the Arbitration Tribunal of the Community. This section is therefore intended to manage the arbitration functions of the Court.

### *iii. Enforcement Section*

32. This section is responsible for enforcing the Judgments and Rulings of the Court in line with the provisions of the Revised Treaty and other basic legal texts of the Community. In addition, it also coordinates with the competent national authorities of Member States in processing writs of execution issued by the Chief Registrar.

### **1.4.7 Research and Documentation Department**

33. The Research and Documentation Department is the Legal department of the Court and primarily houses the library of the Court. Headed by a Director, the department comprises two divisions: The Research and Legal Affairs division and the Library and Documentation division.

#### *i. The Research and Legal Affairs Division*

34. This Division of the Court is staffed by one professional staff as the head, assisted by five legal officers. The Division's main functions include:
- (i) Conducting in-depth legal research on applications pending before the Court;
  - (ii) Analysing facts on issues presented by parties and summarizing same for use by Judges;
  - (iii) Applying facts as presented by parties to applicable legal norms;
  - (iv) Proffering legal advice and opinions on various issues of interest to the Court;
  - (v) Drafting and vetting contract agreements to be entered into by the Court;
  - (vi) Providing considered legal opinions on cases filed for use by the Honourable Members of the Court;
  - (vii) Representing the Court in various fora within and outside the Community;
  - (viii) Compiling and updating community legal texts relating to the Court;
  - (ix) Liaising, on behalf of the Court, with international organizations for the enhancement of technical cooperation;
  - (x) Provision of general legal services, including recording and production of meeting reports, and;
  - (xi) Any ad-hoc responsibility assigned by the Management.

#### *ii. The Library and Documentation Division*

35. This Division is headed by a Senior Professional Officer, a professional Librarian who is assisted by four General Service Staff. The library is organised into three operational rooms: A Reading Room equipped with computers for desk research, a second room equipped with shelves containing different categories of books, and a third room containing ECOWAS Community publications.

36. Most of the material in the Library is law-related, covering the following areas of law:
- (i) Legal reference books in the fields of international law, including the laws of International Organisations;
  - (ii) Community Law;
  - (iii) Comparative Law;
  - (iv) National laws (national laws of the Member States of the Community);
  - (v) Language dictionaries and legal dictionaries;
  - (vi) Human Rights and International Humanitarian Law;
  - (vii) European law;
  - (viii) Administrative law;
  - (ix) Other areas of interest to the various departments of the Court.
37. Presently, the catalogue of the Library includes: 2000 English and Reference books; 1582 French books; 516 Portuguese books; 300 Books on ECOWAS Member States Legislations. The Library, which also houses documents on ECOWAS Institutions, is open to Staff Members of the Court although it can also be accessed by external users upon request.

## II. ACCESS TO THE COURT JURISDICTION AND ADMISSIBILITY OF CASES

### A. JURISDICTION

#### 2.1 Jurisdictional clause

38. It is an accepted legal rule that parties to a dispute retain discretion to have set out the competent adjudicatory body in case a misunderstanding arises from the implementation of their agreement. In such instances, the jurisdictional clause may be exclusive of the jurisdiction of any other body.
39. The ECOWAS Court has declined jurisdiction in cases where the parties before it had agreed on which body should be competent in case of dispute. Whether the Community Court of Justice has jurisdiction to entertain a matter that has a jurisdictional clause appearing on the document tendered in evidence.

- “Whereas there exists (...) an inscription regarding a jurisdictional clause worded as follows: ‘NB: Any dispute or claim is to be referred to the World Court at the Hague, or the International Court of Arbitration and no diplomatic immunity’”.
- “Whereas the jurisdictional clause contained in the certificate of deposit tendered by the Applicants sets aside, ipso facto, the competence of the Community Court of Justice in the instant case.” (...) “Consequently, the Court declares that it lacks jurisdiction to entertain the Case.” ***Mrs Alice R. Chukwudolue and Others v Senegal, ECW/CCJ/JUD/07/07, Judgment of 22 November 2007, paras 56, 63, 66***

#### 2.2 General directives on jurisdiction

40. Directives under the section on “Standing” and access to the Court apply to its personal and material jurisdiction. Article 10 of the 2005 Supplementary Court Protocol governs the personal jurisdiction of the Court as it regulates standing and access. The said provision indeed prescribes for both who can bring a case and against whom a case can be brought before the ECCJ. Article 10 also complements the provisions of Article 9 of the Protocol in regulating the material jurisdiction of the Court.
41. Given that directives under the section on “Standing” cover both personal and material jurisdiction in a comprehensive manner, this section on “Jurisdiction” will be limited to the human rights competence of the Court. Limiting the subsequent sections to human rights litigation is also justified by the same reasons as stated in the introduction to this Manual.

#### 2.3 Jurisdiction *ratione personae*: Who can file a case before the Court?

42. Article 10(d) of the ECOWAS Supplementary Protocol states that access to the ECOWAS Court is open to “[i]ndividuals on application for relief for violation of their human rights.”



43. The Court has applied an extensive interpretation to access by referring to the French wording of "*toute personne*" and admitting cases filed by both natural and legal persons as long as the claims involve human rights and applicants are able to demonstrate victimhood. (see section on standing). Statutes and case-law presented under the section on standing apply to the personal jurisdiction of the Court.
44. A joint reading of Articles 9 and 10 of the Supplementary Protocol suggests that the Court's personal jurisdiction is exercised in respect of the following:
- ECOWAS Member States;
  - ECOWAS Institutions;
  - ECOWAS Staff;
  - Individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies;
  - Individuals and corporate bodies victims of violations of human rights;
  - National courts or the parties concerned, when the ECCJ has to adjudicate on preliminary grounds upon interpretation of the Treaty, Protocols and Rules.
45. Applicants bringing cases can do so both as direct and indirect victims or representatives of the same Applicants.

- The case of ***Martha Adamu and Others v Nigeria, ECW/CCJ/JUD/33/19, Judgment of 9 December 2019, pages 7, 8*** expounds on direct and indirect victims
- A victim is also "... a person who suffers directly or indirectly any harm or pain (physical or mental injury), emotional suffering (through loss of family member or relation), economic loss (loss of properties) or any impairment that can be categorized as human rights violation." ***Solomon Mfa and Others v Nigeria, ECW/CCJ/JUD/06/19, Judgment of 26 February 2019, para 15***
- Children are indirect victims of their father's death in respect of deprivation of the right to life under Article 4 of the African Charter. ***Martha Adamu and Others v Nigeria, ECW/CCJ/JUD/33/19, Judgment of 9 December 2019, page 8***

## 2.4 Jurisdiction *ratione temporis*: When did the violations occur?

### 2.4.1 Substantive temporal jurisdiction

46. None of the Court statutes include provisions on its temporal jurisdiction. However, both Court Protocols provide for a provisional entry into force upon signature; and the 2005 Protocol which grants the Court jurisdiction to consider individual human rights cases entered into force on 19 January 2005. In principle, the Court should therefore have jurisdiction to entertain such cases in respect of facts that occurred subsequent since that date.
47. The Supplementary Protocol creates substantive right of individual access to the Court, which cannot be retrospective.

48. In terms of substantive temporal jurisdiction, given that the Court has applied the African Charter as the main substantive basis for its material jurisdiction,<sup>25</sup> entry into force of the Charter should be the date of effect. All ECOWAS Member States ratified the African Charter long before the entry into force of the Supplementary Protocol. The ECCJ should therefore have substantive temporal jurisdiction in respect of alleged violations of the African Charter's provisions. Case-law of the Court cited under the section of this Manual on material jurisdiction support this understanding of the Court's temporal jurisdiction.

#### 2.4.2 The principle of continued violations

49. Pursuant to Article 14(2) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, a continued or continuous violation is defined as "(2) The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation." In its commentary on this Article, the International Law Commission declared that "a continuing wrongful act is one which has been commenced but has not been completed at the relevant time".
50. Although most of the instances in which the Court made a determination on continued violations pertain to statutes of limitation under Article 9(3) of the Supplementary Protocol, some of the Rulings apply to continued violations under the Court's temporal jurisdiction.

▪ From Counsel's own submission, the Supplementary Protocol is a law that creates rights, albeit to right of access to the Court to individuals, thus it is substantive law. By implication too since there is nothing on the face of the Supplementary Protocol, it should not be given that effect. **Chief Frank Ukor v Rachad Laleye and Alinnor, ECW/CCJ/JUD/01/05, Judgment of 27 May 2005, para 20**

▪ Enforcement of human rights cannot be caught by statutes of limitation, the French text of Article 9(3) of the Supplementary Court Protocol does not prescribe limitation and should be preferred over the English version in applying the limitation, precedents of the Court in this respect including in the case of *Njemanze v Nigeria* were rendered per incuriam and are overruled; in any event, limitation cannot apply to instances of continued violations **Federation of African Journalists v Gambia, ECW/CCJ/JUD/04/18, Judgment of 13 February 2018, page 18-21**

#### 2.5 Jurisdiction *ratione materiae*: Is the Court competent to hear the case?

51. Article 9 (4) of the ECOWAS Protocol, as amended, formally recognises that the ECOWAS Court "has jurisdiction to determine cases of violations of human rights that occur in any Member State."
52. When it adjudicated its first individual case in the 2005 Protocol era, the ECCJ relied on the recognition of the African Charter by the 1991 Revised Treaty as the reference instrument

<sup>25</sup> The Court did so on the basis of Article 19 of its Supplementary Protocol read together with the 1993 Revised Treaty through which ECOWAS Member States recognise human rights in the Charter as fundamental principles of the Community. See *Hon. Dr. Jerry Ugokwe v Nigeria* (2005) ECW/CCJ/APP/02/05 paras 29-30.

for its material human rights jurisdiction together with the Universal Declaration of Human Rights.<sup>26</sup>

53. The mere reference to human rights violation in the application or motion suffices for the Court to establish its material jurisdiction.

▪ (...) On this note this Court has established, or decided in several cases, that for it to have competence of jurisdiction to determine a matter before it allegations of human rights is key. (...) Therefore, the threshold that has been set by precedent is that the application need only contain an allegation of a violation for it to be deemed admissible. ***Martha Adamu and Others v Nigeria, ECW/CCJ/JUD/33/19, Judgment of 9 December 2019, pages 5, 6.***

▪ In the case at hand, the Applicant invokes violation of his right to participate in the public affairs of his country, violation of his right to vote, and violation of his right of eligibility to stand for elections. (...) The Court observes that the personal rights listed out by the Applicant form part of the human rights whose protection is within the ambit of the powers of the Court; thus, the Court hereby declares that it is competent to adjudicate on and determine the allegations (...). ***Kareem Meissa Wade v Senegal, ECW/CCJ/JUD/13/19, Judgment of 4 March 2019***

54. An Application founded in justiciable human rights falls within the jurisdiction of the Court.

▪ (...) The action in this case having been made under human rights violations falls under the ambit of human rights infringement and amount to a justiciable claim. The material put before the Court is in the realm of the main claim. To raise such an argument herein would entail the full deliberation of the case prematurely. In the circumstance, the objection on this ground also fails. For the foregoing reasons as amplified, the preliminary objection fails in its entirety. ***Professor Etim Moses Essien v Gambia, ECW/CCJ/JUD/05/07, Judgement of 14 March 2007, para 27.***

55. The material jurisdiction of the Court does not extend to cases pertaining to the re-examination of, or Appeals against decisions of domestic courts or interpretation of domestic law. This is because the Court is not an Appellate body which confirms or varies decisions of national courts.

▪ Appealing against the decision of the national court of Member States does not form part of the powers 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. (...) The ECOWAS Court of Justice is not a Court of Appeal or a Court of cassation (. . .) as to the orders being sought against the execution of the Judgment already made by the Federal Appeal Court of the Member State of Nigeria – the Court is incompetent. ***Honourable Dr. Jerry Ugokwe v Nigeria, ECW/CCJ/JUD/03/05, Judgment of 7 October 2005, paras 32, 33.***

<sup>26</sup> *Ugokwe v Nigeria, ECW/CCJ/JUD/03/05, Judgment of 7 October 2005.* Such acknowledgment is consistent with the subsequent practice of the Court and the African Charter has primarily formed the basis of human rights complaints since 2005.

- (...) the Community Court of Justice, ECOWAS, is not an Appeal Court before which cases decided by the Courts in Member States could still be brought. **Dr. Mahamat Seid Abazene v Mali and Others, ECW/CCJ/JUD/02/10, Judgment of 4 March 2010, para 27.**

- Though this Court has jurisdiction over human rights violations that occur in Member States of ECOWAS, it has consistently held that it does not have the jurisdiction to act as an Appellate Court over decisions of domestic courts of Member States. (...) much less to interpret the provisions of their domestic law. **Hon. Justice Aladetoyinbo v Nigeria, ECW/CCJ/JUD/18/20, Judgment of 14 July 2020, para 26**

- The ECCJ "... is not a Court of Appeal or of cassation of the decisions of the national courts, and such decisions cannot hinder its intervention when it comes to facts within its jurisdiction, namely a violation of a fundamental right. **Hon. Justice Aladetoyinbo v Nigeria, ECW/CCJ/JUD/18/20, Judgment of 14 July 2020, para 29.**

## 2.6 Jurisdiction *ratione loci*: Where did the violation occur?

56. Jurisdiction *ratione loci* answers the question of where the alleged violation of fundamental human rights or freedoms occurred. In order to qualify under this category, the alleged violation must have occurred within the territory of the respondent state for the Court to have jurisdiction over that matter. *Loci* refers to the location or setting or scene of the events.

- At this stage, jurisdiction ought to be considered as a separate subject from the Court's overall determination of the veracity of the claims being sought by the Plaintiffs. (...) the mere allegation that there has been a violation of human rights in the territory of a member state is sufficient *prima facie* to justify the jurisdiction of this court on the dispute, (...)" **Obinna Umeh and Others v Nigeria, ECW/CCJ/JUD/10/20, Judgment of 1 July 2020, para 24**

57. The alleged violation could have occurred in the territory of any ECOWAS Member States other than the respondent state.

- As has been consistently held by this Court, the mere allegation that there has been a violation of human rights *in the territory of a member state* is sufficient *prima facie* to justify the jurisdiction of this court on the dispute, surely without any prejudice to the substance and merits of the complaint which has to be determined only after the parties have been given the opportunity to present their case, with full guarantees of fair trial. **SERAP and Others v Nigeria and Others, ECW/CCJ/JUD/16/14, Judgment of 10 June 2014, para 72.**

## B. ADMISSIBILITY

### 2.7 Statute of limitation or prescription of claims

58. Article 9(3) of the 2005 Supplementary Court Protocol prescribes that "Any action by or against a Community Institution or any Member of the Community shall be statute barred after three (3) years from the date when the right of action arose." This means the Court loses material jurisdiction over the matter if the violation had taken more than three (3) years to be brought before it for adjudication.

- Statute of limitation does not apply to cases brought by individuals against a Member State or her agents. ***Djot Bayi Talbia and Others v Nigeria and Others, ECW/CCJ/JUD/01/09, Judgment of 28 January 2009, para 30***
- Exception to limitation or extension thereof cannot be regulated by the Court under the Rules when they are not provided by the Protocol. Statute of limitation applies to all matters, including human rights cases, except in instances of gross human rights violations. ***Femi Falana and Another v Benin and Others, ECW/CCJ/JUD/02/12, Judgment of 24 January 2012, paras 28, 30, 31.***
- Enforcement of human rights cannot be caught by statutes of limitation, the French text of Article 9(3) of the Supplementary Court Protocol does not prescribe limitation and should be preferred over the English version in applying the limitation, precedents of the Court in this respect including in the case of *Njemanze v Nigeria* were rendered per incuriam and are overruled; in any event, limitation cannot apply to instances of continued violations. ***Federation of African Journalists v Gambia, ECW/CCJ/JUD/04/18, Judgment of 13 February 2018, pages 18-21***

### 2.8 Standing

Standing or *locus standi*, is understood as the capacity of a party to bring suit in Court.<sup>27</sup> Standing limits participation in lawsuits and asks whether the person(s) bringing a lawsuit, or defending one, has enough cause to "stand" before the court and advocate, since not anyone can go to court for any reason. As a general rule, to have standing, a party must show an "injury in fact" to their own legal interests.

#### 2.8.1 Direct interest for standing

59. Pursuant to the provisions of Article 10 of the 2005 Supplementary Court Protocol, access to the Court is open to the following:
- a) Member States, and unless otherwise provided in a Protocol, the Executive Secretary,<sup>28</sup> where action is brought for failure by a Member state to fulfil an obligation;

<sup>27</sup> Cornell Law School, 'Standing' <https://www.law.cornell.edu/wex/standing> (accessed 6 June 2022).

<sup>28</sup> Now the President of the ECOWAS Commission.

- Article 14 of the 2012 **Supplementary Act A/SP.2/08/11 on Sanctions Against Member States that Fail to Honour their Obligations to the Community** provides that the ECOWAS Authority, Member States, and the President of the Commission, may initiate the procedure for sanction. *It is further provided that an individual or a legal person of a Member State may report to their national authorities or the President of the Commission cases of failure to honour an obligation.*

b) Member States, the Council of Ministers and the Executive Secretary in proceedings for the determination of the legality of an action in relation to any community text;

- The ECOWAS Community Court of Justice has dismissed a suit filed by the **Committee for Defence of Human Rights (CDHR), an NGO**, challenging the application and the proposal to admit Morocco as a member of the Economic Community of West African States (ECOWAS).<sup>29</sup> In determining the legal capacity of the NGO to approach the ECCJ for an assessment of the legality of an action in relation to the legal texts of the ECOWAS Community, the Court noted this is within the purview of Article 10 (b) which allows only Member States, the Council of Ministers and the Executive Secretary (President of the ECOWAS Commission) to do so.

c) Individuals and corporate bodies in proceedings for the determination of an act or inaction of a *Community official* which violates the rights of the individuals or corporate bodies;

- An application filed by a legal person against the Ambassador or Embassy of a Member State or against a Member State is not against a *Community official* in the meaning of Article 10(c) of the 2005 Supplementary Court Protocol, and is inadmissible on that ground. ***Linas International Nigeria Limited v Ambassador of Mali and Others, ECW/CCJ/JUD/02/09, Judgment of 19 March 2009.***

- For an action on legality of an act to be admissible, there must be a cause of action, ie the action complained of must have personally and directly adversely affected the Applicant. ***Odafe Oserada v ECOWAS Council of Ministers and Others, ECW/CCJ/JUD/01/08, Judgment of 16 May 2008, paras 33-37***

- The main condition for individual access under Article 10(c) is that the Applicant should be the bearer of the right allegedly violated by the act or inaction of the Community or its official. ***Mrs. Oluwatosin Rinu Adewale v ECOWAS Council of Ministers and Others, ECW/CCJ/JUD/07/12, Judgment of 16 May 2012, para 45***

d) Individuals on Application for relief for violation of their human rights;

<sup>29</sup> ECW/CCJ/APP/30/18 filed on 26 July 2018.

60. Qualified individuals must be victims, whether natural or legal persons, who personally and directly suffered injury, or act on behalf of victims – there must be a link between the Applicant/victim and alleged harm.

▪ In reference to the French text of Article 10(d) which uses the wording “*toute personne victime*”, both natural and legal persons can allege the violation of rights and freedoms recognised to them under applicable international instruments; there is no point in making a differentiation where the law does not do so. ***The National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector (CNDD) v Côte d’Ivoire*, ECW/CCJ/JUD/05/09, Judgment of 16 January 2009, paras 20-24**

▪ Legal persons, such as civil society institutions, which fail to demonstrate that they are victims, acting on behalf of victims or duly represent the latter lack standing to sue and their application should be dismissed. ***Center for Democracy and Development and Another v Mamadou Tanja and Niger*, ECW/CCJ/JUD/05/11, Judgment of 9 May 2011, paras 26-31.**

▪ (...) To claim to be a victim, there must exist a sufficient direct link between an Applicant and the prejudice he deems to have suffered as a result of the alleged violation. ***Aziagbede Kokou and Others v Togo*, ECW/CCJ/JUD/07/13, Judgment of 3 July 2013, para 24.**

▪ (...) ‘where there is an interest, there is an action’ and also ‘an interest is the measuring rod for an action’. An Application is admissible only when the applicant justifies that he brings a case before a judge for the purposes of protecting an interest or defending an infringement of such. Such an interest must be direct, personal and certain. ***Odafe Oserada v ECOWAS Council of Ministers and Others*, ECW/CCJ/JUD/01/08, Judgment of 16 May 2008, para 27.**

▪ The legal person, an association of journalists, which has demonstrated that it is duly registered as a non-governmental organisation, has standing to bring an application for violations of human rights as a victim because the injury can be regarded as done against the whole profession and as affecting all its members. ***Federation of African Journalists v Gambia*, ECW/CCJ/JUD/04/18, Judgment of 13 February 2018, pages 16, 17.**

### 2.8.2 *Actio popularis*

An ***actio popularis*** is an action in Roman penal law brought by a member of the public in the interest of public order.<sup>30</sup> It appears to have entered the formal lexicon of international law in Judge Winiarski’s dissenting opinion in South West Africa (*Ethiopia v South Africa; Liberia v South Africa*) (Preliminary Objections).<sup>31</sup> The African Commission on Human and Peoples’ Rights has also adopted and applied the principle in landmark decisions.<sup>32</sup>

<sup>30</sup> Egon Schwelb, ‘The Actio Popularis and International Law’, 2 *Israel Yearbook Hum Rts* 46, 47 (1972).

<sup>31</sup> 1962 ICJ Reports 335.

<sup>32</sup> See e.g., Article 19 v Eritrea, para 65; *The Social and Economic Rights Action Center and the Centre for Economic and Social Rights v Nigeria*, para 49.



61. *Actio popularis* falls under the three conditions of public interest, judicious cases, and third party's interest.

▪ (...) the Applicant only needs to demonstrate that there is a public interest worthy of protection that has been allegedly violated; that the matter in question is judicious and that the legal action is not brought for the personal benefit of the Applicant ... and the identification of the victims is not an essential requirement for the action to be brought before the Court. ***The Incorporated Trustees of Laws and Rights Awareness Initiatives v Nigeria*, ECW/CCJ/JUD/16/20, Judgment of 10 July 2020, paras 78; 69-85.**

▪ However, there are two conditions in the implementation of this principle, the first is that the action must be based on public interest. Following from the above is the second ingredient, which is that reliefs sought must not be for the benefits of the applicant. ***Solomon Mfa and Others v Nigeria*, ECW/CCJ/JUD/06/19, Judgment of 26 February 2019, para 63**

62. An NGO may file applications on the basis of *actio popularis* where it is able to prove that it is registered as an entity within the legal or regulatory system of any Member State of ECOWAS and that its mandate upon registration is human rights-related.

▪ (...) Thus, considering the social purposes of the Plaintiff and the regularity of its constitution, it does not need any specific mandate from the people of Niger Delta to bring the present law suit to the Court for the alleged violation of human rights that affects people of that region. ***SERAP v Nigeria*, ECW/CCJ/JUD/18/12, Judgment of 14 December 2012, para 61.**

▪ Direct family do not need prove victimhood. ***Martha Adamu and Others v Nigeria*, ECW/CCJ/JUD/33/19, Judgment of 9 December 2019, pages 5, 6.**

63. Status of Applicant, victim, and standing in human rights claims is assessed as at the time of the alleged violations and not the time of filing or hearing of the application. Standing or status of victim is not lost due to change of circumstances.

▪ (...) the Defendant raised the issue of the Applicant's status in the action brought. He put forward (...) that she could have instituted proceedings before her emancipation; and that since she did not do so, her action had become ineffective and must be declared inadmissible on grounds of being unqualified to file the suit. (...) It must be emphasised that human rights, in being inherent to the human person, are "inalienable, irrevocable and sacred", and cannot therefore suffer any limitation whatsoever. ***Hadijatou Mani Koraou v Niger*, ECW/CCJ/JUD/06/08, Judgment of 27 October 2008, paras 54, 56.**

- e) Staff of any Community institution, after the Staff Member has exhausted all appeal processes available to the officer under the ECOWAS Staff Rules and Regulations;
- f) Where in any action before a court of a Member State, an issue arises as to the interpretation of a provision of the Treaty, or the other Protocols or Regulations, the



national court may on its own or at the request of any of the parties to the action, refer the issue to the Court for interpretation.

## 2.9 Admissibility in respect of human rights cases

64. Article 10(d) of the 2005 Supplementary Court Protocol states two main conditions of admissibility as follows:

- Individuals on application for relief for violation of their human rights; the submission of application for which shall: i. Not be anonymous; nor ii. Be made whilst the same matter has been instituted before another International Court for adjudication.

65. One more condition, which was not explicitly mentioned in the provision is that of exhaustion of local remedies. This condition is covered below as it has often come before the Court for determination.

### 2.9.1 Anonymity

66. The text of Article 10(d) of the Supplementary Protocol states that the Application "shall not be anonymous".

67. There has not been much contention in proceedings before the Court on the application of the condition relating to the identity of the Parties. Therefore, the Court has not had to settle conflicting submissions on whether an Application was anonymous or not.

68. Generally, the Court merely takes notice that the Application is not anonymous upon ensuring, arguably by perusing the file, that the applicant names have been expressly stated.

- Upon scrutiny, the Application is not anonymous (...). The Court therefore, in principle and on the face of it, declares the Application admissible. ***Hama Amadou v Niger, ECW/CCJ/JUG/31/19, Judgment of 30 October 2019, para 49.***

- It is obvious to the Court that the Applicant is clearly identified. ***Lieutenant Colonel Silas Jock Santoi v Nigeria, ECW/CCJ/APP/01/19, Judgment of 23 January 2019, paras 77-79***

69. By Article 33(6) of the Rules, failure to comply with the conditions set out in the preceding paragraphs of Article 33 could lead to a formal declaration of inadmissibility after the Court has heard the opinion of the Judge Rapporteur. In other words, non-compliance with the requirement that an application should not be anonymous would lead to a decision declaring a case.

### 2.9.2 *Lis pendens*: When the matter is still pending.

70. *Lis pendens* is the Latin expression for "suit pending." "*Lis pendens*" is construed to be the jurisdiction, power, or control which courts acquire over property involved in a suit, pending the continuance of the action, and until final judgment. The rule has penetrated international – human rights – law, and is expressly prescribed under Article 56(7) of the African Charter on Human and Peoples' Rights as an admissibility requirement before the African Commission and African Court on Human and Peoples' Rights.

71. According to the text of Article 10(d) of the Supplementary Protocol, an Application brought before the ECCJ "shall not be made while the same matter has been instituted before another international court for adjudication".
72. Strict interpretation suggests that *lis pendens* applies only vis-à-vis judicial adjudicatory bodies and would therefore exclude matters pending before non-judicial or quasi-judicial bodies. It could also be said that the condition allows the Court to hear matters that are being settled friendly or amicable resolution processes.
73. The Court has not had an opportunity to clarify this issue and has merely restated the text of the provision in its rulings.

- (...) Article 10(d) of the Supplementary Protocol of the Court is a special provision and did relate to the parties accessing this Court on human rights contravention while those provisions of the African Charter on Human and Peoples' rights relate to those cases under the purview of the Commission, particularly, the issue of local remedy as mentioned in Article 50 of the said Charter has no bearing on the cases under the premise of Article 10(d) of the Supplementary Protocol, on the grounds that the cases under *Article 10(d)* made it quite clear that the bar to bringing action to this Court must be those cases of *lis pendens* in another international court for adjudication. **Professor Etim Moses Essien v Gambia, ECW/CCJ/JUD/05/07, Judgment of 14 March 2007, paras 26, 27**

- The ECCJ "... is not a Court of Appeal or of cassation of the decisions of the national courts, and such decisions cannot hinder its intervention when it comes to facts within its jurisdiction, namely a violation of a fundamental right. *Only the previous referral to another international court, with like jurisdiction, can frustrate its regular referral.* **Mr. Khalifa Ababacar Sall and Others v Senegal, ECW/CCJ/JUD/17/18, Judgment of 29 June 2018, page 27**

### 2.9.3 *Res judicata*: When the matter was settled.

74. Judgments in which the ECCJ has made a determination on the merits are *res judicata* vis-à-vis the Court. As per the Court's position, a matter is *res judicata* and the Court cannot adjudicate freshly on the following grounds:
  - (a) when the Parties,
  - (b) the issues, and
  - (c) the claims are essential the same as those presented in a subsequent application.
75. Statutes of the ECCJ, especially provisions of Article 10(d) of the Supplementary Court Protocol, do not prescribe *res judicata* as a condition of admissibility. However, the issue of *res judicata* has arisen for determination namely in respect of whether decisions of the ECCJ are *res judicata* vis-à-vis the Court itself.

- Since Judgment No. ECW/CCJ/JUD/20/16 [a previous judgment] of the Court is not subject to appeal, it automatically means that the Judgment is *res judicata*, such that that the very case which gave rise to the said Judgment cannot be brought before the Court for a second time without invoking new facts. Therefore, irrespective of its apparent consistency with formality, the Application of Hama Amadou is inadmissible before the Court. ***Hama Amadou v Niger, ECW/CCJ/JUG/31/19, Judgment of 30 October 2019, paras 66, 67.***

76. The principle of *res judicata* may only be tampered where the matter is being determined again under Review by or Appeal to a higher court of superior jurisdiction.

- These issues about the court's jurisdiction in this matter as well as the exhaustion of local remedies were decided in that Ruling. It is thus inappropriate for Counsel to raise the same issues again. The principle of law is clear that when a Court has decided on some issues in the case, the decision creates issue estoppel as between the parties and/or their privies in the present and any subsequent proceedings in which same issue's is/are raised. Besides, the decision of this Court is final and can only be altered through a revision if the correct procedure is followed. In view of the foregoing, the Court cannot re-open these two issues about its jurisdiction and exhaustion of local remedies. ***SERAP v Nigeria and Another, ECW/CCJ/JUD/07/10, Judgment of 30 November 2010, section on "preliminary issues".***

- Since a case decided by the Court is not subject to Appeal, issues dealt with in the said previous judgment are *res judicata*. ***Hama Amadou v Niger, ECW/CCJ/JUG/31/19, Judgment of 30 October 2019, paras 66, 67.***

77. The ECOWAS Court will decline to exercise its jurisdiction on matters that are too similar or have already been addressed through decisions of domestic courts.

- The Court admitted the past judgment as new evidence despite the state's tardiness in introducing it, as it constituted crucial information for the litigation. The Court then found that the declarations sought in the case, including the one million Naira award, were similar to those that had been heard and determined by the Nigerian Court. ***Sa'Adatu Umar v Nigeria, ECW/CCJ/JUD/17/12, Judgment of 14 December 2012, paras 19-21.***

#### 2.9.4 Exhaustion of local remedies

78. The rule of exhaustion of local remedies prescribes that Applications being filed before international bodies must have first been brought to the knowledge of municipal – judicial – authorities. The rule mainly purports to protect state sovereignty by allowing a respondent state to first address the alleged violation within its domestic mechanisms before it is taken to an international forum. The rule is expressly stated under Article 56(5) of the African Charter as an admissibility requirement applied by the African Commission and African Court on Human and Peoples' Rights.

79. None of the statutes of the ECCJ provides for the condition of exhaustion of local remedies. However, the issue arose in individual human rights Applications under Article 10(d) of the 2005 Supplementary Court Protocol, and the Court ruled that the lack of express provision in the text means that the condition does not apply.
80. While the ECCJ adopts the African Charter as a substantive human rights instrument based on reference to the same in the Revised Treaty, provisions of the Charter pertaining to admissibility of matters before the African Commission do not apply to the ECCJ.

- On examination of the said Article 50, it is clear that the said Article refers not to any organization but the Commission. Consequently, that provision of Article 50 cannot be applied *stricto sensu* to this case pertaining to the exhaustion of local remedy and its relevance to this Court. ***Professor Etim Moses Essien v Gambia, ECW/CCJ/JUD/05/07, Judgment of 14 March 2007, para 22.***

- There should be a distinction between the adoption by ECOWAS under the Revised Treaty of substantive human rights provisions and modalities for implementing the said rights before the African Commission; the Court cannot apply more conditions than those explicitly provided for in the law; ECOWAS Member States intended to waive their prerogative to impose the rule of exhaustion of local remedies. ***Hadijatou Mani Koraou v. Niger, ECW/CCJ/JUD/06/08, Judgment of 27 October 2008, paras 36-53.***

- (...) Article 10(d) of the Supplementary Protocol of the Court is a special provision and did relate to the parties accessing this Court on human rights contravention while those provisions of the African Charter on Human and Peoples' rights relate to those cases under the purview of the Commission, particularly, the issue of local remedies as mentioned in Article 50 of the said Charter has no bearing with the cases under the premise of Article 10(d) of the Supplementary Protocol, on the grounds that the cases under Article 10(d) made it quite clear that the bar to bringing action to this Court must be those cases of *lis pendens* in another international court for adjudication. ***Professor Etim Moses Essien v Gambia, ECW/CCJ/JUD/05/07, Judgment of 14 March 2007, para 26.***

- Consequently, the objection herein regarding the non-exhaustion of local remedies has no bearing on the requirement of bringing this action before this Court. The objection therefore is untenable. (...) For the foregoing reasons as amplified, the preliminary objection fails in its entirety. ***Professor Etim Moses Essien v Gambia, ECW/CCJ/JUD/05/07, Judgment of 14 March 2007, para 27.***

## III. PROCEEDINGS BEFORE THE COURT

### A. CONTENTIOUS PROCEEDINGS

81. Contentious proceedings are generally understood as a legal suit involving a dispute between an Applicant and a Defendant. As the outcome of such process, the competent court is expected to resolve the dispute by stating the solution to the legal issue, and making orders as appropriate, which would bind all parties. Contentious proceedings mostly include a written phase, in which the parties file and exchange pleadings containing a detailed statement of the points of fact and of law on which each party relies, and an oral phase consisting of public hearings at which agents and counsel address the court.
82. Article 15 of the ECOWAS Revised Treaty which provides for the establishment of the ECCJ leaves matters concerning the procedure before the Court to be set out in "a Protocol". Contentious proceedings before the ECCJ are therefore governed by both its 1991 Protocol and 2005 Supplementary Protocol.
83. Contentious proceedings are set out under Article 9(2) of the 1991 Protocol which provides that the Court "shall be competent to deal with disputes referred to it (...)". Article 9(3) on its part provides that "A Member State may, on behalf of its nationals, institute proceedings against another Member State or Institution of the Community (...)".
84. Pursuant to Article 13 of the 1991 Protocol, "Proceedings before the Court shall consist of two parts; written and oral." "Written proceedings shall consist of the Application entered in the Court, notification of the application, the defence, the reply or counter-statement, the rejoinder and any other briefs or documents in support."

#### 3.1 The Written Procedure

Written proceedings consist of the Application entered in the Court, notification of the Application, the Defence, the Reply or counter-statement, the Rejoinder and any other briefs or documents in support of the claim as lodged with the Court.

##### 3.1.1 Who is a party?

85. "Parties" in proceedings before the ECOWAS Court refers to parties (Applicant(s) and Defendant(s)) to the concerned case or the dispute as consistently used for instance in Articles 11 and 12 of the 1991 Court Protocol, and Articles 23(3) and 37(3) of the Rules of Court.
86. The Rules of Court use the terms "Applicant" and "Defendant" in identifying the Parties to a case before the Court as done for instance in respect of the language of the Parties in Article 25(2) of the Rules.
87. Applicants before the Court are those persons or entities that may commence contentious proceedings before the Court as presented in the section of this Manual on the jurisdiction of the Court. The same applies to Defendants, noting that the Court has had to clarify who can in practice be Applicant or defendant in proceedings before it.

- Proper parties are those whose absence an effective order can be passed, but whose presence in the suit is necessary for a complete and final decision on the question/issue involved in the suit. In absence of a proper party an order or decree can be passed. ***Chude Mba v Ghana and Others, ECW/CCJ/JUD/30/18, Judgment of 11 December 2018.***
- The Court declared the case inadmissible for lack of capacity to bring an action against the President of the ECOWAS Commission, and Chairman of the ECOWAS Authority of Heads of State and Government, who were sued as defendants together with Member States of the Community. ***Chude Mba v Ghana and Others, ECW/CCJ/JUD/30/18, Judgment of 11 December 2018***
- An Application filed by a legal person against the Ambassador or Embassy of a Member State or against a Member State is not against a *Community official* in the meaning of Article 10(c) of the 2005 Supplementary Court Protocol, and is inadmissible on that ground. ***Linus International Nigeria Limited v Ambassador of Mali and Others, ECW/CCJ/JUD/02/09, Judgment of 19 March 2009***

### 3.1.2 Filing a case before the Court

88. According to the provisions of Article 13(3) of the 1991 Court Protocol, "Documents comprising the written proceedings shall be addressed to the Chief Registrar of the Court in the order (...) fixed by the Rules of Procedure of the Court. (...).
89. Applications are filed before the Court as per the following process:
- (i) Original pleadings consisting of five (5) certified copies, and one additional copy for every other party, signed by agent or lawyer of the Applicant, are submitted addressed to the Court's Registry (Article 11(1), 1991 Protocol; Article 32(1), Rules of Procedure);
  - (ii) These pleadings are submitted together with all annexes and list of same (Article 32(4), Rules of Procedure);
  - (iii) Additionally, and for Institutions, pleadings should be translated into the official languages of the Court, which are also the working languages of the Community, i.e. English, French and Portuguese (Articles 25(1) and 32(2), Rules of Procedure; Article 87(2), Revised Treaty);
  - (iv) Date of filing with Registry applies in reckoning time limits (Article 32(3), Rules of Procedure);
  - (v) Submission is made by telefax "or other technical means of communication available to the Court ..." (Article 32(6), Rules of Procedure).

### 3.1.3 Format and content of an application

90. Pursuant to Article 11(1) of the 1991 Court Protocol, applications brought before the ECCJ "(...) shall set out the subject matter of the dispute and the parties involved and shall contain a summary of the arguments put forward as well as the plea of the plaintiff."
91. As per Article 33 of the ECCJ Rules of Procedure, applications filed before the Court should be drafted as follows:
- (i) the name and address of the applicant;
  - (ii) the designation of the party against whom the Application is made;
  - (iii) the subject-matter of the proceedings and a summary of the pleas in law on which the Application is based;
  - (iv) the form of order sought by the Applicant;
  - (v) the nature of any evidence offered in support (where appropriate);
  - (vi) an address for service in the place where the Court has its seat and the name of the person who is authorized and has expressed willingness to accept service; and/or a statement that the lawyer or agent agrees that service is to be effected on him by telefax or other technical means of communication (until such address is provided, services will be effected by registered letter addressed to the agent or lawyer of that party).
92. Timelines for servicing and exchanges of pleadings are as follows:
- (i) Application is served on defendant upon receipt, or as soon as it is in order in circumstances foreseen under Article 33(6) apply (Article 34, Rules of Procedure);
  - (ii) One (1) month for defendant to lodge defense after receipt of application (Article 35(1), Rules of Procedure);
  - (iii) Rules on filing, format and contents of applications stated in Article 32 of the Rules of Procedure apply to defense (Article 35(1), Rules of Procedure);
  - (iv) Time may be extended by the President of the Court upon reasoned request by Defendant (Article 35(2), Rules of Procedure);
  - (v) One (1) month each for Applicant to reply, and defendant file a rejoinder from date of receipt of submissions by the party concerned (Article 36(1), Rules of Procedure);
  - (vi) Time may be further extended by the President of the Court upon request (Article 36(1), Rules of Procedure); and
  - (vii) Computation of time is regulated by Article 75 of the Rules.



### 3.1.4 Exchange of pleadings and timelines

93. Pursuant to Articles 11(2) and 13(3) of the 1991 Court Protocol, "Documents comprising the written proceedings shall be addressed to the Chief Registrar of the Court in the order and *within the time limit fixed by the Rules of Procedure of the Court. A copy of each document produced by one party shall be communicated to the other party.*"

94. As per Article 11(2) of the 1991 Protocol, "The Chief Registrar of the Court shall immediately serve notice of the Application and of all documents relating to the subject matter of the dispute to the other party (...)"

95. Timelines for filing Applications before the Court are as follows:

- (i) Thirty (30) days for the Applicant to put the Application in order or produce any missing documents required by the Rules as stated above (Article 33(6), Rules of Procedure);
- (ii) Ten (10) days for filing the signed original and originals of annexes thereto where copy of the application was submitted by telefax or other means of communication;
- (iii) Date on which Registry receives documents will be considered for purposes of computing time (Article 32(6), Rules of Procedure); and
- (iv) Non compliance with any of the conditions may render the Application formally inadmissible should Court decide so upon hearing (Article 33(7), Rules of Procedure).

### 3.1.5 Joinder and dis-joinder

96. Rules on joinder or dis-joinder of cases can be summed up as follows as further detailed under Article 38 of the Rules:

- (i) Discretion of the Court applies (in situations where cases are joined or disjoined on the request of a party, the Court has discretion to merge or not merge the concerned applications);
- (ii) The procedure can be implemented at any time of the proceedings;
- (iii) Conditions include two or more cases relating to the same subject matter; and
- (iv) The concerned procedure can be implemented for either written or oral procedure.

### 3.1.6 Discontinuance

97. Discontinuance of cases may be considered under the following circumstances and conditions as further detailed under Article 72 of the Rules:

- (i) Procedure to be implemented before the Court makes a determination on the matter;
- (ii) Parties reach a settlement in their dispute and intimate to the Court the abandonment of their claims
- (iii) Case will be removed from register by President with a decision as to costs in accordance with Article 66(8), having regard to any proposals made by the parties on the matter



### 3.1.7 Stay of proceedings

98. A stay of proceedings is a Ruling by a court to stop or suspend a proceeding or trial temporarily or indefinitely. A court may later lift the stay and continue the proceeding. Some stays are automatic, but others are based on judicial discretion. Usually, the pendency of an appeal stays proceedings in the court below. As general conditions, a party seeking a stay must show: (1) that he will likely prevail on the merits of the Appeal; (2) that he will suffer irreparable injury if the stay is denied; (3) that the other parties will not be substantially harmed; and (4) that the public interest will be served by granting the stay.<sup>33</sup>
99. Proceedings may be stayed in the following circumstances as further detailed under Article 78 of the Rules:
- (i) In all cases, by decision of the President adopted after hearing the parties and, save in the case of references for a preliminary ruling;
  - (ii) Proceedings may be resumed by order or decision, following the same procedure;
  - (iii) Date of effect will be that indicated in the order or decision of stay or, in the absence of such indication, on the date of that order or decision;
  - (iv) While proceedings are stayed time shall cease to run for the purposes of prescribed time limits for all parties;
  - (v) Where the order or decision of stay does not fix the length of stay, it shall end on the date indicated in the order or decision of resumption or, in the absence of such indication, on the date of the order or decision of resumption; and
  - (vi) From the date of resumption time shall begin to run afresh for the purposes of the time limits.

### 3.1.8 Report by the Judge Rapporteur, Articles 1 and 39 of the Rules

100. Pursuant to Article 1 of the Rules, the "Judge – Rapporteur" is a Judge nominated by the President to summarize or give a report on a case or issue. Even though the statutes do not include any express provision on the contentious proceedings, an indication is deducted from Article 97 of the Rules which provides that a "as soon as the request for Advisory Opinion is lodged, the President shall designate a Judge to act as Rapporteur".
101. In contentious proceedings, the role of the Judge Rapporteur precedes and prepares deliberations by the plenary and unfolds as follows:
- (i) President shall fix a date on which the Judge Rapporteur is to present his preliminary report to the Court, taking into account the circumstances provided by the applicable Rules, i.e. Rule 39(1) of the Rules, read together with those of Article 59 of the Rules in instances of rejoinder, expedited procedure;<sup>34</sup>

<sup>33</sup> Cornell Law School, 'Stay of proceedings' [https://www.law.cornell.edu/wex/stay\\_of\\_proceedings](https://www.law.cornell.edu/wex/stay_of_proceedings) (accessed 6 June 2022).

<sup>34</sup> Rule 39(1) of the Rules provides as follows: 1. The President shall fix a date on which the Judge Rapporteur is to present his preliminary report to the Court, either (a) After the rejoinder has been lodged, or (b) Where no reply or no rejoinder has been lodged within the time limit fixed in Accordance with Article 59 of these rules, or (c) Where the party concerned has waived his right to lodge a reply or rejoinder, or (d) Where the expedited procedure referred to in Article 59 is to be applied, when the President fixes a date for the hearing.

- (ii) The preliminary report shall contain recommendations as to whether a preparatory inquiry or any other preparatory step should be undertaken as well as directive on whether or not to undertake the oral part of the procedure as provided for in Article 53 of the Rules.

## 3.2 Oral procedure

### 3.2.1 Rules governing the oral procedure

102. Pursuant to Article 13(4) of the 1991 Court Protocol, the oral proceedings shall consist of the hearing of parties, agents, witnesses, experts, advocates or counsels. The rights and privileges of lawyers and such other counsel are governed by Article 28 of the Rules.

103. Article 40 of the Rules also provides that an oral procedure may be envisaged under the following conditions:

- (i) A party lodges a reasoned Application for oral procedure;
- (ii) The Application is to be lodged within one month from notification to the party of the close of the written procedure; and
- (iii) The Court considers the application and may decide not to grant same.

### 3.2.2 Hearing of parties, summoning of witnesses and experts

104. Pursuant to Article 43, 44 and 45 of the Rules, the hearing of parties, and summoning of witnesses and experts is organised as follows:

- (i) Witnesses may be summoned either at Court's own motion or upon request by a party, and both facts sought and reason for motion should be specified;
- (ii) Witnesses will give evidence after the parties have been given notice to attend;
- (iii) Minutes reproducing evidence given by witnesses is drawn by the Chief Registrar and made part of the official record;
- (iv) Pecuniary penalty may be imposed on witnesses who fail to obey the summons and attend for examination or refuses to give evidence or take oath;
- (v) The Court may order that an expert's report be obtained, appoint an expert to be under the supervision of the Judge Rapporteur in the case
- (vi) The expert may request for examination of witnesses, submit a report, and Court may order that he or she be examined, the parties having been given notice to attend;
- (vii) Objections may be raised by parties to a witness or an expert, within two weeks after service of the order summoning the witness or appointing the expert and the Court shall rule on same.

### 3.2.3 Oral proceedings

105. Order of priority of hearings under an oral procedure is regulated by Rule 52(1) of the Rules. Oral proceedings are conducted as follows:

- (i) The oral proceedings in cases heard in camera shall not be published, (Article 54(1) of the Rules);
- (ii) Applicants may address the Court only through their agents, advisers or lawyers, (Articles 54 (1) and (2) of the Rules); and
- (iii) The Court may order the re-opening of the oral procedure, (Article 58 of the Rules).

### 3.2.3 Expedited procedures

106. Expedited procedures are based on the principle that the Court can determine cases by derogating from the provisions of its Rules, where the particular urgency of the case requires it to give its ruling with the minimum of delay. Such procedures are regulated under Article 59 of the Rules.

107. An expedited procedure is undertaken under the following circumstances and conditions:

- (i) On application by one party, in exceptional cases as decided by the President, and after hearing the other party;
- (ii) The Application shall be made by a separate document lodged at the same time as the Application initiating the proceedings or the defense, as the case may be;
- (iii) Once the defense has been lodged or, if the decision to adjudicate under an expedited procedure is not made until after that pleading has been lodged, once that decision has been taken, the President shall fix a date for the hearing, which shall be communicated forthwith to the parties; and
- (iv) The Court shall give its Ruling after hearing the parties.

### 3.2.4 Legal aid

108. The ECOWAS Court does not run a legal aid scheme whether formal or *ad hoc*. However, there is an ongoing process towards the establishment of a legal aid programme for the Court. This process entails a proposal by the Court to the ECOWAS Assembly of Heads of State and Government to adopt a supplementary act on the establishment of the Court's legal aid programme; and an amendment of the Rules of Court to include provisions on the granting and management of legal aid.

109. The main features being considered include:

- (i) Discussions on whether to adopt an internal or external approach to managing the legal aid programme;
- (ii) Main criteria for eligibility should include ECOWAS citizenship, indigence (proposed to be based on monthly income of applicant or spouse, partner, bearing in mind income disparities in different countries of the region);
- (iii) Legal aid should be open to both Applicants and Defendants;

- (iv) Applications that are *prima facie* inadmissible or unfounded should not warrant legal aid;
- (v) A legal aid fund should be established with both States' contributions and external donors contributions;
- (vi) The following aspects are being considered
  - o The Court will provide an information note to Applicants for legal aid, as well as an Application form;
  - o Legal aid application should suspend time for submission of pleadings until the Court issues its Ruling on the Application.

### 3.2.5 Intervention

110. Pursuant to Article 21 of the 1991 Protocol, "Should a Member State consider that it has an interest that may be affected by the subject matter of a dispute before the Court, it may submit by way of a written application a request to be permitted to intervene."
111. Under Article 89 of the Rules, intervention before the Court is regulated as follows:
- (i) Applications must be filed within six weeks of the publication of the notice of the Application initiating the main proceedings;
  - (ii) Contents of Applications are found at Article 89(1) of the Rules;
  - (iii) Observations of parties are sought on intervention request prior to the intervener being served actual pleadings of the case subject to secret or confidential documents; and
  - (iv) Contents of intervention pleadings and time for submissions are found at Article 89(5) of the Rules.
112. Given that no other provisions, including in the Rules of Court, deal specifically with intervention by parties other than Member States, it should be considered that intervention is limited to Member States.
113. However, Article 59(4) of the Rules on "expedited procedures" provides that "An *intervener* may lodge a statement in *intervention* only if the President considers this to be necessary." Article 66(6) of the Rules on "costs" on its part provides that "The Member States and *institutions* which *intervene* in the proceedings shall bear their own costs." Furthermore, Article 66(7) of the Rules states that "The Court may order an intervener other than those mentioned in the preceding subparagraphs to bear his own costs." Finally, Article 89(1)(f) of the Rules provides for a specific procedure in instances where the application for intervention is made by a Member State.
114. A joint reading of the above provisions of the Rules suggests that entities other than Member States apply for intervention. This reading is affirmed in the practice of the Court.
115. It emerges from the case-law of the Court that intervention by non-state entities are requested and granted on condition that the intervening party has an interest in the outcome of the dispute, and that such interest is certain.

- "The Intervener asserts that (...) he had *an interest in the case*. (...) the Supplementary Protocol of the ECOWAS Court of Justice also states this principle under Article 10 (c) and (d) it provides that "Individual and cooperate bodies ... *may appear* before the Court"; (...). In the instant case, the Intervener has sufficient interest in the Application of the Plaintiff, and his interest in the outcome of the dispute appears certain. This is because validating the Applicant's election, if sanctioned by an Order, results ipso facto in the invalidation of the election of the intervener's election. (...)"

- "In the present case, and according to the principle that the subsidiary follows from the principal; or still, according to the relationship of cause and effect, the Principal Application communicates its condition to the Intervener's application. Consequently, since the Court does not have the jurisdiction to consider the Principal Application, the Intervener's Application must fail." **Honourable Dr. Jerry Ugokwe v Nigeria, ECW/CCJ/JUD/03/05, Judgment of 7 October 2005, paras 34, 35.**

116. Legal standing to intervene can also be assumed and focus be placed on other conditions such as time limit. A request for intervention filed six weeks after the date of publication of the notice of filing of the concerned Application cannot be accepted.

- The Court examined only the Applicant's objection that the Application was filed out of time but did not deal with the question whether the Applicant Intervener had standing to intervene in the matter. The Applicant Intervener stated that he had an interest in the case given that he is the owner of the goods allegedly seized by the Defendant. **Chief Frank Ukor v Rachad Laleye and Alinnor, ECW/CCJ/JUD/01/05, Judgment of 27 May 2005, paras 26; 26-29**

### 3.2.6 *Amicus curiae* procedure

117. *Amicus curiae* is a latin expression for "friend of the Court." It describes a person or group who is not a party to an action, but has a strong interest in the matter, and will petition the Court for permission to submit a brief in the action with the intent of influencing the Court's decision. Such briefs are called "*amicus briefs*."<sup>35</sup> In many instances, the *amicus curiae* attempts to draw the court's attention to arguments or information that the parties may not have presented, such as the effects of a particular Court Ruling on the interests of certain third parties.

118. Neither the 1991 Protocol nor the Rules explicitly provides for *amicus curiae* interventions in proceedings before the Court. However, in practice, the Court has granted requests for intervention as *amicus curiae* in several cases. In such instances, requests were granted under Article 89 of the Rules, which regulates intervention generally by Member States was also extended to other legal entities (**see section on "Intervention"**).

119. Accordingly, a party interested in being admitted as *amicus curiae* should follow the rules applicable to interveners before the ECOWAS Court per Chapter III of the Rules.

<sup>35</sup> Cornell Law School, 'Amicus curiae' [https://www.law.cornell.edu/wex/amicus\\_curiae](https://www.law.cornell.edu/wex/amicus_curiae) (accessed 6 June 2022).

120. *Amicus curiae* intervention is inherent in the procedure for intervention under Article 89 of the Rules.

- "Similarly, Amnesty International, the Canadian Journalist for Freedom of Expression, (...) brought an Application pursuant to inherent jurisdiction of the Court and Article 89 of the Rules of this Court seeking to join the suit as interveners/*amici curiae*. The Defendant did not oppose the Application. The Court granted the *amicus curiae* thirty days to file a consolidated brief instead of the forty five days they had asked for." ***Federation of African Journalists v Gambia, ECW/CCJ/JUD/04/18, Judgment of 13 February 2018, pages 8, 9.***

121. Intervention is granted as long as Application is filed, and Applicant is duly represented.

- "On 28/02/2019, Amnesty International approached the Court via a motion seeking leave of the Court to make written submission as *Amicus Curiae*. On the 7/05/19, the Court had its first session in the case and both parties were duly represented by their counsel and the counsel for Amnesty International was in attendance. The Application by the Amnesty International was granted. (...) On 03/06/2019, the Respondent filed its Defence to the Applicant's Application whilst Amnesty International filed its *amicus curiae* submission on the 19/06/19." ***Women Against Violence and Exploitation in Society (WAVES) and Child Welfare Society, Sierra Leone (CWS-SL) (On behalf of pregnant adolescent school girls in Sierra Leone) v Sierra Leone, ECW/CCJ/JUD/37/19, Judgment of 12 December 2019, page 8.***

### 3.2.7 Third party proceedings

122. A third-party procedure refers to the procedure in a civil suit whereby a defendant is given room to join another person who is not a party to suit as co-defendant on the grounds that he (the defendant) has a legally recognized claim against that other person called the third party.<sup>36</sup>

123. Third party proceedings are organised as follows:

- (i) Rules set out under Articles 32 and 33 of the Rules on written procedure, contents and form of contentious Applications apply to third party Applications;
- (ii) Further details specific to third party Applications are found under Article 91(1) and (2) of the Rules;
- (iii) Applicants must show how the Judgment concerned affects their rights and Applications be lodged within two months of publication in the Community Gazette of the said Judgment;
- (iv) The Court may, on Application by the third party, order a stay of execution of the Judgment; and
- (v) The contested Judgment shall be varied on the points on which the submissions of the third party are upheld.

<sup>36</sup> Law Insider, 'Third party proceedings' <https://www.lawinsider.com/dictionary/third-party-proceedings> (accessed 6 June 2022).

## IV. JUDGMENT

### A. DELIVERY AND SERVICE

#### 4.1 Judgments

124. Judgment delivery is governed as follows with further details specified under Articles 60 to 65 of the Rules:
- (i) Contents of a Judgment are specified under Article 60 of the Rules;
  - (ii) Judgments are delivered in open court;
  - (iii) The parties are given notice to attend the reading and served with certified copies of the judgment;
  - (iv) The Court may on its own motion or on Application by a party made within one month after the delivery of a Judgment, rectify clerical mistakes, errors in calculation and obvious slips in it;
  - (v) Where the Court omits to give a decision on a specific head of claim or on costs, any party may within a month after service of the Judgment apply to the Court to supplement its Judgment; and
  - (vi) The Chief Registrar shall arrange for the publication of reports of cases before the Court.

#### 4.2 Default Judgment

125. The Court may render Judgments by default under the following circumstances and conditions with further details provided under Article 90 of the Rules:
- (i) Defendant, after being duly served, fails to lodge a defense to the Application in the proper form within the time prescribed;
  - (ii) Applicant should file the Application for Judgment by default and same be served on Defendant;
  - (iii) Prior to giving Judgment by default the Court shall consider whether Application is admissible, formal applicable procedures are complied with, and Application is well founded *prima facie*;
  - (iv) Execution may be stayed or allowed subject to provision of security until the Court determines any Application for the default Judgment to be set aside; and
  - (v) Application to set aside a Judgment by default may be made, within one month of notification of the said Judgment and Decision of the Court thereon might be set aside.

- In practice, the Court has declared Application for default Judgment admissible upon confirming the jurisdiction of the Court, standing of Applicant, admissibility of the main Application, abidance with formalities, and proof of allegations in the face of evidentiary documents. In default proceedings, burden of proof lies (remains) on the Applicant. ***Lieutenant Colonel Silas Jock Santoi v Nigeria, ECW/CCJ/APP/01/19, Judgment of 23 January 2019, paras 63-79; 80-86; 87-99; 100-177***

### 4.3 Costs

126. The following rules govern costs in proceedings before the Court, further details being provided under Articles 66, 67, 68, 69, 70, 71 of the Rules:

- (i) In principle, if costs are not claimed, the parties shall bear their own costs;
- (ii) The unsuccessful party bears the costs if they have been applied for in the successful party's pleadings but Court may order that successful party to pay costs which the opposite party was unreasonably caused to incur; intervening Member States and institutions bear their own costs;
- (iii) Court may order that costs be shared among several unsuccessful parties in circumstances defined under Article 66 of the Rules;
- (iv) Where the parties have come to an agreement on costs, the decision as to costs shall be in accordance with that agreement;
- (v) All other rules on costs, assessment and payment thereof are provided under sub-rules of Article 66 and 67 of the Rules; and
- (vi) The costs of proceedings before the Court, types of recoverable costs, disputes on the same, and applicable currency are stated under Articles 68, 69, 70 and 71 of the Rules, and the Court makes an order in case of dispute as to the same.

- "Whereas in the terms of Article 66(2) of the Rules of the Court 'The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings', it is ripe to adopt same. This statement which was adopted for the first time then, has since been applied several times to various subject-matters (...)" ***Odafe Oserada v ECOWAS Council of Ministers and Others, ECW/CCJ/JUD/01/08, Judgment of 16 May 2008, section on costs***

### 4.4 Service of decisions

127. Service is effected as per the following processes with further details specified under Article 74 of the Rules:

- (i) Service is effected at the addressee's address for service either by the dispatch of a copy of the document by registered post with a form for acknowledgement of receipt or by personal delivery of the copy against a receipt;
- (ii) Where the addressee has agreed that service is to be effected on him by telefax



or other technical means of communication, any procedural document other than a Judgment or Order of the Court may be served by the transmission of a copy of the document by such means;

- (iii) Where, for technical reasons or on account of the nature or length of the document, such transmission is impossible or impracticable, the document shall be served, if the addressee has failed to state an address for service, at his address either by registered post or personal delivery with acknowledgement of receipt; and
- (iv) Service shall then be deemed to have been effected on the addressee by registered post on the tenth day following the lodging of the registered letter at the post office of the place where the Court has its seat, unless it is shown by the acknowledgement of receipt that the letter was received on a different date or the addressee informs the Chief Registrar, within three weeks of being advised by telefax or other technical means of communication, that the document to be served has not reached him.

## **B. OTHER PROCEEDINGS BEFORE THE COURT**

### **4.5 Appeals**

- 128. Pursuant to Article 76(2) of the Revised Treaty, the ECOWAS Court of Justice does not have power to entertain any Appeal against its Judgments. As per the provision, failing amicable settlement, "(...) either party or any other Member States or the Authority may refer the matter to the Court of the Community whose decision shall be final and shall not be subject to Appeal."
- 129. At its 56th Ordinary Session in June 2006, the Council of Ministers of ECOWAS recognized the need to establish an Appellate Chamber within the Court. A section was created to that effect within the Registry of the Court preparatory to the establishment of the Appellate Chamber.
- 130. The operationalisation of the Appellate Chamber is pending adoption of proposed statutory changes by the political organs of ECOWAS.

### **4.6 Revision**

- 131. The Court considers Applications for revision of Decisions under the following circumstances and conditions, with further details being specified under Articles 25 of the 1991 Protocol and 92-94 of the Rules:
  - (i) Application to be based on discovery of decisive facts which were unknown to Court and the party seeking revision at the time when the Decision was made, except if lack of knowledge was due to negligence;
  - (ii) Application is made within three months of the date on which the facts on which the Application is based came to the Applicant's knowledge;
  - (iii) Court may require prior compliance with the initial Decision before admitting revision procedure;
  - (iv) Statute of limitation is five years of the delivery of the initial Decision

- (v) Formalities pertaining to written proceedings under the Rules apply to Revision; and
- (vi) The Court rules on the Application for Revision by means of a Judgment before proceeding to hear the substance of the Application.

- Jurisdiction assumed under the main case remains for the Revision procedure. ***Abu Dennis Uluebeka and Others v Nigeria*, ECW/CCJ/JUD/36/21, Judgment of 26 October 2021, para 51.**

- Successful Applications for Revision must meet three main conditions, be filed within five years of Delivery of the Decision seeking review, be filed within three months of the discovery of the new fact, and be premised on a fact that is decisive in nature and unknown to Court and party seeking Review. ***Musa Saidykhan v Gambia*, ECW/CCJ/RUL/03/12, Ruling of 7 February 2012, para 64**

- Admissibility conditions in case of Revision are cumulative and lack of one of them determines admissibility of the Application. ***Tokumbo L. Oyemade v ECOWAS Executive Secretary and Others*, JUD/ECW/CCJ/JUD/04/05, Judgment of 10 October 2005, para 31.**

- Issues of misconstructions/misapplications of law are issues of law and have nothing to do with facts at all. (...) Issues of law are grounds of Appeal and not Review (...). ***Ocean King Ocean King Nigeria Ltd v Senegal*, ECW/CCJ/JUD/07/11-REV, Ruling of 12 February 2014, para 26**

## 4.7 Interpretation

132. Pursuant to Article 23 of the 1991 Protocol, "If the meaning or scope of a Decision or Advisory Opinion is in doubt, the Court shall construe it on Application by any party or any Institution of the Community establishing an interest therein."

133. Application for interpretation of Judgments is governed by the following rules with more specific details found under Article 95 of the Rules:

- (i) Applications are made in accordance with Rules 32 and 33 which prescribe for written procedure;
- (ii) Contents of such Applications are detailed in Article 95(1) of the Rules; and
- (iii) The Court shall give its decision in the form of a Judgment.

- It is a general principal of law that an Application of interpretation of a Judgment should involve mainly the operative part of the Decision, and not seeking that the Court reviews its reasoning. ***Georges Constant AMOUSSOU v Benin*, ECW/CCJ/JUD/09/15, Judgment of 23 April 2015, paras IV.10, IV.11.**

## 5. REMEDIES AND ENFORCEMENT

### A. REMEDIES

#### 5.1 General principles on remedies

134. The ECOWAS Court statutes do not provide for any specific remedy that the Court may grant. The practice of the Court on Reparations was established over time through case-law with recent reliance on the right to reparation under Article 2(3) of the ICCPR.

- "Any individual who is a victim of violation of his rights is entitled to just and equitable Reparation". *Djot Bayi Talbia and Others v Nigeria and Others*, ECW/CCJ/JUD/01/09, Judgment of 28 January 2009, para 45.
- "Compensation is awarded in order to ensure just satisfaction and no more." *Chief Ebrimah Manneh v Gambia*, ECW/CCJ/JUD/03/08, Judgment of 5 June 2008, para 39.
- "It is trite law that there is a right in international law to an effective remedy for violations of the rights of any accused as reflected in Article 2(3)(a) of the ICCPR (...)" *Counsellor Kabineh Muhammad Ja'neh and Another v Liberia*, ECW/CCJ/JUD/28/20, Judgment of 10 November 2020, para 166.

#### 5.2 Reparations

135. Reparations before the ECOWAS Court are specified in the operative part of its Judgment which also includes the Decision as to costs. The Court grants remedies similar to those offered in domestic systems. Such remedies may include declarations and mandatory orders.

- Generally speaking, the Court has adopted three types of damages: special damages, general damages, and punitive damages. *Chief Ebrimah Manneh v Gambia*, ECW/CCJ/JUD/03/08, Judgment of 5 June 2008, para 29.
- Special damages are enumerable of quantifiable monetary costs or losses. These damages must be pleaded and proved. Examples, include loss of income as a result of unlawful detention, medical costs, repair or replacement of damaged property, lost wages, lost earning potential, loss of business, loss of irreplaceable items, loss of support, etc. *Chief Ebrimah Manneh v Gambia*, ECW/CCJ/JUD/03/08, Judgment of 5 June 2008, para 29.
- General damages are items of harm or loss suffered for which only a subject value may be attached. Examples include pain, physical suffering, emotional trauma of suffering, loss of companionship, loss of consortium, disfigurement, loss of reputation, loss or impairment of mental or physical capacity, loss of enjoyment of life, etc. *Chief Ebrimah Manneh v Gambia*, ECW/CCJ/JUD/03/08, Judgment of 5 June 2008, para 30.

- Punitive damages are generally awarded not to compensate the victim but in order to reform or deter the Defendant from pursuing a course of action such as that which caused damage to the victim. Such damages are awarded only in specific cases. **Chief Ebrimah Manneh v Gambia, ECW/CCJ/JUD/03/08, Judgment of 5 June 2008, para 31.**
- Quantum of damages depend on facts of the case, situation of the Applicant and Rules governing the award of damages. (the Court draws such Rules from international human rights case-law) **Chief Ebrimah Manneh v Gambia, ECW/CCJ/JUD/03/08, Judgment of 5 June 2008, paras 32, 39 – Hadijatou Mani Koraou v Niger, ECW/CCJ/JUD/06/08, Judgment of 27 October 2008, para 97.**
- Nature and form of the effective remedy should be proportional to the gravity of harm that is suffered. **Counsellor Kabineh Muhammad Ja'neh and Another v Liberia, ECW/CCJ/JUD/28/20, Judgment of 10 November 2020, para 167.**
- Quantum is assessed on an all-inclusive basis where Applicant did not provide any guideline for an accurate calculation. **Hadijatou Mani Koraou v Niger Koraou, ECW/CCJ/JUD/06/08, Judgment of 27 October 2008, para 95.**

### 5.3 Restitution

136. Restitution generally refers to both disgorging something which has been taken, and to compensation for loss or injury done. **In civil cases it is a** remedy associated with unjust enrichment in which the amount of recovery is typically based on the Defendant's gain rather than the Applicant's loss. **In criminal cases it translates into** full or partial compensation for loss paid by a criminal to a victim that is ordered as part of a criminal sentence or as a condition of probation.<sup>37</sup> Restitution has been adopted by the African Court on Human and Peoples' Rights as a mode of reparation in applying the provisionis of Article 27(1) of the African Court Protocol.<sup>38</sup>

137. The ECCJ has held that the violation of the Applicant's right to a fair trial protected under Article 7(1) of the African Charter following his unlawful and unfair dismissal from the Police Force, on trumped up charges, warrants restitution in the form of reinstatement.

- Reinstatement the Applicant in his appropriate position in the Police Force of the Defendants and pay him all outstanding salaries, benefits, entitlements, including promotion. **Mohammed El Tayyib Bah v Leone, ECW/CCJ/JUD/11/15, Judgment of 4 May 2015, Operative section**

138. Restitution may include arrears of salary and other benefits. Damages in arrears of salary can be based on the legitimate expectation that Applicant expected to work until retirement.

<sup>37</sup> Cornell Law School, 'Restitution' <https://www.law.cornell.edu/wex/restitution> (accessed 6 June 2022).

<sup>38</sup> *Kenedy Gihana and Others v Rwanda* (merits and reparations) (2019) 3 AfCLR 655.

- Court ordered Defendant to i) pay salaries and other benefits in arrears from the date of dismissal up to that of notification of the Judgment; ii) reinstate Applicant as Associate Justice of the Supreme Court or allow him retire with full benefits; and iii) pay USD 200,000 damages for moral prejudice. ***Counsellor Kabineh Muhammad Ja'neh and Another v Liberia, ECW/CCJ/JUD/28/20, Judgment of 10 November 2020, Operative section.***

## 5.4 Monetary compensation

139. General damages may be ordered in addition to specific damages such as restitution through reinstatement in a case of unlawful dismissal.

- Directs the Defendant to pay the Applicant the sum of **Two Hundred Fifty Thousand US. Dollars (\$ 250,000.00)** as general damages for the wrong occasioned by their illegal act. ***Mohammed El Tayyib Bah v Sierra Leone, ECW/CCJ/JUD/11/15, Judgment of 4 May 2015, Operative section.***

140. The ECCJ has held that monetary compensation can be granted in instances of unlawful detention.

- Due to the unique nature of their unlawful detention, the Court grants each of the Applicants an all-inclusive amount of USD 42,720. ***Djot Bayi Talbia and Others v Nigeria and Others, ECW/CCJ/JUD/01/09, 28 January 2009, para 53.***

141. Generally, monetary compensation can also be granted for any other prejudice whether material or moral. This type of reparation applies mostly where restitution is not possible or does not suffice to remedy the violation. In the practice of the African human rights system, both the African Commission<sup>39</sup> and African Court<sup>40</sup> have resorted to monetary compensation to remedy both material and moral prejudice.

## 5.5 Administrative Orders

142. The Court can issue Administrative Orders for Reparation instead of monetary compensation to ensure that the prejudice caused is addressed.

- Take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta;
- Take all measures that are necessary to prevent the occurrence of damage to the environment;

<sup>39</sup> *Antoine Bissangou v Congo*, Communication 253/02 (2006) AHRLR 80 (ACHPR 2006); *Geneviève Mbiankeu v Cameroon*, Communication 389/10 (ACHPR 2015).

<sup>40</sup> *Mohamed Abubakari v Tanzania* (reparations) (2019) 3 AfCLR 334; *Kenedy Gihana v Rwanda* (merits and reparations) (2019) 3 AfCLR 655.

- Take all measures to hold the perpetrators of the environmental damage accountable. ***SERAP v Nigeria, ECW/CCJ/JUD/18/12, Judgment of 14 December 2012, para 121.***

143. Administrative orders may extend to replacement of embezzled funds, and domestic criminal prosecution of individuals involved in the violation for purposes of recovering the funds. This was the case in ***SERAP v Nigeria***.

- (...) Thus, whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the first Defendant should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education. ***SERAP v Nigeria, ECW/CCJ/JUD/07/10, Judgment of 30 November 2010, para 28.***

## 5.6 Legislative change

144. The Court may order legislative change in circumstances where the existing law or actions of the Defendant in implementation of the said law are in breach of provisions of an international instrument or Community Law.

- Repeal or amend Section 24 of the Cybercrime Act 2015, in accordance with its obligations under Article 1 of the African Charter and the International Covenant on Civil and Political Rights. ***The Incorporated Trustees of Laws & Rights Awareness Initiatives v Nigeria, ECW/CCJ/JUD/16/20, Judgment of 10 July 2020, para 186.***

## 5.7 Interim measures

145. A provisional (interim/conservatory) measure is a temporary remedy granted under special circumstances. The aim of provisional measures is to preserve parties' rights, both substantive and procedural, pending the Decision on the merits. In the African human rights system, the African Commission and African Court on Human and Peoples' Rights have resorted to such measures mostly on two main conditions: i) extreme gravity and urgency; and ii) risk of irreparable harm to persons.

146. The ECOWAS Court may order interim measures pursuant to Article 20 of the 1991 Protocol, which provides that "The Court, each time a case is brought before it, may order any provisional measures or issue any provisional instructions which it may consider necessary or desirable."

147. Applications for interim measures are governed by the following rules with further details provided under Articles 79-86 of the Rules:

- Applications must establish a *prima facie* case for the interim measure applied for and be made by a separate document in accordance with Rules governing written pleadings;

- (ii) The President shall refer the Application to the Court within 48 hours postpone all other cases, and give a Decision after hearing the parties;
- (iii) The Decision on the Application shall take the form of a reasoned Order and its execution may be made conditional on the lodging by the Applicant of security, of an amount and nature to be fixed in the light of the circumstances;
- (iv) Unless the Order fixes the date on which the interim measure is to lapse, the measure shall lapse when final Judgment is delivered;
- (v) The Order shall have only an interim effect, and shall be without prejudice to the Decision of the Court on the substance of the case;
- (vi) Rejection of an Application for an interim measure shall not bar the party who made it from making a further Application on the basis of new facts; and
- (vii) The provisions on interim measures shall apply to Applications to suspend the execution of a decision of the Court or of any measure adopted by another institution, submitted pursuant to these Rules.

148. An interim measure is preventive in nature and becomes unnecessary where the damage/ violation has already occurred/has already been completed. In such cases, the Court would decline the order.

- The Court reiterates the significance of provisional measures and reaffirms that it is a temporary stopgap to prevent the occurrence of potential harm, injury or damage that may arise from an alleged violation of human rights. The measure is largely preventive in nature and where the perceived or anticipated damage has already occurred with the infliction of the attendant suffering its order becomes devoid of purpose. ***SERAP v Nigeria, ECW/CCJ/RUL/03/21, Ruling of 22 June 2021, paras 48-50, Operative section.***

149. Express provisions of the ECOWAS law prescribing a course of action form a basis for the Court to grant interim measures.

- The Court notes that the Declaration of the Assembly of Heads of State and Government of 24 December 2010 contains in itself the threat of the use of force; the legality of this decision being challenged before this Court; and Article 23 of the new Protocol relating to the Court (...) providing that "when a dispute is referred to the Court, the Member States or the Institutions of the Community shall refrain from any action likely to aggravate the dispute or to impede its settlement."
- "Orders the Member States and the Institutions of the Community to comply strictly with the provisions of the new Article 23 of the Protocol on the Court (...)." ***Godwill Mrapor and Others (Military intervention in Côte d'Ivoire) v ECOWAS Authority of Heads of State and Government, ECW/CCJ/ADD/01/11, Preliminary Ruling of 18 March 2011, paras 24, 29.***



## VI. ENFORCEMENT OF JUDGMENTS

### A. PROCEDURES FOR ENFORCEMENT

#### 6.1 Domestic implementation

150. Pursuant to Article 25(5) of the 1991 Protocol, “The Decision of the Court has no binding force except between the parties and in respect of that particular case.” Article 62 of the Rules provides that “The Judgment shall be binding from the date of its delivery.”

151. The new Article 24 of the Court Protocol provides for the following procedure in respect of domestic enforcement of decisions of the Court:

1. Judgments of the Court that have financial implications on nationals of Member States or Member States are binding.
2. Execution of any decision of the Court shall be in 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.
3. Upon the verification by the appointed Authority of the recipient Member State that the writ is from the Court, the writ shall be enforced.
4. All Member States shall determine the competent national authority for the purpose of recipient and processing of execution and notify the Court accordingly.
5. The writ of execution issued by the Community Court may be suspended only by a decision of the Community Court of Justice.

152. As at December 2021, only six Member States of ECOWAS, namely: Burkina Faso, Ghana, Guinea, Mali, Nigeria and Togo had complied with the provision of Article 24(4) of the Supplementary Protocol of 2005 on the Court.<sup>41</sup> In implementing the Judgment of the Court in the case of *Karaou v Niger*, the Respondent State also designated the *Directeur du Contentieux d'Etat*, a directorate within the Ministry of justice.<sup>42</sup> Nigeria designated the Attorney General and Minister of the Justice of the Federation.

#### 6.2 Examples of domestic implementation

##### 6.2.1 Hon. Dr. Jerry Ugokwe v Nigeria

153. The Order sought to restrain the Independent National Electoral Commission from invalidating the Applicant's election or validating the election of another person pending the determination of the case by the ECCJ. The Community Court granted the special interim order.

<sup>41</sup> See ECOWAS Court, 'Ecowas Court President Urges Regional Parliamentarians to Contribute to Improving the Enforcement of Decisions of the Court' <http://www.courtecowas.org/2021/05/28/ecowas-court-president-urges-regional-parliamentarians-to-contribute-to-improving-the-enforcement-of-decisions-of-the-court/>, accessed 9 March 2022.

<sup>42</sup> Directorate of State Litigation.



154. In implementation of the ECOWAS Court's interim order, the Attorney-General of Nigeria addressed a letter to the Speaker of the House of Representatives with an express indication not to swear in the beneficiary of the Appeal Court decision until the ECCJ had decided the case on the merits.<sup>43</sup> No one was sworn in until the ECCJ decided that it lacked jurisdiction to hear the matter on the merits.<sup>44</sup>

### 6.2.2 Hadidjatou Mani Koraou v Niger

155. On 14 September 2007, Koraou brought a claim against Niger to the ECCJ for discrimination, slavery and unlawful detention. On 27 October 2008, the ECOWAS Court found in her favour and against Niger for failing to protect Koraou from slavery by a third party and ordered Niger to pay damages in the amount of CFA 10 000 000 (\$20 000).
156. Counsel for Koraou notified the ECCJ Judgment to the Secretary General of Government who transmitted it to the Director of the *Contentieux d'Etat*, the state agent in the proceedings before the Court.<sup>45</sup> The Director sent a *Lettre de mandatement*, a letter of state liability, to the Finance Minister requesting that the National Treasury pay within 3 weeks.<sup>46</sup> After the Finance Minister issued an Order to pay on 17 March 2009, Koraou's counsel cashed a cheque on the same date.<sup>47</sup> Counsel wrote a cheque to Koraou on 21 March 2009.

### 6.2.3 Mamadou Tandja v Niger

157. Finding that Niger and the military junta failed to prove the legal basis for the arrest and detention of Mr Tandja, the ECCJ, through a Judgment dated 8 November 2010, ordered the immediate release of former President Tandja.
158. The military refused to release former President Tandja and in fact, arguably circumvented ECCJ's order by requesting the *Cour d'Etat*<sup>48</sup> to waive his immunity so that he could be charged and tried with embezzlement of public funds.<sup>49</sup> The President was eventually released on 10 May 2011 by the new civilian government in implementation of an Order by the Appeal Court of Niamey which annulled previous proceedings instituted against him.<sup>50</sup>

### 6.2.4 Sikiru Alade v Nigeria

159. The Applicant had been arrested by the Nigerian Police and charged with alleged armed robbery before a Magistrate Court under a so-called "holding charge". The Magistrate Court did not have jurisdiction for the offence of armed robbery and so ordered his detention in prison. He had been there for over 8 years without trial as at the time he brought this application.

<sup>43</sup> See *Ugokwe v Nigeria*, para 10.

<sup>44</sup> See *Ugokwe v Nigeria*, para 10. See also Biafra Nigeria World News & Archives 'ECOWAS Court stops swearing in of Anambra Rep - Olujinmi backs ruling' [http://news.biafranigeriaworld.com/archive/guardian/2005/06/03/ecowas\\_court\\_stops\\_swearing\\_in\\_of\\_anambra\\_rep\\_olujinmi\\_backs\\_ruling.php](http://news.biafranigeriaworld.com/archive/guardian/2005/06/03/ecowas_court_stops_swearing_in_of_anambra_rep_olujinmi_backs_ruling.php) accessed 9 March 2022.

<sup>45</sup> Interview with Advocate Abdourahaman Chaibou, Counsel for Hadidjatou (Niamey, 18 May 2011). Notification of judgment was done in early December 2008.

<sup>46</sup> The request was filed on 12 December 2008, see interview Advocate Chaibou.

<sup>47</sup> Payment occurred towards the end of the financial year while implementation of state budget was almost completed, see interview Advocate Chaibou.

<sup>48</sup> The highest court under the military regime.

<sup>49</sup> Former President Tandja's immunity was actually waived by the *Cour d'Etat* in its Arrêt no 10-01 CE of 14 December 2010.

<sup>50</sup> See *Prosecutor v Tandja Mamadou*, Arrêt no 111, Indictment Division, Appeal Court of Niamey, 3 May 2011.

160. The Court found that the continued detention of the Applicant is a violation of his rights under Article 9(4) of the Court's Protocol and Articles 6 and 7 of the African Charter. It ordered the Respondent State to pay damages in favour of the Applicant to the tune of N2, 700, 000.00 (Two Million, Seven Hundred Thousand Naira) comprising of the sum of N300, 000.00 (Three Hundred Thousand Naira) for each year of his detention. The Court further ordered the release of the Applicant from prison detention
161. The Applicant has been released from detention following a review by the Chief Judge of Lagos on 18 September 2012. However, the damages awarded by the Court have not been paid to the Applicant.<sup>51</sup>

### 6.2.5 Mohammed El Tayyib Bah v Sierra Leone

162. The subject matter of the suit pertains to the unlawful and unfair dismissal of the Applicant from the Police Force of the Respondent, on trumped up charges, and without a hearing thereby violating the Applicant right to fair hearing.
163. The Court found that the said acts violated Article 7(1) of the Charter and ordered the Respondent to reinstate the Applicant to his appropriate position in the Police Force of the Defendants and pay him all outstanding salaries, benefits, entitlements, including promotion. The Court further directed the Respondent to pay the Applicant the sum of Two Hundred Fifty Thousand US. Dollars (\$ 250,000.00) as general damages for the wrong occasioned by their illegal act.
164. The government of Sierra Leone negotiated the damages awarded to El Tayyib- Bah and eventually paid him \$150,000.<sup>52</sup>

## B. ENFORCEMENT

### 6.3 Framework for enforcement

165. Pursuant to Article 7(3)(g) of the Revised Treaty, the ECOWAS Assembly of Heads of State and Government shall bring cases to Court in respect of Member States or Institutions' failure to honour obligations; or abuse of authority and power by institution of community.
166. Furthermore, Article 77 of the ECOWAS Revised Treaty empowers the Authority to impose certain sanctions on any Member State who fails to fulfil its obligations to the Community through, among others, 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.
167. In accordance with the Supplementary Act A/SA.13/02/12 of 17 February 2012 on Sanctions Against Member States that fail to honour their obligations towards *the Community, non-compliance with decisions of the ECOWAS Court amounts to failure to honour one's obligation to ECOWAS.*

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<sup>51</sup> Open Society Justice Initiative, 'Alade v the Federal Republic of Nigeria' <https://www.justiceinitiative.org/litigation/alade-v-federal-republic-nigeria> accessed 9 March 2022.

<sup>52</sup> Sorie Fofana, 'The Plight of Tayyib Bah' <https://www.globaltimes-sl.com/archive/the-plight-of-tayyib-bah/> accessed 9 March 2022.

168. In the Preamble to the Act, the ECOWAS Authority of Heads of States and Government recalls that 'ECOWAS has established supra-national institutions whose decisions are binding and enforceable in full and directly both in its institutions and in member states'.<sup>53</sup> The Preamble goes further to state that it is adopted in the implementation of Article 77 of the Revised Treaty.<sup>54</sup> Most importantly, Article 1 of the Supplementary Act defines 'obligations owed to the Community' as: 'Application and respect of ... the Treaty, Conventions, Protocols and Supplementary Acts, Regulations, Decisions, Directives, and *the Decisions of the Community Court of Justice*'.<sup>55</sup> Finally, the Act enumerates 'the protection and respect of human rights, the rule of law, democracy, and constitutional order' as obligations that states owe to the Community.<sup>56</sup>
169. Pursuant to Article 14 of the Act, the Authority, a Member State, or the President of the ECOWAS Commission may initiate a procedure for sanction against a Member State which does not fulfil its obligations to the Community. Furthermore, in terms of Article 15(1) of the Act, reports of non-compliance may be filed by any natural or legal person of a Member State, by any institution of the Community, and by any Member State. The reports will be examined by either the Council of Ministers or the Authority.
170. The prominent role of the ECOWAS Commission is emphasised by the provision under Article 15(2) that non-compliance reports filed by institutions of the Community, individuals and legal persons are sent to the President of the Commission. Non-institutional reports may be channelled through national authorities in charge of regional integration.
171. Under the Act, individuals, legal entities, member states and institutions of the Community, including the Court, may report non-compliance to the President of the Commission. Monitoring reports of the Commission are submitted to the Council of Ministers, which then makes recommendations to the Authority as to what sanctions to mete against the non-compliant state.<sup>57</sup>

## 6.4 Challenges to enforcement

### 6.4.1 Domestication requirement in dualist Member States

172. In the case of ***Moukhtar Ibrahim Aminu v Government of Jigawa State and Others***, the Respondent contended that the Court did not have the jurisdiction to entertain the action on the ground that the Protocol of the Court which gave it power to hear and determine issues of violation of human rights by individuals has not been domesticated in Nigeria as provided for under Section 12 of the Constitution of the Federal Republic of Nigeria.<sup>58</sup>
173. This position seems to be supported by the ruling of the Supreme Court of Nigeria in the matter of ***General Sani Abacha and Others v Fawehinmi*** where it held that
- An international Treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. Also, the provision of the Constitution of

<sup>53</sup> ECOWAS, Acte additionnel A/SA13/02/12 portant régime des sanctions à l'encontre des Etats membres qui n'honorent pas leurs obligations vis-à-vis de la CEDEAO' Abuja, 17 February 2012, Preamble, para 2.

<sup>54</sup> As above, para 4.

<sup>55</sup> Emphasis of the author.

<sup>56</sup> See 2012 Supplementary Act A/SA13/02/12, art 2(2) iv.

<sup>57</sup> See discussion of compliance norms and mechanisms under chapter two.

<sup>58</sup> ECW/CCJ/JUD/12/14.

the Federal Republic of Nigeria which provides that any law which is inconsistent with any Section of the Constitution shall to the extent of its inconsistency be null and void.

174. The ECOWAS Court rejected this argument in the case of ***Moukhtar Ibrahim Aminu v Government of Jigawa State and Others*** and held thus:

It is trite that the question of domestication is entirely a local duty of the state to comply with its domestic laws including its Constitution. However, where the action of the State is indicative of the fact that it intends to abide by the contents of the Treaty and proceeded to enact into law the provision of the African Charter on Human and People's Rights contained in Article 4(g) of the Revised Treaty makes the objection of the 1st and 2nd defendants a non-issue and immaterial. As always, a state cannot approbate and reprobate in respect of domestication of Treaties, that it derives benefits from its Application.

175. In ***Decision DCC 20-434 of 30 April 2020 on the Enforcement of Decisions of the ECOWAS Court Against Benin***, the Constitutional Court of Benin held that decisions rendered by the ECOWAS Court against that country from inception were null and void for lack of ratification of the Protocol establishing the regional court. Pursuant to the decision, the provisional entry into force is not valid.

#### 6.4.2 Judicial enforcement before the ECOWAS Court

176. The ECOWAS Court has so far declared that it lacks jurisdiction *ratione materiae* on cases seeking for the enforcement of its own Judgments.
177. In the case of ***Karim Meissa Wade v Senegal***, the Court ruled that where it has delivered a Judgment, it is up to the parties to pursue the enforcement of same in accordance with the provisions of the Supplementary Protocol of 19 January 2005 and the Supplementary Act on Sanctions of 17 February 2012. The Court ruled similarly in the case ***Les Etablissements Vamo et autres v Benin***.<sup>59</sup>

<sup>59</sup> ECW/CCJ/APP/12/15.

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