The Uneven Impact of International Human Rights Law in Africa's Subregional Courts

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1. Introduction

The active presence of international human rights law in the work of subregional courts in Africa is undeniable but the nature of its reception, deployment and consequent impact in the framework of each court varies significantly. The idea of regional integration in Africa is generally associated more with trade liberalisation and the integration of Africa's relatively small economies with the aim of enhancing economic growth and by extension, improving the standards of living of the peoples of Africa.[1] Consequently, the judicial organs of regional economic communities (RECs) in Africa are commonly established within their respective treaty frameworks for the purpose of interpreting and applying the constituent treaty and other legal instruments of the parent organisation.[2] However, unlike their counterpart in Europe on which they are arguably modelled, it is rather for their work in the field of judicial protection of human rights than in trade and economic integration that the best known judicial organs of

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1 See generally E. Aryeetey and A.D. Oduro, 'Regional Integration Efforts in Africa: An Overview', in J.J. Teunissen (ed), *Regionalism and the Global Economy: The Case of Africa* (The Hague: FONDAD, 1996), pp. 11–67.

2 Treaty for the Establishment of the East African Community (EAC Treaty), Arusha, 30 November 1999, in force 7 July 2000, Article 23, available at: www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf; Revised Economic Community of West African States Treaty (Revised ECOWAS Treaty), Cotonou, 24 July 1993, in force 23 August 1995, 2373 UNTS 233, Article 15, read together with ECOWAS Protocol A/P.I/7/91 on the Community Court of Justice, Abuja, 6 July 1991, in force, Article 9, available at: www.courtecowas.org/site2012/pdf_files/protocol.pdf.

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these RECs, Africa's subregional courts,[3] have built a reputation.[4] Two of these subregional courts, the East African Court of Justice (EACJ) – the judicial organ of the East African Community (EAC) and the ECOWAS Community Court of Justice (ECCJ) – the judicial organ of the Economic Community of West African States (ECOWAS) – which are probably the most active of Africa's subregional courts have both increasingly become preferred *loci* for general[5] regional human rights adjudication in their respective subregions. They form the case study in this chapter.

In the course of building their respective reputations as courts with formidable albeit 'secondary' human rights jurisdictions, both the EACJ and the ECCJ may have had recourse to international human rights law beyond ways envisaged by the drafters of the treaties. This chapter analyses how international human rights law has shaped the work of subregional courts in Africa. I have adopted an analytical approach in the development this chapter. The objective is to show how each court has received and deployed international human rights law in a distinctive manner. In doing so, attention is also paid to how much of *peer learning*[6] from the mechanisms of international human rights law is evident in the jurisprudence of the EACJ and the ECCJ. A major claim in this chapter is that in ways probably unusual for courts of general jurisdiction[7] the courts under

3 There is at least one REC recognised by the African Union in each subregion in Africa. Thus, for convenience sake and partly to differentiate the courts of the RECs from the continental judicial body, the judicial organs of the RECs are generally referred to as 'subregional courts'. The term is adopted in this chapter.

4 See, for instance, James Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy', *Duke Journal of Comparative and International Law*, 24 (2013), 250, who takes the following view: '[T]he EACJ exemplifies a new trend in African regional human rights enforcement. Rather than serving as a tribunal to resolve trade disputes, as envisaged by its original designers, the court has evolved into one that seeks to hold member governments accountable for violations of human rights and to promote good governance and the rule of law.'

5 As will become clear in the course of this contribution, the subregional courts exercise their human rights jurisdiction over the entire scope of possible rights without any limitations of a functional basis.

6 I have deliberately preferred the term 'peer learning' to distinguish this phenomenon from the more common judicial dialogue because, in my opinion, thus far, the movement of learning is heavily one-sided.

7 As distinct from international courts specifically established for the purposes of human rights adjudication such as the African Court on Human and Peoples' Rights, the European Court of Human Rights or the Inter-American Court of Human Rights.

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review have extended their own influence through human rights adjudication in which international human rights law has been robustly invoked. However, the chapter argues that the impact of international human rights law in the two courts has been uneven. Whereas the EACJ has maintained and expressed a willingness to apply international human rights law to enhance its interpretation of relevant provisions in the EAC Treaty, actual reference to that body of law is very negligible. On the other hand, the ECCJ's approach has been to engage in wholesale adoption of aspects of international human rights law in its substantive body of law in ways that would actually or potentially bypass national constitutional barriers to direct application of international human rights law in ECOWAS member States. I therefore conclude that whereas international human rights law has an independent impact on the practice of the ECCJ, it continues to have a dependent, almost parasitic impact on the human rights practice of the EACJ. After this introduction, I briefly present the nature of the human rights competence of the RECs and their courts before delving into an analytical account of the interaction between Africa's subregional courts and international human rights law. The concluding section summarises the main points addressed in the chapter.

2. *The Legitimising Role of Human Rights in International Relations: An African Anxiety?*

Why is international human rights law important in the framework of trade-oriented RECs and their judicial organs? Distinct from the RECs and their institutions such as the subregional courts, regional protection of human rights is communally pursued by African States on the platform of the African Union (AU) in what is known as the African human rights system (AHRS). The AHRS is, in a manner of speaking, as a self-contained human rights system complete with its own central normative instrument – the African Charter on Human and Peoples' Rights[8] (along with a host of other instruments founded on the Charter) and its own set of supervisory mechanisms including the Commission, the Court and the Committee of Experts on the rights of children.[9] Since all member States of the various

8 African Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, in force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217.

9 For a comprehensive discussion of the African human rights system see F. Viljoen, *International Human Rights Law in Africa* (2nd edn, Oxford: Oxford University Press, 2012).

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RECs are also member States of the AU, the AHRS already binds them to a transnational protection system through which potential victims of human rights violations can seek redress. This ought to allow the RECs to focus on the economic integration objectives for which they exist. Thus, there has to be some reason(s) why the RECs and their courts would also pay more than a passing attention to human rights.

One line of explanation (or perhaps, justification) that has been advanced is that human rights realisation under the RECs – what we may call Africa's subregional human rights regimes – are instrumental sprouts necessary for maintaining pacific domestic polities to enable economic integration to occur without disruption from domestic crises.[10] But this cannot be the only possible explanation. Another strong candidate as an explanation would be the search for legitimacy. At least two versions of the concept of legitimacy present themselves for consideration in this discourse. First is the kind of legitimacy that tilts towards national or domestic audiences. As Fritz Scharpf suggests, '[s]ocially shared legitimacy beliefs serve to create a sense of normative obligation that helps ensure voluntary compliance with undesired rules or decisions of governing authority'.[11] Citizens must perceive their government as legitimate in order for the government to enjoy voluntary compliance with its laws and policies. While this kind of legitimacy applies to the RECs in an indirect manner, it does not sufficiently explain why human rights must take centre stage in regional integration schemes.[12] A second perspective to legitimacy is that offered by Jack Donnelly when he opined that '[h]uman rights have become a (small) part of the post-Cold War calculus of polit-

10 This is especially true of the ECOWAS in West Africa which grappled with multiple civil wars and internal disturbances in the 1990s. See S.T. Ebobrah, 'The Role of the ECOWAS Community Court of Justice in the Integration of West Africa: Small Strides in the Wrong Direction', in L. Hamalai *et al.* (eds), *40 Years of ECOWAS (1975–2015)* (Lagos: National Institute for Legislative Studies, 2014), Chapter 7; S.T. Ebobrah, 'The Role of the ECOWAS Community Court of Justice in the Integration of West Africa: Small Strides in the Wrong Direction?', *iCourts Working Paper Series*, No. 27 (2015), 1–30, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621453.

11 F.W. Scharpf, 'Legitimacy in the Multilevel European Polity', *MPIfG Working Paper*, 09/1 (2009), p. 5, available at: https://pure.mpg.de/rest/items/item_1232320_3/component/file_1232318/content.

12 Since Fritz Scharpf agrees that international organisations do not necessarily demand direct compliance from citizens but rather from their States, this aspect of legitimacy is only relevant for assuring that litigants engage the services of the subregional courts. This is a small point I hope to develop a little more in this chapter.

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ical legitimacy'.[13] In explaining how human rights have become a new part of the criteria for acceptance into the 'international society', Jack Donnelly cites Martin Wight to argue that 'collective recognition as part of international society […] appeals to "principles that prevail (or are at least proclaimed) within a majority of the states… as well as in the relations between them"'.[14] In plain language, if African States themselves and the international organisation(s) they create must receive recognition and acceptance in and by the rest of the international community, there has to be evidence that human rights are practised in the individual States or are proclaimed both in the legal framework of the States and in their relations *inter se*. If the proclamation under the auspices of the AU cannot be transferred to confer legitimacy on the RECs in their now separate – although connected – relationships, human rights had to feature in the treaties of the RECs to create eligibility for legitimacy. This is even more so as the collective commitment of European States to the European human rights system did not appear sufficient for the European Union (EU) to claim legitimacy. This is evident from the European Council's admission in its decision at its Cologne Summit that '[p]rotection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy'.[15] In order to be serious candidates for recognition as legitimate members of the international community, the RECs in Africa simply had to make proclamations of commitment to human rights.

3. Human Rights in the Mandates of the Subregional Courts

The significance of the deployment of international human rights law in the practice of Africa's subregional courts cannot be fully appreciated without a basic understanding of the historical emergence of human rights in regional integration discourse in Africa. Either consciously or unwittingly,

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13 J. Donnelly, 'Human Rights: A New Standard of Civilization?', *International Affairs*, 74 (1998), 20.

14 Donnelly, 'Human Rights', 1–2, citing M. Wight, *Systems of States* (Leicester: Leicester University Press, 1977), emphases omitted.

15 Annexes to the Presidency Conclusions, Cologne European Council, 3–4 June 1999, 150/99 REV 1, Annex IV, European Council Decision on the Drawing up of a Charter of Fundamental Rights of the European Union, p. 43, available at: www.consilium.europa.eu/media/21070/57886.pdf. See also A. von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union', *Common Market Law Review*, 37 (2000), 1307 (arguing, on this basis, in favour of a human rights charter for the EU).

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African RECs may have mimicked European integration in which human rights were also recorded to have been a late normative addition to the integration framework.[16] The human rights experience in each of the RECs was, however, almost abrupt rather than the steady evolution reputed to have been provoked by the experience of national actors in Europe. The appearance of human rights in the work and language of subregional courts in Africa is a relatively recent development. In the first epoch of regional integration in Africa,[17] human rights hardly, if ever, featured in the negotiations and in the drafting of regional integration treaties.[18] Accordingly, the first generation treaties of RECs in Africa made little or no mention or reference to human rights. Whether this was an oversight or a deliberate strategy aimed at avoiding the complications of managing the sometimes conflicting relationship between trade and human rights, is unclear. It leaves room for speculation since at the time the treaties were being negotiated in various regions of Africa, the hazy structure of human rights protection in Europe spearheaded by the European Court of Justice was well-advanced yet was not copied by the RECs, even though other institutional structures were borrowed possibly from the EU.[19] However, by the 1990s when a so-called second wave of regionalisation hit Africa,[20] a significant shift that occurred was the inclusion of human rights

16 On the entry of human rights in the treaty framework of European integration see von Bogdandy, 'European Union as a Human Rights Organization?', 1307–38.

17 Efforts towards regional economic integration in Africa's subregions began soon after colonialism had ended on the continent. In the case of East Africa, the newly independent States of Kenya, Tanzania and Uganda picked up on and continued colonial efforts to integrate the three economies with the adoption of the original Treaty of the East African Community (EAC) in 1967. This attempt at integration in East Africa collapsed with the dissolution of the original EAC in 1977. In West Africa, attempts at integration began in the 1960s but only culminated in the adoption of the original Treaty of the Economic Community of West African States (ECOWAS) in 1975.

18 See Viljoen, 'International Human Rights Law in Africa', p. 482.

19 Former military leader of Nigeria and one of the founding founders of the ECOWAS, Yakubu Gowon alludes to the fact that the European Communities (and, to a smaller extent, the EAC which, in turn, borrowed from the EU) were major influences that guided the drafting and adoption of the ECOWAS, for instance. See Y. Gowon, 'The Economic Community of West Africa States: A Study in Political and Economic Integration', PhD thesis submitted to the University of Warwick (1984), pp. 102–3, available at: http://wrap.warwick.ac.uk/4397/1/WRAP_THESIS_Gowon_1984.pdf.

20 This second epoch is characterised by the revision of the Revised ECOWAS Treaty by States in West Africa and the revival of the EAC with the adoption of a new Treaty of the EAC in 1999 by the original three States of Kenya, Tanzania and

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language in the treaties and constitutive documents of the revived RECs. The factors that triggered this sudden interest in including human rights in the integration treaties have not been fully explained, although some commentators attribute it *inter alia* to the momentum that the African regional human rights instrument – the African Charter on Human and Peoples' Rights – had gathered as a continental normative force.[21] Whatever the case may be, James Gathii, for instance, describes the development as 'a new form of rights-based legal mobilization that must be seen in the shifting normative context in which trade agreements include human rights in their preambles'.[22] In fact, the post-1990 treaties of the RECs in Africa did not only mention human rights in preambles, but went much further to include statements of commitment to human rights protection within operational parts of the treaties. However, in none of the treaties was the protection of human rights expressly included as a clear objective for integration in a manner that would warrant the classification of any of the RECs as a human rights organisation. Further, none of the RECs has adopted a treaty exclusively dedicated to the protection of human rights.[23] Consequently, despite the expression of institutionalised commitments to human rights values in this second epoch of integration, institutional protection of rights is not a primary function of the RECs or their judicial organs. Even more importantly for our present discourse, the references to human rights are relatively thin and non-committal in some sense, probably another impetus for the resort to international human rights law, as we shall soon find out.

3.1 Human Rights in the Treaty Framework of the East African Court of Justice

By its Article 5(1), the EAC Treaty declares the objectives of the Community to be 'to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and judicial

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Uganda. These States have since been joined by Burundi, Rwanda and South Sudan bringing the number of partner States of the EAC to six.

21 See, for instance, Viljoen, 'International Human Rights Law in Africa', p. 483.

22 Gathii, 'Mission Creep or a Search for Relevance', 251.

23 Isolated provisions or groups of provisions expressly protecting rights or with implications for rights protection may, however, be found in some treaties, protocols and documents of some RECs.

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affairs for their mutual benefit'.[24] Even though in two other paragraphs there are allusions to promoting sustainable use of the environment and ensuring protection of the environment as well as mainstreaming gender in all its endeavours, the EAC is hardly a human rights organisation. However, in fidelity to the trend of proclaiming, if not practicing, human rights to legitimise States and international organisations, the EAC Treaty makes clear allusions to human rights in a few Articles. For instance, Article 3 dealing with the consideration of applications from other States for admission as members of the EAC requires 'acceptance of the Community as set out in this Treaty' and more importantly 'adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice' as conditions for admission.[25] Article 6 titled 'Fundamental Principles of the Community' commits EAC partner States *inter alia* to 'the recognition, promotion and protection of human and peoples [sic] rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.[26] Another provision worthy of mention is Article 7 titled 'Operational Principles of the Community' under which EAC member States 'undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights'.[27]

While drawing attention to the specific use of the phrase 'universally accepted' to qualify the human rights to be observed, one cannot also ignore the specific mention of the African Charter as a regional human rights instrument whose provisions EAC member States commit to observe. At the very least, these may well constitute the thin legal foundation upon which international human rights law enters into the juridical field in the EAC. As there is no dedicated institution within the EAC Community framework to coordinate the limited human rights aspects of the Treaty, the EACJ has since assumed responsibility for monitoring implementation of these human rights aspects in addition to other parts of the Treaty. The challenge is in the allocation of competence within the EAC Treaty, the main mandate of the EACJ is to 'ensure the adherence to law in the interpretation and application of and compliance with this Treaty'.[28] This mandate is further elaborated in Article 27 of the EAC Treaty which deals

24 EAC Treaty, Article 5(1).
25 *Ibid.*, Articles 3(3)(a), 3(3)(b).
26 *Ibid.*, Article 6(d).
27 *Ibid.*, Article 7(2).
28 *Ibid.*, Article 23(1).

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with the jurisdiction of that Court. In its initial (current) jurisdiction, the EACJ is only authorised to exercise 'jurisdiction over the interpretation and application of this Treaty'.[29] The more interesting aspect is what may be termed the suspended jurisdiction which declares that the EACJ 'shall have such other original, appellate, human rights and other jurisdiction as will be determined by the [EAC] Council at a suitable subsequent date'.[30] It is in spite of this provision suspending a potential human rights jurisdiction at the legislative pleasure of the Council that the EACJ has boldly but creatively announced its presence in the field of regional human rights adjudication.[31] It is within the framework of its creative management of its jurisdiction to accommodate human rights that the invocation and deployment of international human rights law takes place.

3.2 *Human Rights in the Treaty Framework of the Court of Justice of the Economic Community of West African State*

Adopted before the EAC Treaty, the 1993 Revised ECOWAS Treaty was a clear departure from the 1975 original Treaty as far as human rights are concerned. It proclaims: 'The aims of the [ECOWAS] Community are to promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standard of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent.'[32] The idea of human rights is completely absent in the objectives. However, in its Article 4 relating to 'Fundamental Principles', States parties 'affirm and declare their adherence to [certain] principles [including] recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter of

29 *Ibid.*, Article 27(1). It comes with a proviso that the jurisdiction shall not cover matters reserved for organs of the member States.

30 *Ibid.*, Article 27(2). As of 14 January 2019, the protocol to confer the court with a human rights jurisdiction had still not materialised.

31 Accounts of the EACJ's bold decision in the pioneering case of *Katabazi et al.* v. *Secretary General of the East African Community and Attorney General of the Republic of Uganda*, 1 November 2007, AHRLR 119 (EAC 2007) abound in the literature. In this case, the EACJ famously declared that it will not abdicate its Treaty interpretation and application duty at the simple mention of human rights in the reference brought before it.

32 Revised ECOWAS Treaty, Article 3(1).

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Human and Peoples' Rights'.[33] In Article 56(2) of the Revised ECOWAS Treaty, ECOWAS member States that are signatories to the African Charter on Human and Peoples' Rights and to a couple of other instruments 'agree to co-operate for the purpose of realising the objectives of these instruments'.[34] In Article 66 relating to 'The Press', the member States undertake to protect the rights of journalists.[35] Outside of the Treaty document itself, in ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance, ECOWAS member States declare: 'The rights set out in the African Charter on Human and People's [sic] Rights and *other international instruments* shall be guaranteed in each of the ECOWAS Member States.'[36]

In the absence of a dedicated mechanism for human rights supervision, the ECCJ has also become the institution confronted by disgruntled citizens seeking to ventilate their grievances of human rights violations. After a series of events discussed in the literature,[37] the ECOWAS member States adopted the Supplementary Protocol on the ECOWAS Court of Justice[38] which introduced far-reaching changes to the mandate of the ECCJ. From a human rights perspective, the grant of access to individuals for allegations of human rights violations and the grant of competence to the Court to receive complaints of human rights violations that occur within the territories of member States are perhaps the most outstanding.[39] An important feature of the human rights competence conferred on the ECCJ

33 *Ibid.*, Article 4(g).
34 *Ibid.*, Article 56(2).
35 *Ibid.*, Article 66(2)(c).
36 ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Dakar, 21 December 2001, in force 20 February 2008, Article 1(h), emphasis added, available at www.internationaldemocracywatch.org/attachments/350_ECOWAS%20Protocol%20on%20Democracy%20and%20Good%20Governance.pdf. See also *ibid.*, Preamble.
37 S.T. Ebobrah, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice', *Journal of African Law*, 54 (2010), 1–25; K.J. Alter, L.R. Helfer and J.R. McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice', *American Journal of International Law*, 107 (2013), 737–79.
38 Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 Paragraph 1 of the English version of the Said Protocol, Accra, 19 January 2005, in force, available at: www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf.
39 See *ibid.*, Articles 3, 4 (amending Articles 9(4) and 10(d) of the Protocol on the Community Court of Justice).

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was that no specific rights catalogue was attached to the mandate in spite of the knowledge that ECOWAS itself had no dedicated human rights instrument. It is against this background that the interaction between the ECCJ and international human rights should be understood. The ECCJ found itself with an expansive human rights mandate without a catalogue to supervise. Thus, in East Africa and West Africa, the proclamations of commitment to recognise, respect and protect human rights relevant for a claim to legitimacy before the international community have been squeezed into the treaties without any clear plan of action to actualise the rights proclaimed. This is where the subregional courts have stepped in to bring rhetoric in the form of the proclamations closer to practice. Against the expectation that 'the only means of securing compliance with human rights treaty obligations would be the machinery, if any, embodied in or attached to those treaties themselves',[40] Africa's subregional courts have positioned themselves to supervise implementation of various components of international human rights law within their respective areas of jurisdiction, with varying approaches and consequences.

4. *The Varying Application of International Human Rights Law by Africa's Subregional Courts*

From the discussion so far, it would have become clear that the RECs have raised some expectation that human rights would be protected within their respective frameworks. It is also clear that in the absence of an organ or institution dedicated to the monitoring and supervision of member States' compliance with the commitments made to recognise, promote and protect human rights, the subregional courts stand as the most likely institutions available to mediate the inevitable tension that arose as the gap between promised proclamation and actual practice increased and national courts are too handicapped by a variety of constitutional and other domestic legal obstacles to be able to provide succour. In the absence of their own human rights catalogues, it is to international human rights that litigants and the courts have turned in the their bid to translate proclamations of commitment to human rights into practice.

40 B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', *Australian Yearbook of International Law*, 12 (1988–9), 84.

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It must quickly be pointed out that unlike what happened in Europe where the human rights component was exercisable within the parameters of EU competence – either in the work of the EU organs and institutions or against member States in the course of implementing EU law, in both the EAC and ECOWAS, there was no such limitation of the scope of area over which human rights jurisdiction is exercisable. In the remainder of this section, I present a sample of cases (by no means exhaustive) in which international human rights law has been presented in claims before both the EACJ and the ECCJ, their respective reactions to the presentations and the ultimate resolution of the case highlighting the manner each court reacted to and deployed international human rights.

4.1 International Human Rights in the Practice of the EACJ

The first point to recall as we open the analysis in this section is that the EACJ still does not have a clear mandate to exercise competence over human rights claims. The effect of Article 27(2) of the EAC Treaty continues to stand as an obstacle against a full-blown exercise of jurisdiction. As a shortcut, the Court has adopted the wisdom of one of its former judges to claim that there is an 'inchoate' human rights jurisdiction in the EAC Treaty framework.[41] With this in mind, coupled with the EACJ's own jurisprudence beginning with the *Katabazi* case where the Court announced that 'it will not abdicate from exercising its jurisdiction of interpretation […] merely because the reference includes allegation of human rights violation',[42] the EACJ is a cautious but activist adjudicator willing to push the boundaries of its jurisdiction to accommodate what it probably considers to be deserving cases of human rights violations. Although it often passes as a hesitant adjudicator when it comes to claims of human rights violations, encouraging litigants to frame their claims on other less controversial Treaty-based causes of action such as alleged violations of the principles of the rule of law, the EACJ does apply regional international law in the form of the African Charter on Human and Peoples' Rights and even snippets of global international human rights law in its practice.

41 J. Ogoola, 'Where Treaty Law Meets Constitutional Law: National Constitutions in the Light of the EAC Treaty', in J. Döveling, K. Gastorn and U. Wanitzek (eds), *Constitutional Reform Processes and Integration in East Africa* (Dar es Salaam: Dar es Salaam University Press, 2013), pp. 49–64.

42 *Katabazi et al.* v. *Secretary General of the East African Community and Attorney General of the Republic of Uganda*, p. 16.

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This happens in a constitutional format to evaluate national legislation and executive acts and inactions but rarely, if ever, does the EACJ review judicial action.

Faced with a claim in the case of *Plaxeda Rugumba* v. *The Secretary General of the East African Community and Attorney General of the Republic of Rwanda*,[43] in which the applicant challenged the legality of the arrest and continued detention of her brother, a Rwandan military officer detained by Rwandan authorities, the EACJ (First Instance Division) quickly affirmed that there was no debate as to whether the Court had jurisdiction over a human rights claim. The Court agreed that it had no human rights jurisdiction. However, it convinced itself that it was merely interpreting the EAC Treaty to ascertain if the actions of Rwanda were in violation of the EAC Treaty. In order to make this evaluation of State action against Treaty requirement, the EACJ found itself drawing on regional human rights normative framework in the form of the African Charter.[44] The EACJ then took pains to rationalise that '[t]he invocation of the provisions of the African Charter on Human and Peoples [sic] Rights was not merely decorative of the Treaty but was meant to bind Partner States'.[45] Effectively, while it sought to show a violation of Articles 6(d) and 7(2) of the EAC Treaty, particularly their references to the concepts of good governance and the rule of law, it could not avoid the ambit of human rights as provided for in the African Charter. It has to be noted that the impugned action of the Rwandan State had nothing to do with the economic integration process. It was strictly a matter arising from the domestic relations of the parties – how Rwanda, a State party to the EAC, treats its citizen within its national territory. The EACJ assumed the position of a general protector of human rights. Thus, in this instance, the EACJ received and deployed the African Charter's international (regional) human rights law to review the actions of a partner State as a domestic constitutional court would do. The Court then came to a conclusion and declared that Rwanda was in violation of the EAC Treaty by its failure to protect rights guaranteed in the African Charter.

The hesitant approach of the First Instance Division of the EACJ contrasts sharply with the position of the Appellate Division in cases in which international human rights law is raised. Initially, the Appellate Division

43 *Plaxeda Rugumba* v. *Secretary General of the East African Community and Attorney General of the Republic of Rwanda*, EACJ, Ref. No. 8 of 2010, Judgment, 30 November 2011.

44 See *ibid.*, para. 37.

45 *Ibid.*

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was also quite defensive in its adjudication of human rights claims and by extension, its application of international human rights law. This comes out for example, in the appeal brought by the Attorney General of Rwanda in the same *Plaxeda Rugumba* case.[46] First admitting that '[i]t is trite that the jurisdiction of the Court to entertain human rights disputes still awaits the operationalisation of a Protocol under Article 27(2)', the Appellate Division concluded that '[i]t must follow […] that the Court may not, as of now, adjudicate disputes concerning violations of human rights *per se*'.[47] Yet, almost in the same breath, the Appellate Division stressed that '[t]hough the EAC Treaty is bereft of a chapter on Human Rights, nonetheless, it contains the hint of such rights in a number of its provisions'.[48] Citing former Judge James Ogoola, it referred to those as 'a layer of inchoate human rights in the Treaty'.[49] The difficulty in the Court's position is that it is doubtful if the so-called layer of inchoate human rights could sustain a legal claim for human rights on their own in pretty much the way issues arise with respect to the non-self-executing treaties principle in the United States legal system. To avoid expressly confronting the political authorities of the EAC in relation to its exercise of human rights jurisdiction, the Appellate Division of the EACJ has to explain that the EACJ looks for 'a cause of action flowing from the Treaty (that is different and distinct from violations of human rights) on which to peg the Court's jurisdiction… [and which provides] the legal linkage and basis for the Court's jurisdiction… separate and distinct from human right's [sic] violations'.[50] Taking advantage of the collective proclamation to protect rights in the Treaty but hindered by Article 27(2) of the EAC Treaty which denies it jurisdiction over human rights, the EACJ captures infringement of the EAC Treaty as the cause of action but subtly employs international human rights law to support the human rights nature of the infringement with little or no elaboration of the scope of the right(s) violated.

In the case of *Mohochi* v. *Attorney General of Uganda*,[51] the EACJ's struggle with the adjudication of international human rights comes out even

46 *Attorney General of the Republic of Rwanda* v. *Plaxeda Rugumba*, EACJ, Appeal No. 1 of 2012, Judgment, 21 June 2012.
47 *Ibid.*, para. 23.
48 *Ibid.*, para. 24.
49 *Ibid.*, para. 24, emphases omitted.
50 *Ibid.*, para. 24.
51 *Mohochi* v. *Attorney General of the Republic of Uganda*, EACJ, Ref. No. 5 of 2011, Judgment, 17 May 2013.

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clearer. In this matter, a Kenyan lawyer who was part of a delegation of lawyers to the Chief Justice of Uganda was arrested, denied entry and deported to Kenya. The claim before the EACJ was that the actions of the Ugandan immigration authorities and the national law on which those actions were based were in conflict with and violated Uganda's obligations within the EAC Treaty framework, particularly Articles 6(d) and 7(2). In its defence, lawyers for Uganda proposed that Article 6(d) of the EAC Treaty 'consists of aspirations and broad policy provisions […] which are futuristic and progressive'.[52] It was in several ways a variation of the non-self-executory argument. The EACJ's response was to declare that 'the Treaty is neither a Human Rights Convention or [sic] a Human Rights Treaty as understood in international law'.[53] The Court went further to even declare that it was not aware of any areas in the EAC Treaty that could be referred to as human rights provisions.[54] Arguably, the Court in this case was resisting the terminology of human rights completely in order to rescue its claim to jurisdiction to interpret the Treaty. In fact, the EACJ stated categorically that 'it is not violations of human rights […] of the international community that is the cause of action'.[55] International human rights law had to be sacrificed for the Court to rescue its claim to jurisdiction.

The EACJ's internal dialectic on the status of international law in its practice probably came to the fore in the case of the *Democratic Party* v. *Secretary General of the East African Community et al.*.[56] The action was brought by a political party to force EAC partner States to perform certain obligations under the African Charter. It, therefore, was not exactly a claim for substantive rights of a litigant. In its judgement on the matter, the First Instance Division went on the defensive when it explained that the African Charter was applied in the 'specific [violation] of Article 6(d) of the Treaty and not the Charter per se'.[57] The First Instance Division of the EACJ would not be caught applying international human rights law, not even regional human rights law if that would amount to forcing jurisdiction on itself contrary to Article 27(2) of the EAC Treaty, notwithstanding the proclamation of commitment to universally acceptable human rights.

52 *Ibid.*, para. 19(ii).
53 *Ibid.*, para. 28.
54 *Ibid.*, para. 29.
55 *Ibid.*, para. 32.
56 *Democratic Party* v. *Secretary General of the East African Community et al.*, EACJ, Ref. No. 2 of 2012, Judgment, 29 November 2013.
57 *Ibid.*, para. 34.

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In fact, the First Instance Division went even further to assert that 'this Court [cannot] properly delve into obligations created on the Respondents by other international instruments'.[58] This division of the EACJ was unwilling to stake out its head in pursuit of competence over international human rights law. It was loyal to its boundaries as spelt out in the EAC Treaty.

Before the Appellate Division, it became a different ball game altogether. The Appellate Division stated emphatically that the allusion to the African Charter in Article 6(d) of the EAC Treaty 'creates an obligation on the EAC Partner States to act in good faith and in accordance with the provisions of the Charter [and that] [f]ailure to do so constitutes an infringement of the Treaty'.[59] It was almost as if without mentioning it, the Court invoked the good faith principle expressed in the Vienna Convention on the Law of Treaties. On the basis of its finding of an international human rights law obligation under the African Charter in the context of the EAC Treaty, the Appellate Division then proceeded to claim jurisdiction over international human rights law. It said: 'Articles 6(d) and 7(2) of the Treaty empower the East African Court of Justice to apply the provisions of the Charter […] as well as any other relevant international instrument to ensure the Partner States' observance of the […] Treaty, as well as those of other international instruments to which the Treaty makes reference'.[60] In other words, gradually, the EACJ put forward itself as capable of holding EAC partner States to account for their commitment to international human rights law even within their various domestic systems and even if their EAC proclamation might have been a façade to attract international legitimacy. Further, the Court asserts that mere mention of an international human rights instrument in the EAC Treaty framework was sufficient to confer jurisdiction. It would be noted, however, that apart from the African Charter, no other instrument receives such express reference, begging the question whether 'universally acceptable' human rights standards is a blanket reference to all international human rights instruments.

Perhaps, realising that it might have pushed the boundaries too far in favour of a competence to apply international human rights law, the Appellate Division of the EACJ seemed to pull the brake when it said in

58 *Ibid.*, para. 55.
59 *Democratic Party* v. *Secretary General of the East African Community et al.*, EACJ, Appeal No. 1 of 2014, Judgment, 28 July 2015, para. 64.
60 *Ibid.*, para. 69, emphasis omitted.

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the same case that 'nothing can preclude the [EACJ] from referring to the relevant provisions of the Charter, its Protocol […] in order to interpret the Treaty'.[61] After departing in no small measure from the First Instance Division on the status of international human rights law in the practice of the EACJ, the Appellate Division then took a shortcut to realign with the First Instance Division when it said the EACJ can interpret the African Charter in the context of the EAC Treaty.[62]

So far, the story tells us that international human rights law is not excluded from the practice of the EACJ. However, that body of law is only invokable on the condition that it enjoys reference in the EAC Treaty, it is applied in the context of Treaty interpretation and invoked as an independent source of substantive rights. Two small points to be made are that Articles 6(d) and 7(2) of the EAC Treaty appear to serve the dual legitimacy attraction purpose. Towards the international community, the EAC partner States proclaim that they also respect or at least intend to respect and protect universally acceptable human rights. Towards their respective national audiences, the same provisions also seem to make the same statement. Yet, it is the EACJ, not the States that appear eager to bring proclamation to practice. While the EACJ seeks to drag and compel the transformation of proclamation into practice amidst the jurisdictional restraints imposed by the EAC Treaty, neither the Court nor its users have ventured much beyond the African Charter in the deployment of international human rights law in the EAC framework. Accordingly, despite the slight similarity of the language used to import international human rights law in both the EAC Treaty and the ECOWAS Treaty, the impact of international human rights law in the EAC is all but non-existent.

4.2 International Human Rights in the Practice of the ECCJ

International human rights law is the favourite adopted child of the ECCJ. A proper point to start the analysis of international law in the practice of the ECCJ is the story of the Court's refusal to assume and exercise jurisdiction in the case of *Afolabi Olajide* v. *Nigeria*.[63] Faced with a claim by an individual against his own State alleging a violation of provisions of

61 *Ibid.*, para. 71.
62 *Ibid.*, para. 73.
63 See generally Alter, Helfer and McAllister, 'A New International Human Rights Court for West Africa'.

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the Revised ECOWAS Treaty and the African Charter, the ECCJ declined jurisdiction on the grounds that the ECOWAS Protocol establishing the ECCJ did not grant access to the Court to individuals. As the story goes, a number of events took place and, with the Court itself leading the charge while collaborating with civil society, ECOWAS heads of State and government were forced to adopt a Supplementary Protocol in 2005. Significant for present purposes is the fact that the 2005 Supplementary Protocol of the ECCJ opened access to individuals and conferred a somewhat imprecise but definite competence on the Court to receive and determine cases alleging the violation of human rights in the territories of ECOWAS member States.[64]

Notwithstanding the fact that ECOWAS, like the EAC, is not a human rights organisation and does not have its own human rights instrument, the 2005 Supplementary Protocol was silent on the source of human rights law to be applied by the ECCJ. Undeterred by any such institutional lacuna, litigants approached the ECCJ to claim remedies for alleged violations of human rights, invoking a mix of international human rights law sources.[65] Litigants generally did not motivate for or justify the rationale for invoking any international human rights law instrument beyond relying on the competence conferred on the ECCJ to entertain claims of human rights violations. For instance, in *Essien* v. *the Gambia*, the plaintiff sought '[a] declaration that the action and conduct of the Republic of the Gambia […] violated […] the African Charter on Human and Peoples' Rights and […] the Universal Declaration of Human Rights'.[66] The member States of ECOWAS did not object or oppose the invocation of these instruments beyond complaining that local remedies had not been exhausted prior to commencement of action as required by the African Charter.

In the absence of contestation by the member States, it was the ECCJ itself which used the opportunities of addressing the question of its competence to engage its basis for receiving claims based on international human

64 See Supplementary Protocol A/SP.1/01/05, Articles 3, 4 (amending Articles 9(4) and 10(d) of the Protocol on the Community Court of Justice).

65 For instance, in the case of *Essien* v. *Republic of the Gambia and University of the Gambia*, ECCJ, Ruling, 14 March 2007, ECW/CCJ/APP/05/05 (2007), the applicant invoked the African Charter and the Universal Declaration of Human Rights.

66 *Ibid.*, para. 1(b). See also *ibid.*, para. 10.

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rights law.[67] In the *Essien* case, after making reference to the fact that the African Charter is mentioned in Article 4(g) of the Revised ECOWAS Treaty, the ECCJ without much ado or further reflection resolved that the critical question was whether 'the rights being claimed by the plaintiff [are] fundamental human rights guaranteed by the African Charter on Human and Peoples' Rights and the […] Universal Declaration [of Human Rights]'.[68] In these few words, the ECCJ claimed competence over international human rights instruments, even though it did not indicate from where the competence to apply the Universal Declaration of Human Rights (UDHR) as a body of positive normative obligation on ECOWAS States arose. In *Ugokwe*, it was in response to a challenge of non-exhaustion of local remedies that the ECCJ again went to town to elaborate the basis of its application of international human rights law. The Court stated that '[i]n articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloguing of various human rights but by the provision of article 4 paragraph (g) of the Treaty of the Community, the Member States […] are enjoined to adhere to the principles including "the recognition, promotion and protection of human and peoples [sic] rights in accordance with the […] African Charter […]"'.[69] Like the EACJ, this Court has resorted to the statements of fundamental principles in the Treaty to found a link to international human rights law. The ECCJ then went further to assert that '[e]ven though there is no cataloguing of the rights that the individuals and citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court […] to bring in the application of those rights catalogued in the African Charter'.[70] In this one paragraph, the ECCJ moved from advancing a right of litigants to base claims on international human rights to asserting its own competence to apply that body of law, loosely relying on its authority to apply the sources of law set forth in Article 38 of the Statute of the International Court of

67 In a later set of cases brought by the NGO SERAP against Nigeria, the respondent State began to challenge the competence of the ECCJ over international instruments and argued that the Court could only adjudicate cases regarding the ECOWAS treaties. See *SERAP* v. *Federal Republic of Nigeria*, ECCJ, Judgment, ECW/CCJ/JUD/18/12, 14 December 2012, para. 24.

68 See *Essien* v. *Republic of the Gambia and University of the Gambia*, para. 10.

69 *Ugokwe* v. *Federal Republic of Nigeria*, ECCJ, Judgment, ECW/CCJ/APP/02/05, 7 October 2005, para. 29.

70 *Ibid.*

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Justice.[71] However, in the later *SERAP (Environment)* case, the Court gave the hint of a rationale when it said it could apply international human rights instruments because ECOWAS States have 'renewed their allegiance to the said texts, within the framework of ECOWAS'.[72]. By 2007 when it heard the famous *Hadijatou Mani Koraou* case,[73] it had already been settled in ECOWAS law that by Article 4(g) of the Revised ECOWAS Treaty, the African Charter was the preferred source for human rights claims before the ECCJ but any other international human rights instrument was also welcome. The Court merely added that the reference to Article 4(g) permitted the application of the substantive parts of the African Charter but did not require insistence on the procedural aspects such as exhaustion of local remedies. By the time it decided the *SERAP (Environment)* case, the Court was bold to assert that 'the Court's human rights protection mandate is exercised with regard to all the international instruments'.[74] As far as the ECCJ was concerned, it was a new mechanism to protect human rights in all instruments to which ECOWAS States were signatories.[75]

In summary, encouraged by the ECCJ's uncritical reception of claims based on international human rights law, litigants before the Court increasingly invoked all available international human rights instruments. Thus, by a combination of emboldened litigant use of these instruments, favourable pronouncements by the Court and member States' subtle acquiescence, international law has become established as part of primary Community law that the ECCJ is authorised to apply. Consequently, in addition to the African Charter which occupies the pride of place,[76] instruments such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; the Convention against all Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR); and

71 ECOWAS Protocol A/P.I/7/91 on the Community Court of Justice, Article 19(1).

72 *SERAP* v. *Federal Republic of Nigeria*, Judgment, para. 29, emphases omitted.

73 *Hadijatou Mani Koraou* c. *La République du Niger*, La Cour de Justice de la Communauté économique des États de l'Afrique de l'Ouest, l'Arrêt, ECW/CCJ/JUD/06/08, 27 octobre 2008.

74 *SERAP* v. *Federal Republic of Nigeria*, Judgment, para. 28.

75 *Ibid.*, para. 29.

76 In *Jallow and Scattred* v. *Republic of the Gambia*, ECCJ, Judgment, ECW/CCJ/JUD/06/17, 10 October 2017, p. 10, the ECCJ declared that the African Charter is the main source of human rights in the Community framework.

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the UDHR have all founded human rights claims before the ECCJ. Like the EACJ regime, the claims before this Court have nothing to do with the economic integration process. Rather, allegations of violations arising from all aspects of civil life are acceptable candidates for adjudication. While in relation to treaties, the ECCJ's practice suggests that the condition for application is that the respondent State ought to have ratified the treaty in question,[77] the Court sets no conditions of any sort for its application of the UDHR. This raises the question whether the ECCJ applies the UDHR as customary international human rights law, a matter on which the Revised ECOWAS Treaty is silent. This is even more problematic as the status of the UDHR as codification of customary international human rights law is still being debated. Although, as far back as 1965, the late Judge Humphrey Waldock had already taken the view that the UDHR was a part of customary international law,[78] not everyone was convinced that all of the UDHR provisions constituted customary international law even at the turn of the century.[79] In the face of such uncertainty, the absolute deployment of the UDHR by the ECCJ to found obligations on ECOWAS member States might require deeper rationalisation and justification. Overall, it is indisputable that the ECCJ has embraced international human rights law to a degree that exceeds other comparable international courts of general jurisdiction and has in fact positioned itself as an alternative enforcement mechanism to the internal mechanisms established in the various human rights treaties.

Having established the comprehensive acceptance of international human rights law in the ECOWAS judicial framework, the remainder of this section examines some of the ways in which the ECCJ has deployed this body of law in its work. I shall only focus on the Court's use of international human rights law to expand *ratione personae*, to override domestic constitutional and legal obstacles to human rights adjudication and to strengthen or justify its decisions.

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77 See, for instance, the *SERAP (Environment)* case in which the Court indicated that the reason why the international instruments were applied was because ECOWAS member States were signatories to those instruments. *SERAP* v. *Federal Republic of Nigeria*, Judgment, para. 29.

78 H. Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention', *International and Contemporary Law Quarterly Supplementary Publication*, 11 (1965), 15.

79 See, for instance, R.B. Lillich, 'The Growing Importance of Customary International Human Rights Law', *Georgia Journal of International and Comparative Law*, 25 (1996), 1 *et seq*.

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4.2.1 Expanding ratione personae

Article 10 of the Protocol on the Community Court of Justice, as amended by the 2005 Supplementary Protocol, which grants access to the ECCJ to individuals is couched in language that suggests a victim requirement for bringing human rights cases.[80] In its jurisprudence, the Court has consistently maintained that only direct victims of a violation who can show concrete harm are eligible to bring cases before the Court.[81] A consequence of this provision is that indigent and other similarly disempowered victims of alleged human rights violations would be unable to approach the Court for relief. In order to escape this restriction of access, the ECCJ has had to rely on international law to invoke the concept of *actio popularis* to allow NGOs to represent victims of alleged human rights violations. In *SERAP* v. *Nigeria*, the ECCJ justified its decision to grant an NGO access to bring an action on behalf of the people of the Niger Delta in Nigeria. The Court said '[t]here is a large consensus in International Law that when the issue at stake is the violation of rights of entire communities, […] the access to justice should be facilitated'.[82] Relying on Article 2(5) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, the Court stated that even though it was not an instrument binding on African States, 'its importance, as a persuasive evidence of an international communis opinion [sic] juris in allowing NGOs to access the Courts for protection of Human Rights related to the environment, cannot be ignored or underestimated by this court'.[83] The Court then went on to find support in the American Convention on Human Rights, the Rules of Court of the African Court on Human and Peoples' Rights and the jurisprudence of the African Commission on Human and Peoples' Rights.[84] On the basis of 'those authorities, and […] [on] the need to reinforced [sic] the access to

80 Supplementary Protocol A/SP.1/01/05, Article 4 (amending Article 10(d) of the Protocol on the Community Court of Justice which grants access to '[i]ndividuals on application for relief for violation of their human rights').

81 See, for instance, *Hassan* v. *Governor of Gombe State et al.*, ECCJ, Ruling, ECW/CCJ/RUL/07/12, 15 March 2012, paras. 46–7 where the Court emphasised the victim requirement. See also *Osaghae et al.* v. *Republic of Nigeria*,ECCJ, Judgment, ECW/CCJ/JUD/03/17, 10 October 2017, pp. 16, 17, 19, 26, 29.

82 *SERAP* v. *Federal Republic of Nigeria and ORS*, ECCJ, Ruling, ECW/CCJ/APP/07/10, 10 December 2010, para. 56.

83 *Ibid.*, paras. 57–8.

84 *Ibid.*, paras. 59–61 (calling the Rules of Court as 'the Rules of Procedure of African Court of Justice and Human Rights').

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justice for the protection of human and people [sic] rights in the African context', the Court held that the NGO SERAP could bring the action.[85]

It has to be noted, however, that the ECCJ also relied on international human rights law to deny the right to bring actions in a representative capacity.[86] Nevertheless, it was also to international human rights law that the Court turned to when it hinted that in cases of 'serious or massive violations pursuant to article 58 of the African Charter', it would be willing to allow an action to be brought on grounds of *actio popularis*.[87]

4.2.2 Overriding Domestic Obstacles to Human Rights Adjudication

In a number of cases brought before the ECCJ, especially against Nigeria, preliminary objections based on domestic constitutional or other legal restrictions have been raised. The *SERAP (Environment)* case presents the best example. Challenging the jurisdiction of the ECCJ in that case, Nigeria raised two main arguments. First, it argued that its Constitution only recognises the authority of its domestic courts to examine allegations of violations of rights guaranteed in the ICCPR.[88] Secondly, it argued that the rights contained in the ICESCR are not justiciable rights.[89] In other

85 *Ibid.*, para. 61.

86 See, for instance, *Osaghae et al.* v. *Republic of Nigeria*, pp. 17–18, where the Court relied on decisions of the UN Human Rights Committee to define the victim requirement and limit the scope of *actio popularis*.

87 See *ibid.*, p. 17.

88 This is probably a shorthand version of the constitutional position. By Section 12 of the 1999 Constitution of Nigeria, international treaties do not have domestic legal consequence unless a national law is enacted to domesticate the treaty. In the case of the ICCPR, Chapter IV of the Constitution captures a number of rights guaranteed by that instrument and confers jurisdiction on domestic courts to hear cases alleging a violation of fundamental rights. See Constitution of the Federal Republic of Nigeria, (Promulgation) Decree No. 24 of 1999, Official Gazette, Extraordinary, 5 May 1999, Vol. 86, No. 27, pp. A855–1104, with Amendments through 2011, available at: www.constituteproject.org/constitution/Nigeria_2011.pdf?lang=en.

89 See *SERAP* v. *Federal Republic of Nigeria*, Judgment, para. 24. This is also a twofold objection. First, there is the objection based on the popular position in the Nigerian legal system that economic, social and cultural rights are not justiciable in Nigerian courts because these rights are contained in Chapter II of the Constitution relating to Directive Principles of State Policy. Secondly, it was argued that the ICESCR itself does not provide that the rights contained therein are justiciable.

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words, the basis for challenging the jurisdiction of the ECCJ was incompatibility with Nigerian constitutional law. The ECCJ's response was, first of all, to point out that the basis of its jurisdiction was ECOWAS law rather than the constitutional law of its member States.[90] The Court then went on to assert as follows: '[O]nce the concerned right […] is enshrined in an international instrument that is binding on a Member State, the domestic legislation of that State cannot prevail on the international treaty or covenant, even if it is its own Constitution.'[91] This was clearly a restatement of the accepted position of international law, including the VCLT, that a State cannot rely on its national law to avoid its international obligations. The ECCJ then went further to specifically cite Article 5(2) of the ICESCR to conclude that 'invoking lack of justiciability of the concerned right, to justify non accountability [sic] before this Court, is completely baseless'.[92] On this basis of reliance on international human rights law, the Court's conclusion was that 'it has jurisdiction to examine matters in which applicants invoke [the] ICCPR and [the] ICESCR'.[93] As far as international human rights law permitted, the ECCJ would not be denied jurisdiction by the restrictions of any national law.

4.2.3 International Human Rights Law as Justification for ECCJ Decisions

As a relatively young court, the ECCJ has not generated a vast body of its own jurisprudence. It is also still growing its authority in the field of human rights. Accordingly, the Court has had to rely on the jurisprudence of more established international human rights bodies to justify or support some of its decisions. The cases of *Udoh* v. *Nigeria*[94] and *Obi* v. *Nigeria*[95] provide examples in this regard. In *Udoh*, the Court had to deal with the question whether the arrest and detention of the applicant was lawful. Coming to its own conclusion that 'there is no factual evidence of reasonable grounds or legal provision upon which the arrest and detention are based',[96] the Court resorted to international human rights law to clarify the concept of reasonable detention. It invoked the views of the

90 *SERAP* v. *Federal Republic of Nigeria*, Judgment, para. 26.
91 *Ibid.*, para. 36.
92 *Ibid.*, para. 38.
93 *Ibid.*, para. 40.
94 *Udoh* v. *Federal Republic of Nigeria*, ECCJ, Judgment, ECW/CCJ/JUD/26/16.
95 *Obi* v. *Federal Republic of Nigeria*, ECCJ, Judgment, ECW/CCJ/JUD/27/16.
96 *Udoh* v. *Federal Republic of Nigeria*, p. 18.

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UN Human Rights Committee in the case of *Mukong* v. *Cameroon*[97] and the judgment of the Inter-American Court of Human Rights in the case of *Castillo-Páez* v. *Peru*.[98] In *Obi*, the ECCJ's application of international human rights law was to justify its decision to reject the view that the prohibition of the death penalty would be absolute. The Court held: 'As for the thesis according to which the death sentence is contrary to the right to life as envisaged by international conventions, it is simply refuted by case law of comparable international courts, particularly the European Court of Human Rights […] and the Inter-American Court of Human Rights.'[99] International human rights law is not only a source of rights before the ECCJ, but also the body of law the Court applies to justify its decisions.

5. Conclusion

The change in the trajectory of Africa's subregional courts occasioned by their entry into the field of regional human rights protection is undeniable. While this has occurred in part by reason of the willingness of the member States to the RECs to introduce the concept of human rights in the respective, treaties, the Courts themselves have to take the credit for their emergence as formidable *loci* for human rights protection. While the member States were responsible for proclaiming their commitment to recognition and respect for human rights, possibly as a ticket to claim individual and collective legitimacy before the international community, it is the courts that led the charge to transform the proclamation into practice, leading to the 'recognition and empowerment of citizens as legal subjects of human rights'.[100] The story in this chapter is how international human rights law has aided Africa's subregional courts in advancing the course of human rights. I believe to have shown how the two most active subregional courts in Africa – the EACJ and the ECCJ – have both taken advantage of the inclusion of commitments to human rights in the statements of

97 *Mukong* v. *Cameroon*, Communication No. 458/1991, 21 July 1994, UN Doc. CCPR/C/51/D/458/1991 (1994).

98 *Castillo-Páez* v. *Peru*, Judgment, 3 November 1997, Ser. C, No. 34.

99 See *Obi* v. *Federal Republic of Nigeria*, p. 21.

100 Similar to Philip Alston's observation in relation to human rights in the EU. See P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', *European Journal of International Law*, 13 (2002), 822.

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fundamental principles to assert competence to apply international human rights law, to give flesh to the dry bones in the treaties. However, as was explained, the actual reception and deployment of international human rights law by the two courts has been uneven. Whereas the EACJ has been restricted by the suspension of its human rights jurisdiction, the ECCJ has enjoyed unlimited freedom in the use of international human rights law, effectively displacing its original jurisdiction and entrenching international human rights law as part of ECOWAS law. The consequences for citizens, the courts and the RECs themselves continue to emerge and will probably affect further developments.

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My iCourts experience

The foundation for my incredible iCourts experience was laid in 2013 while I was on leave from the Niger Delta University, working as a consultant staff with the African Commission on Human and Peoples' Rights in Banjul, The Gambia. At the invitation of the Mandela Institute of the University of Witwatersrand Law School in South Africa, I attended a workshop on Sub-regional Courts in Africa at Wits in Johannesburg where I could not help but notice the very incisive contributions of someone who (I later found out) was the Director of the Centre of Excellence for International Courts (iCourts) at the University of Copenhagen. Naturally, I engaged him on the fringes of the workshop and realised that he had so much of the 'science' that I suddenly realised was missing from my own work on subregional organisations in Africa. That interaction with Professor Mikael Rask Madsen had a lasting impact on me. As such, months later when I saw an advert shared on the mail server of a professional group I belonged to, announcing openings for Post Doctoral positions at iCourts, I needed no persuasion even though I was then already a Senior Lecturer at my home University. I was convinced that the Post Doctoral position at iCourts was what I needed to learn and acquire the 'science' that I felt was missing in my academic work.

After what I considered to be a very thorough selection process, I was pleasantly surprised to receive the life-changing email that informed me of my selection as one four Post Doctoral fellows. It was with excitement that I approached the authorities at my home University for leave to take up the position, pursued the procurement of a work permit with the invaluable support of the International Office at the University of Copenhagen and resumed as a Post Doctoral Fellow in August 2014. On arrival, I was so well received. I immediately took note of the fact that everything at iCourts was so organised, almost to perfection! The staff, both academic and support, at iCourts and the Faculty of Law generally seemed to have gone out of their way to help me and my family settle down to life in Copenhagen. With the kind of support I received, my first formal meeting with Mikael (as I later became used to addressing him) went very well. That meeting was very useful in focusing the direction of my stay. As the conversation proceeded, it became clearer that I had made the right decision to come to iCourts. Working with me to develop a work plan for the three years that my fellowship was supposed to last, Mikael helped

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me realised that I had to detach myself from the emotional attachment that I seemed to have for the institutions I was supposed to be studying. In that same conversation, it also became clear to me that scholarship had to be separated from advocacy approach to writing that I was used to in my earlier academic life. It was thus, with a very high sense of expectation and a determination to unlearn what I knew and learn new things that I returned to my shared office. Coming from an African University where academic work takes place under very challenging conditions, my work station at iCourts was itself a motivation for me to work. I simply felt that everything I needed to engage in pure academic work was in place and I inspired.

The learning process for me, did not take long to commence. Before the end of my first week I received notice of both of a forthcoming 'science lab' (where internal peer review of work in progress took place) and my first iCourts retreat. The experience in the room during 'science lab' and at every other academic event at iCourts was spectacular. There was always something to learn from everyone, including the carefully selected PhD students at various stages of their work. It was at iCourts that I had my first proper experience of applying for an academic grant. Working with my friends, the other Post Doctoral Fellows, I managed to put together an application that I went through over and over again even after the results had come in, and I had known that my application was not successful. The experience brought clarity to me that socio-legal research was doable. iCourts also taught me that there was more to legal scholarship than the doctrinal approach.

While I was happily digesting my new academic experience as a Post Doc at a place like iCourts, Mikael invited me and told me point blank that I needed to attend more conferences to publicise my work and get feedback from the relevant academic communities. Thus, the building of networks beyond my usual network began for me. The value of doing visible work good enough to be cited by other scholars was constantly a refrain in the hallways. As I got used to a new style of working, I got the reminder that I needed to also host workshops and conferences. I wondered how that was even going to be possible in Europe where I had no networks. But it was with the same ease that I learnt every other thing that I learnt how to host the conferences by working with the very well organised teams at iCourts. In all, iCourts made academic work a joy in all ramifications.

I had come to iCourts as a Senior Lecturer at the Faculty of Law, Niger Delta University in Nigeria. Some months into my fellowship at iCourts, I received notification that I had been promoted to the rank of Professor of

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Law at my home University. I beamed with excitement as I went to share the news with Mikael. I remember that his comment was that iCourts had forced the hands of my home University as they suddenly realised the University could lose me to Europe. Then he asked me if I felt I had learnt the science enough. I knew I had not, and I told him so. I therefore, remained at iCourts for another year within which I learnt the science a bit more and felt more and more like a part of a family. That aura of being a family yet maintaining the disciple of a top academic institution is perhaps what I missed most about iCourts when I returned to home University where I assumed office as Dean of Law. After serving for two terms of two years each, as Dean of Law, I am currently the Director of the Institute for Niger Delta Studies at the Niger Delta University where I hope to bring my experience at iCourts to bear.

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