Chapter Nine

International Environmental Governance: A Case for Sub-Regional Judiciaries in Africa

Eghosa Osa Ekhator

1. Introduction

There has been a rise in the use of international, regional and sub-regional judiciaries in the promoting and upholding of human rights. Recently, many of these international courts, especially regional and sub-regional judiciaries or courts, have been at the forefront of promoting environmental governance around the world especially in Africa. Examples include the African Commission on Human and Peoples' Rights, African Court of Human and People's Rights and the different sub-regional judiciaries such as the ECOWAS Court of Justice (ECCJ) and East African Court of Justice (EACJ). The ECCJ has been utilised by NGOs to seek redress for victims of environmental injustices in Nigeria.[1] For example, Socio-Economic Rights and Accountability Project (SERAP), a Nigerian-based NGO has been at the forefront of filing cases on socio-economic rights (including right to environment and education amongst others) at the ECCJ.[2] Furthermore, the East African Court of Justice stopped the Tanzanian government from constructing a road across the Serengeti National Park because of its potential adverse environmental impacts.[3] Thus, Professor Gathii has contended that the recent decisions of the sub-regional courts (especially ECCJ and EACJ) have led to an 'expansion towards international judicial environmentalism'[4] in Africa. Here, the sub-regional courts (ECCJ and EACJ) in *SERAP v. Federal Republic of Nigeria*[5] and *the African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania*[6] have added to the emergent international environmental governance by extending the remit of sub-regional judiciaries to include environmental protection or right to environment related issues.

[1] *SERAP v Federal Government of Nigeria* Judgment No. ECW/CCJ/JUD/18/12. Also see Eghosa Ekhator, 'Improving Access to Environmental Justice under the African Charter on Human and People's Rights: The Roles of NGOs in Nigeria' (2014) 22 (1) AJICL 63.
[2] Generally, see Ekhator (n 1)
[3] *African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania*, Ref. No. 9 of 2010, Judgment, East African Court of Justice at Arusha First Instance Div. ¶ 64 (Jun. 20, 2014). Cited in James Gathii, 'Saving the Serengeti: Africa's new international judicial environmentalism' (2016) 16 (2) CJIL 386
[4] Gathii *ibid*.
[5] *SERAP v Federal Government of Nigeria* (n 1)
[6] *ANAW* (n 3)

In West Africa, regional integration initiatives or measures predated the post-independence era or period.[7] These regional initiatives in the colonial period were influenced by the need for colonial powers to engage in trade or exchange between the colonies and Western countries in Europe.[8] Some of the notable colonial regional measures in the West African sub-region included the West African Currency Board (WACB) and the West African Airways Corporation (WAAC) in English speaking colonies (Nigeria, Ghana, Sierra Leone and the Gambia).[9] However, many of these regional measures (especially in the English speaking countries) collapsed in the post-independence era. Hence in 1970s, West African leaders came together to develop new initiatives in the sub-region. The setting up of the Economic Community of West African States (ECOWAS) in May 1975 is a culmination of these efforts by the leaders.[10]

ECOWAS is a regional group of fifteen states founded in 1975 and its mission is the attainment of regional and economic integration of the member states.[11] One of the key institutions of the ECOWAS is the Community Court of Justice (ECCJ). A major aim of the ECCJ is the promotion and protection of human rights and peoples' rights in accordance with the tenets of the African Charter on Human and Peoples' rights.[12] Similarly, formal regional integration in East Africa can be traced to 1967 with the founding of the EAC by Kenya, Tanzania and Uganda. By 1977, the EAC was dissolved following disagreements among its member states. Efforts to revive the EAC began in 1991 and culminated in the development of a new EAC Treaty in 1999.[13] The East African Court of Justice is 'the judicial arm of the East African Community and is vested with the primary mandate of interpreting and applying the Treaty for the Establishment of the East African Community'.[14]

Due to the non-justiciability of the right to environment doctrine and lack of adequate access to environmental justice in many African countries, NGOs, activists, communities and

[7] Mike Obadan, 'Introduction' in Ladi Hamalai and Mike Obadan (eds) 40 Years of ECOWAS (1975-2015) (NILS 2015) 26
[8] *ibid*
[9] Obadan (n 7)
[10] Obadan (n 7)
[11] ECOWAS Website < https://www.ecowas.int/about-ecowas/basic-information/> accessed 12 November 2019.
[12] Revised ECOWAS Treaty, Article 4(g)
[13] Solomon Ebobrah, 'Sub-Regional Judicial Enforcement of Economic, Social and Cultural Rights' in Danwood Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (CUP 2016) 281
[14] Victor Lando, 'The domestic impact of the decisions of the East African Court of Justice' (2018) 18 (2) *African Human Rights Law Journal* 463, 463

individuals[15] now utilise the sub-regional judiciaries in accessing justice in human rights issues or litigation. For example, the ECCJ has been utilised by NGOs to seek redress for victims of environmental injustices in Nigeria.[16] The main question this chapter seeks to address is: whether the rise of environmental governance or litigation in sub-regional judiciaries will lead to better environmental protection for the victims and communities.

Due to the different institutions, norms and frameworks developed under the African Union (AU), the concept of 'African Union Law' has emerged.[17] AU law has been defined 'as the bodies of treaties, resolutions and decisions that have direct and indirect application to the member States of the Union'.[18] Human rights issues are at the centre of the development of AU bodies and the emergent African Union Legal order (AU Law).[19] The African Charter on Human and Peoples Rights[20] is at the centre of the human rights architecture or regime in Africa. The African Charter establishes a system or framework for the promotion and protection of human rights in Africa within the framework of the Organisation of African Unity (now AU). [21] The African Charter promotes a plethora of human rights such as civil and political, socio-economic and cultural, individual and collective rights.[22] It is the first regional mechanism in the world to incorporate the different classes of human rights in a single document.[23] The African Charter makes no distinctions between the different types of rights in its provisions (for example, socio-economic rights, civil and political rights, and group rights). Hence, the various categories of rights enshrined in the African Charter are all enforceable and justiciable under the African human rights system including the sub-regional judiciaries.[24] The African Charter is expressly mentioned in the treaties of the EAC and ECOWAS.[25]

---

[15] The Supplementary Protocol (2005) amended 1991 Protocol of the Court to give individuals a direct right of access to the ECCJ in human rights issues or litigation. However, see Solomon Ebobrah, 'The Uneven Impact of International Human Rights Law in Africa's Subregional Courts' in Martin Scheinin, (ed). *Human Rights Norms in 'Other' International Courts* (Cambridge University Press 2019) 307-308. Also see *Osaghae and others v Republic of Nigeria* ECW/CCJ/JUD/O3/17.

[16] See Ekhator (n 1)

[17] Olufemi Amao, African *Union Law: The Emergence of a Sui Generis Legal Order* (Routledge 2018)

[18] Amao, *ibid* 22.

[19] Amao (n 17)

[20] African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5. However, there are other relevant AU mechanisms on human rights. See, Amao (n 18) 100-101.

[21] African Charter of Human and Peoples' Rights OAU CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 entered into force October 21, 1986.

[22] Manisuli Ssenyonjo (ed), The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights (Martinus Nijhoff Publishers 2012).

[23] *ibid.*

[24] However, Ebobrah (n 13) 289 aver that socio-economic rights are recognized indirectly in the treaties.

[25] Ebobrah (n 13) 286. For example, Article 6(d) of the EAC Treaty and Article 4(g)(h) of the ECOWAS Treaty refers specifically to the African Charter.

This chapter is divided into five parts including this introduction. The second part discusses the roles of sub-regional judiciaries in the emerging environmental governance architecture in Africa. This chapter focuses on the ECCJ and EAC because they are amongst the most active sub-regional judiciaries in Africa.[26] The third part focuses on the ECCJ. Here, some of the relevant ECCJ cases on the environment will be discussed. This part of the chapter considers the barriers militating against the successful implementation of ECCJ judgements in the sub-region. Part four of the chapter focuses on the EACJ and its relevance to the environmental protection discourse in the East African sub-region. The fifth part of the chapter which is the conclusion focuses on the limitations of the sub-regional judiciaries. Also, in this section, some suggestions or recommendations are discussed.

2. Regional Economic Communities (RECs) in Africa

Currently, there are over fourteen economic groupings in Africa that qualify as regional economic communities. However, the African Union (AU) only recognises eight of these organisations as the building blocks of the AU and the African Economic Community (AEC).[27] These regional economic communities (RECs) were originally set up to serve as vehicles of regional integration on the continent. Also, many of these RECs as a means or vehicle of fostering regional and trade relations established judicial organs or courts within their existing frameworks or treaties.[28] These judicial organs were initially set up to settle inter-state differences and to interpret treaties and other legal mechanisms within their respective frameworks.[29] A major impact of the adoption of the continent-wide treaty for the creation of an AEC- is the emergence of a new era in regionalism in Africa.[30] And this coincided with what is termed the "new regionalism", which led to the expansion of the human rights mandate of many sub-regional judiciaries in Africa.[31] The EACJ and ECCJ have been at the forefront in the expansion of human rights mandate under their various treaties and sub-regional orders.

[26] See Gathii (n 3). However, the SADC Tribunal is currently suspended and many of its decisions were never enforced or implemented.
[27] African Union website https://au.int/en/organs/recs contains names of the eight AU-recognised RECs. Lucyline Murungi and Jacqui Gallinetti, 'The role of sub-regional courts in the African human rights system' 13 *SUR-Int'l J. on Hum Rts.* 119, (observing that RECs are also referred to as sub-regional economic communities).
[28] Solomon Ebobrah, 'Courts of Regional Economic Communities in Africa and Human Rights Law' in Stefan Kadelbach, Stefan Rensmann and Thilo Rieter (eds), *Judging International Human Rights* (Springer 2019) 223
[29] Ebobrah, *ibid* 224, (arguing that new regionalism 'takes regional integration beyond mere trade liberalisation).
[30] Ebobrah *ibid*
[31] Ebobrah (n 28); Daniel Abebe, 'Does International Human Rights Law in African Courts make a difference' (2016) 56(3) *Virginia Journal of International Law* 527

Hence 'both the EACJ and the ECOWAS Court are now recognised as critical players in the African human rights system (AHRS).' [32]

2.1 Roles of Sub-regional judiciaries in Environmental Governance Architecture in Africa

In the global order on international environmental law, there are no explicit international environmental courts exercising jurisdiction over the thousands of multilateral treaties dealing with environmental protection.[33] These treaties tend to create non-compliance or review measures encompassing quasi-judicial features via facilitative approaches thereby enhancing capacity building, transparency, financial and technological assistance instead of sanctions.[34] Some examples include the Compliance Committee under the Aarhus Convention on Access to Justice and Kyoto Protocol.[35] Despite the absence of an explicit environment court on the international plane, a large body of jurisprudence emanating or touching upon environmental issues have arisen from issue-specific judicial bodies not limited to human rights courts and treaties.[36] Hence, Addaney et al posit that these international bodies or mechanisms 'present opportunities for pursuing environmental claims at the international and regional levels that otherwise do not exist.'[37]

Furthermore, there has been a rise in the use of international, regional and sub-regional judiciaries in the promotion and upholding of human rights. Some of these international courts especially regional and sub-regional judiciaries or courts have been at the forefront of promoting environmental governance around the world especially in Africa. Examples include the African Commission on Human and Peoples' Rights (African Commission) [38], African Court of Human and People's Rights (African Court) and the different sub-regional judiciaries such as ECCJ and EAC. It is arguable that reasons for the burgeoning environmental

[32] Ebobrah (n 28) 225
[33] Christina Voigt and Evadne Grant, 'The Legitimacy of Human Rights Courts in Environmental Disputes' (2015) 6 (2) *Journal of Human Rights and the Environment* 131
[34] Michael Addaney, Elsabé Boshoff and Michael Gyan Nyarko, 'Protection of environmental assets in urban Africa: Regional and Sub-Regional Human Rights and Practical Environmental Protection Mechanisms' (2018) 24 (2) *Australian Journal of Human Rights* 182, 185
[35] Voight and Grant (n 33)
[36] Voight and Grant (n 33) 131
[37] Addaney (n 34) 186
[38] However, it should be noted that the African Commission is a part-time quasi-judicial body.

governance under sub-regional judiciaries in Africa are the lack of access to environmental justice in some parts of the continent and delays in the judicial process in many countries.[39]

3. The ECOWAS Court of Justice

CSOs, individuals and communities have relied on the ECCJ to seek redress for victims of environmental injustice in Nigeria and other parts of the sub-region. One of the key institutions of the ECOWAS is the ECCJ. A major aim of the ECCJ is the promotion and protection of human and peoples' rights in reliance on the tenets of the African Charter on Human and Peoples' Rights.[40] By virtue of Article 76(2) of the Revised Treaty of the Economic Community of West African States[41] (Revised ECOWAS Treaty), the decisions of the ECCJ are final and not subject to appeal. These decisions or judgements are binding on Member States, the Institutions of the Community and on individuals and corporate bodies who are subject to the jurisdiction of the ECCJ.[42] Parties that can institute actions at the ECCJ include Member States and the Authority of Heads of State or Government.[43] By virtue of Article 4(g) of the Revised ECOWAS Treaty and 9(4) of the 2005 Supplementary Protocol of the ECOWAS Court of Justice[44] the ECCJ can entertain claims by individuals and corporate bodies for relief for violation of their human rights. The ECCJ adjudicates cases filed by individuals and NGOs alleging violations of human rights. ECOWAS judges have an express mandate to hear such cases - under the Supplementary Protocol which grants 'jurisdiction to determine cases of violation of human rights that occur in any Member State' in response to complaints by private litigants.[45]

Article 4(g) of the Revised ECOWAS Treaty of 1993 enjoins Member States of the regional group to adhere to the 'recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.' This obligation is also reflected in the preamble to the Revised Treaty as well as in Article 56(2) where Member States commit themselves to cooperate for the realization of the mandates or

[39] Ekhator (n 1). Also see Gathii (n 3)
[40] Article 4(g) of the Revised ECOWAS Treaty.
[41] Signed on 24 July 1993 and entered into force on 23 August 1995, (1996) 25 I.L.M. 663.
[42] Article 15(4) of the Revised ECOWAS Treaty
[43] Article 76(2) of the Revised ECOWAS Treaty. See also ECOWAS Community Court of Justice, Protocol A/P.1/7/91, (Adopted July 6, 1991, Came into Force Nov. 5, 1996, Amended by Supplementary Protocol A/SP.1/01/05 in 2005), at Art. 9(1).
[44] Supplementary Protocol A/SP.1/01/05.
[45] Ebobrah (n 28) 242

aims of the African Charter.[46] Notwithstanding that Nigeria is a signatory to the 1993 ECOWAS Revised Treaty, the Treaty is yet to be domesticated or incorporated into its national laws.[47] Nigeria, Ghana, Sierra Leone, Liberia and Gambia are common law countries in the sub-region that operate dualist system wherein treaties are not applied domestically unless incorporated via the machinery of legislation.[48]

There have been a few cases on environmental protection in the ECCJ and this chapter focuses on two of these cases.[49] The cases that this chapter discusses are: *SERAP v Federal Government of Nigeria*[50] and *Osaghae and others v. Republic of Nigeria*.[51] In *SERAP v. Federal Republic of Nigeri*a, SERAP, (a Nigerian-based NGO) instituted an action against the Nigerian government. SERAP contended that the Niger Delta region despite its natural endowments has borne the negative consequences arising from the activities of companies operating in that region. Some of these negative externalities include oil spills and environmental degradation amongst others. Also, SERAP alleged violations by the government on the right to health, economic and social development, adequate standard of living and the inability of the Nigerian government to adequately enforce the environmental law and regulations in the oil and gas industry amongst others. The plaintiffs maintained that Federal Government of Nigeria has been culpable for environmental degradation in the Niger Delta. The core of the reliefs sought by the applicant (SERAP) was a declaration that the Nigeria government had violated the tenets of the African Charter (and other relevant international standards) and that the Niger Delta communities should have a right to a clean or general satisfactory environment.[52] For example, in regard to right to health, SERAP relied on Articles 16 and 24 of the African Charter and Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESR) to argue that the Nigerian government has failed to promote environment or conditions to live a healthy life due to its failure to stop the widespread

[46] Solomon Ebobrah, 'Human Rights Realisation in the Africa Sub-Regional Institutions' in Manisuli Ssenyonjo (ed), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, 2012) 287.
[47] This is replicated in countries that are dualist in nature in the sub-region. See Muyiwa Adigun 'Enforcing ECOWAS judgments in Nigeria through the common law rule on the enforcement of foreign judgments' (2019) 15 (1) *Journal of Private International Law* 130, 133
[48] See Amos Enabulele, 'Reflections on the ECOWAS Community Court Protocol and the Constitutions of Member States' (2010) 12 (1) INT'L COMM L REV 111, 121
[49] Also see, *Marie Molmon & 114 Ors. v Guinea* ECW/CCJ/JUD/16/16, May 17, 2016 < http://prod.courtecowas.org/wp-content/uploads/2019/01/ECW_CCJ_JUD_16_16.pdf > accessed 12 November 2019.
[50] *SERAP* case (n 1)
[51] *Osaghae and others v Republic of Nigeria* (n 15)
[52] *SERAP* (n 1) para. 63.

pollution arising from the oil industry which has impacted negatively on the quality of life of the affected communities in the Niger Delta.[53]

The ECCJ held that the Nigeria violated Articles 1 and 24 of the and ordered that the Nigerian government to take effective measures within the shortest possible period to restore or remediate the environment of the Niger Delta.[54] The ECCJ further held that the Nigerian government must take steps to prevent the occurrence of damage to the environment in the Niger Delta and take measures to hold the architects of environmental damage responsible for their actions.[55] The ECCJ posited that the Nigerian government is expected to comply and enforce this decision by virtue of Article 15 of the Revised Treaty and Article 24 of the ECCJ Supplementary Protocol.[56]The ECCJ further held that the Nigerian government must take steps to prevent the occurrence of damage to the environment in the Niger Delta and take measures to hold the architects of environmental damage responsible for their actions. Unfortunately, till date, the government of Nigeria is yet to enforce or implement this decision.[57]

In *Osaghae v others v Republic of Nigeria*,[58] the case was instituted by four individuals from the Niger Delta in Nigeria. The first plaintiff who is from Edo State in Nigeria avers that he has suffered marginalization from the Nigerian government and its agents.[59] The second plaintiff who is from Delta State in Nigeria avers that he has been a victim of environmental injustice arising from the activities of oil companies and the third plaintiff who is from Edo State claims that the communal fishing water in the Niger Delta region has been destroyed due to the activities of oil firms in the region.[60] Finally, the fourth plaintiff who is from Edo State avers that he is a victim of the improper takeover of its communal or community natural resources and environmental deprivation. The plaintiffs aver that they are 'suing for themselves and on behalf of the Niger Delta people of Nigeria'.[61] The plaintiffs based their complaint or application on the following:

(i) A Declaration that the allocation of oil concessions or blocs to private companies and individuals in Nigeria is unlawful and violates the provisions of Articles 21, 22 and 24 of the African Charter; Article 1 (1-3) of the International Covenant on Civil

[53] *Ibid* para.67
[54] SERAP (n 1).
[55] *SERAP* (n 1)
[56] *SERAP* (n 1)
[57] Ekhator (n 1). The court also held that SERAP has the requisite *locus standi* to institute the case.
[58] *Osaghae and others v Republic of Nigeria* (n 15)
[59] *Osaghae and others v Republic of Nigeria* (n 15) para. 7
[60] *ibid*
[61] *ibid*

and Political Rights (ICCPR); and Article 1 (1-3) and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

(ii) A Declaration that the unrestrained oil exploration, gas flaring and attendant pollution and deaths in the Niger Delta arising from the activities in the oil sector constitutes threats to right to life, health and right to self-determination of the Niger Delta people as enshrined in Articles 1, 2, 4, 16 and 24 of the African Charter; Article 1 and 6 of the ICCPR; and Article 1 and 12 of the ICESCR.

(iii) To declare a moratorium on oil bloc transactions in respect of Article 1 and 21.2 of the African Charter.

(iv) To mandate the Government of Nigeria to redistribute the ownership of all onshore and offshore oil blocs in the Niger Delta back to the indigenous oil communities in lines with Articles 21 and 22 of the African Charter and Article 11 of the ICESCR.

(v) An order to direct the Nigerian Government to pay the sum of $30 billion to repair the environmental damage caused by over 9 million barrels of spilt crude oil in the Niger Delta. This complaint is based on Articles 1, 21 and 24 of the African Charter and Article 12 of the ICESCR.

(vi) An order compelling the Nigerian Government to conduct a self-determination referendum for the people of the Niger Delta. This is based on Articles 1.1, 1.2 and 1.3 of the ICCPR & ICESCR.

On the other hand, the Nigerian Government averred that the ECCJ had no jurisdiction in the case because the plaintiffs lacked the requisite *locus standi* to institute the case, lack of reasonable cause of action and the suit was an abuse of the court process.[62] In terms of the substance of the case, the ECCJ stated that the plaintiffs have led evidence to corroborate their claims against the defendants.[63] However, the ECCJ held that:

> …it is important to distinguish the capacity upon which the parties act, i.e. as non-natural and natural persons. While in SERAP supra, the Plaintiff by virtue of its registration under the Laws of Nigeria is recognized to represent the People of Niger Delta without the need to produce any proof of authorization. The Plaintiffs in this case are natural persons claiming to appear on behalf of the People of Niger Delta without authorization. The proof of authorization in the case of natural persons acting on behalf of a group cannot be dispensed with. The Niger Delta is so vast that an

[62] *Osaghae others v Republic of Nigeria* (n 15) para. 9.3
[63] *Ibid* para.9.2

> action brought for and on behalf of the said people without authorization sounds questionable. The Plaintiffs have failed to attach a mandate if any, given to them to clear the air in this regard.[64]

This decision has been criticized by some scholars.[65] For example, Giacomini argues that this decision in *Osaghae*, represents a missed opportunity by the ECCJ for the ventilation or enforcement of the rights of the Niger Delta people due to the various procedural errors highlighted in the judgment.[66] Arguably, this decision will have negative impacts on the burgeoning environmental governance architecture under the ECCJ. However, this case evidences the important role of ECCJ in environmental protection in the sub-region.

3.1 Enforcing ECCJ Judgments

A major conundrum inherent in the ECCJ is the enforceability of its decisions in the Member States. There are conflicting views on the enforceability of ECCJ'S rulings, the views include that decisions are advisory or persuasive, enforceability depends on the legal structure or the mode of domesticating international treaties in the different Member states,[67] directly enforceable[68] or not enforceable in the Member States.[69] Despite the barriers militating against the implementation or domestication of the ECCJ judgements in Member States, the recent decisions by the ECCJ have created opportunities for victims of environmental injustice or abuses to by-pass the justice machinery and attempt to get justice for victims of environmental abuses or injustice.[70]

However due to the constitutional impediments to the implementation of decisions of the ECCJ, diverse suggestions have been proffered by scholars.[71] Enabulele suggests that there

---

[64] *Ibid* para.9.3,
[65] See Ebobrah (n 15)
[66] Giada Giacomini, 'Niger Delta People v Nigeria: A Missed Occasion before the ECOWAS Court of Justice' Focus Africa (2018) < https://www.federalismi.it/nv14/articolo-documento.cfm?artid=35993 > accessed 12 November 2019
[67] Enabulele (n 48). Thus, recently in Ghana (which is also dualist state), the high court (in Ghana) refused to enforce a judgement of the ECCJ. *In the Matter of an Application to Enforce the Judgment of the Community Court of Justice of the ECOWAS against the Republic of Ghana and In the Matter of Chude Mba v. The Republic of Ghana*, Suit No. HRCM/376/15 (High Court, Ghana, 2016) (unreported), cited in Richard Oppong, 'The High Court of Ghana declines to Enforce an ECOWAS Court Judgment' (2017) 25 (1) *African Journal of International and Comparative Law* 127, 128.
[68] See Enyinna Nwauche, 'Enforcing ECOWAS Law in West African National Courts' (2011) 55(2) *Journal of African Law* 181. This is arguably the situation in monist countries in West Africa where international law applies directly.
[69] This is arguably the position in dualist countries wherein international treaties need to be domesticated into national laws by the relevant authorities for it to have effect. Generally, see Helen Chuma-Okoro, 'The Nigerian Constitution, the ECOWAS Treaty and the Judiciary: Interplay of roles in the Constitutionalisation of Free Trade' (2015) 4(1) *Global Journal of Comparative Law* 43
[70] Ekhator (n 1)
[71] *ibid*.

should be synergy or integration amongst the ECOWAS countries in implementing the ECCJ decisions.[72] This is because some of the countries in the ECOWAS sub-region are dualist in nature and the problems 'associated with the differences between the ECOWAS treaty and the domestic law of Community States, and between the community court and the national courts.'[73] Furthermore, article 24 of the ECOWAS Supplementary Protocol states that decisions of the ECCJ should be executed via the judicial machinery of the states. All ECOWAS states are mandated to set up a national authority for the implementation of its judgements. Unfortunately, very few Member States have established such national authorities. Thus, enforcing ECCJ judgements in the ECOWAS states is a difficult task.[74] Notwithstanding that Nigeria has set up the machinery of enforcement, the impact of the ECCJ judgements have been insignificant in the country.[75] In 2011, Nigeria appointed the Attorney General of the Federation as the national authority responsible for implementing the ECCJ's decisions.[76] Also, only five Member States including Nigeria, Guinea, Mali, Burkina Faso and Ghana have appointed competent nationality authority for the implementation or enforcement of the ECCJ judgments in accordance with Article 24(4) of the Protocol as amended.[77] Despite the various statistics on the enforcement of ECCJ decisions, the consensus is that some of the decisions have not been enforced in the various countries.[78] In a recent academic paper by the Chief Registrar of the ECCJ, he posits that since the adoption of the Supplementary Protocol on the ECCJ, only 35 out of the 64 enforceable decisions by the ECCJ, have been complied with.[79]

In Ghana, akin to the position in Nigeria, the ECOWAS Protocol and the treaty establishing the ECOWAS are not in force and the Parliament is yet to exercise its powers under Article 72(2) of the Constitution of the Republic of Ghana.[80] Recently in Ghana (which

---

[72] Enabulele (n 48)
[73] Enabulele (n 48) 113. The English-speaking countries in the sub-region such as Nigeria, Ghana, Sierra Leone, Liberia and Gambia are generally referred to as dualist countries in the ECOWAS sub-region. Generally, see Nwauche (68) for the constitutional provisions in their various constitutions.
[74] Jadesola Lokulo-Sodipo and Abiodun Osuntogun, 'The Quest for a Supranational Entity in West Africa: Can the Economic Community of West African States Attain the Status?' (2013) 16(3) *PER / PELJ* 255, 259
[75] Ekhator (n 1)
[76] Chuma-Okoro (n 69). However, Tony Anene-Maidoh, 'Enforcement of Judgments of ECOWAS Court of Justice' (2018) 1 (1) *Journal of Law Review National Institute for Legislative and Democratic Studies* 58, 59 suggests that 'it is noteworthy that some countries that are yet to appoint national authorities have complied with decisions and judgements of the Court.'
[77] Guardian Newspaper
'ECOWAS court records highest number of Judgment, ruling in 2018/2019' (12 July 2019)
https://guardian.ng/news/ecowas-court-records-highest-number-of-judgment-ruling-in-2018-2019/ > accessed 29 November 2019
[78] Anene-Maidoh (n 76)
[79] Anene-Maidoh (n 76) 59.
[80] Oppong (n 67) 128

is also dualist state), the high court refused to enforce a judgement of the ECCJ.[81] Also, in *Republic v High Court (Commercial Division) Accra, Ex parte Attorney General, NML Capital and the Republic of Argentina*,[82] which involved an action to enforce the decision of the International Tribunal of the Law and the Sea (ITLOS). The Ghanaian Supreme Court held that Ghana is a dualist country and even if a treaty is ratified by the Parliament until it is incorporated or domesticated into municipal law by the appropriate legislation, it has no legal effect in the country.[83] However, in Africa, it is only the Member States of the East African Community that have incorporated the Treaty Establishing the East African Community into their national laws.[84]

Many of the cases brought to the ECCJ originate from Nigeria and till date, the precise number of ECCJ judgments implemented or enforced in Nigeria is unknown.[85] Also, despite the slow rate of enforcement of ECCJ judgments in the sub-region, it has been contended that no country has declined to comply at all, probably due to the fact that the 'ECOWAS legal regime makes provision for sanctions where a state fails to comply with a decision of the ECCJ.'[86] Notwithstanding the apparent lack of enforcement of many ECCJ judgments in Nigeria, it is probable that in the future, ECCJ judgements might be implemented in Nigeria. A major reason for this is that contracting countries to treaties cannot rely on the basis of its domestic laws as reasons or justification for not performing its expected obligations under such treaties.[87] In the ECOWAS sub-region, where Nigeria is the major economic and military power, thus, if ECOWAS is to be successful, Nigeria must be seen to respect and implement the various ECOWAS treaties it has ratified. Furthermore, by virtue of section 19(d) of the Constitution of Nigeria (as amended) 'respect for international law' is one of the foreign policy objectives of the Nigerian government enunciated in the constitution.[88] Thus, Nigeria should strive to observe and enforce international law in the country.

---

[81] See *Mba* case (n 67)

[82] Civil Motion No J5/10/2013 (Supreme Court, Ghana, 2013). Cited in Richard Oppong and Lisa Niro, 'Enforcing Judgments of International Courts in National Courts' (2014) 5(2) *Journal of International Dispute Settlement* 344

[83] Oppong and Niro (n 82)

[84] Oppong (n 67) 130-131

[85] This point is debatable because the Chief Registrar of the ECCJ has posited that Nigeria has implemented some ECCJ decisions. Generally, see Anene-Maidoh (n 76).

[86] Ebobrah (n 13) 299. Generally, see Article 77 of the Revised ECOWAS Treaty and Article 24 of the 2005 Supplementary Protocol.

[87] See Article 27 of the Vienna Convention on the Law of Treaties.

[88] This provision falls under Chapter II of the Nigerian constitution, making it non-justiciable and, in effect, unenforceable. Despite its non-enforceability, arguably this provision evidences the fact that Nigerian government should respect its international obligations.

4. The East African Court of Justice

The EACJ is the judicial arm or organ of the East African Community (EAC) created under Article 9 of the Treaty of the Establishment of the East African Community.[89] The EACJ consists of a First Instance Division and an Appellate Division.[90] The jurisdiction of the EACJ as exemplified by Articles 23 and 27 of the 1991 EAC Treaty (as amended) to hear and determine disputes on the interpretation and application of the Treaty.[91] Notwithstanding the absence of an explicit human rights mandate, the EACJ has claimed jurisdiction over matters arising from violation of human rights.[92] Also, it has been suggested that 'the judges of the EACJ have been proactive in encouraging human rights cases to come before the Court.'[93]

A recent case on environmental protection in EACJ is *African Network for Animal Welfare (ANAW) v. Attorney General of Tanzania*.[94] ANAW, the applicant in this case is a registered NGO in Kenya and it averred that the actions of the Tanzanian government was in violation of Articles 114 (1) and Articles 5(3) (c), 8(1) (c) and 111 (2) of the Treaty for the Establishment of the EAC.[95] In this case, the applicants argued that Tanzania's government decision to build a road across Serengeti National Park constituted a violation of treaty provisions that require EAC Partner States to protect and preserve the quality of the environment. The court further held, that it was a violation and accordingly, the EACJ issued an injunction restraining Tanzania from implementing that decision.[96] Thus, the EACJ stopped the government of Tanzania from building a 'road across Serengeti National Park because of its potential adverse environmental impacts'.[97] In this case, the First Instance Division of the EACJ in 2014, issued a permanent order stopping the Tanzanian government from building a road through the Serengeti National Park and this decision was mainly upheld by the Appellate Division of the EACJ in July 2015.[98]

---

[89] EAC website <http://eacj.org/ > accessed 12 November 2019
[90] Ebobrah (n 13)
[91] Also see Ebobrah (n 28) 224
[92] Article 27(2) of the EAC Treaty suspends the human rights jurisdiction of the EACJ until a Protocol is adopted to explicitly extend its jurisdiction to human right issues. In *James Katabazi & 21 Others v the Secretary-General of the EAC & Another* and numerous cases, the EACJ 'through a mix of judicial activism and creative interpretation has claimed for itself limited human rights jurisdiction.' See Lando (n 14) 467
[93] James Gathii, 'Variation in the use of Subregional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice' (2016) 79(1) *Law & Contemp. Probs* 37
[94] *ANAW* case (n 3)
[95] *ANAW* case (n 3) para. 13
[96] Ebobrah (n 13) 294-295
[97] Gathii (n 3) 386
[98] *ibid*

Analogous to enforcement of ECCJ judgments, the EAC Treaty requires Partner States to take prompt measures to enforce the judgments of the EACJ.[99] Some scholars have contended that there has been a fair rate of enforcement of the EACJ decisions.[100] Ebobrah contends that this is due to the fact that judgments from the EACJ have not generally resulted in declarations or orders that have huge policy and financial impacts.[101] On other the hand, Possi argues that not much 'is known about the extent of compliance with the EACJ's decisions. One could correctly characterise the EACJ's decisions as being academic.'[102] Notwithstanding the various criticisms against the EACJ,[103] it has impacted positively on the national judiciaries of the states in the resolution of disputes in national courts.[104]

On the part of the ECCJ in its exercise of its human rights mandate has consistently exercised jurisdiction in human rights cases and provided a sub-regional avenue for 'aggrieved Community citizens to seek redress for human rights violations.'[105] However, the implementation or enforcement of the ECCJ decisions has been a recurring issue notwithstanding that there is 'a provision in amended Protocol for national court of Member States to refer questions of interpretation of the Treaty, Protocol or other ECOWAS legal texts to the ECOWAS Court of Justice, no such referral has been received from any Member State.'[106] Thus, some of the key problems besetting the ECCJ includes problems of enforcement, lack of referrals by member states, non-appointment of competent national authorities, and failure to domesticate the Revised Treaty and Protocol to the ECCJ.[107]

5. Conclusion

Despite the various Community frameworks on enforcement of judgments of sub-regional courts in Africa, sub-regional courts 'do not have the powers to enforce their judgments.'[108]

[99] Ebobrah (n 13)
[100] Generally, see Lando (n 14)
[101] Ebobrah (n 13)
[102] Ally Possi, 'An appraisal of the functioning and effectiveness of the East African Court of Justice' (2018) 21(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1, 20.
[103] However, the EACJ has remained proactive in its judgements despite the backlash against it by Partner States. See Tomasz Milej, 'Human Rights protection by international courts – What role for the East African Court of Justice?' (2018) 26(1) *African Journal of International and Comparative Law* 108
[104] Generally, see Lando (n 14).
[105] Muhammed Ladan, 'Appraisal of the Human Rights Mandate of the ECOWAS Court of Justice '(April 18, 2018). International Conference on the Protection of Human Rights as a Factor for Peace Building in West Africa, 2018. 2
[106] Ladan *ibid* 17
[107] Ladan (n 105)
[108] Ebobrah (n 13) 298

Due to the difficulties in implementing the decisions of sub-regional judiciaries in Africa (especially the ECCJ), some academics[109] have suggested diverse range of strategies, such as the use of common law regime on the enforcement of foreign judgments.[110] Furthermore, some scholars have suggested that that one method of implementing ECCJ judgements in Nigeria is by registering the ECCJ rulings as foreign judgements by virtue of the Foreign Judgements (Reciprocal Enforcement) Act[111] (this is one slant of the statutory regime for enforcing foreign judgments in Nigeria. However, the Foreign Judgements (Reciprocal Enforcement) Act is said to be inchoate and not in force in Nigeria).[112] Arguably, this is fraught with a lot of difficulties.[113] Some of these difficulties include the non-domestication of the Protocol to the ECCJ and ECOWAS Revised Treaty in Nigeria and whether ECCJ judgments can be considered to be "foreign judgments" under the Foreign Judgments (Reciprocal Enforcement) Act in the country. This is also exemplified in Ghana in the *Mba* case, where the high court refused to enforce a judgement of the ECCJ.

South Africa has both a common law and statutory regime for enforcing foreign judgments.[114] The latter is regulated by the Enforcement of Foreign Civil Judgments Act 1988. Section 2(1) of the Act provides that this Act 'shall apply in respect of judgments given in any country outside the Republic which the Minister has for the purposes of this Act designated by notice in the Gazette.'[115] In *Government of the Republic of Zimbabwe v Louis Karel Fick*[116], the Constitutional Court of South Africa (CCSA) became the first apex court to hold that the common law regime for enforcing judgments from the courts of a foreign state can also be used to enforce a decision of an international court or tribunal. This case involved the possible enforcement of a decision of the South African Development Community Tribunal (SADC).[117] The CCSA enforced the SADC Tribunal's judgment by developing the common law, treating the judgment as a foreign judgment and applying South African private international law rules. Hence, common law or dualist countries (via their judiciaries) in the ECOWAS sub-region should also develop their respective common law regime on enforcing foreign judgments to

[109] Adigun (47) and Oppong (67) amongst other scholars suggest that the common law regime can successfully be adapted to enforce decisions of international courts or tribunals in African countries.
[110] Oppong (n 67); Adigun (n 47)
[111] 1990 now Cap F35 LFN 2004. Generally, see Adigun (n 47), Anene-Maidoh (n 76)
[112] Adewale Olawoyin, 'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10(1) Journal *of Private International Law* 129.
[113] For a general overview of the foreign judgements' enforcement paradigm in Nigeria, see Olawoyin *ibid*
[114] Generally, see Oppong and Niro (n 82)
[115] *ibid*
[116] [2013] ZACC 22.
[117] Oppong and Niro (n 82)

include the implementation or enforcement of ECCJ judgments in their respective jurisdictions. Thus, Adigun has persuasively argued that the 'common law on the enforcement of foreign judgments can be successfully adapted to give domestic effect to the judgments of ECOWAS Court as an international tribunal in Nigeria.'[118]

However, it has been suggested that the CCSA decision in *Fick* limited the evolution of common law in this regard solely to 'to the enforcement of judgments and orders of international courts or tribunals *based on international agreements that are binding on South Africa*'.[119] Notwithstanding the above assertion, common law evolves with time and arguably, judiciaries of dualist countries in the ECOWAS sub-region can extend the common law rule on enforcement of foreign judgments to ECOWAS judgments in their respective countries.[120] Despite the difficulties in relying on the common law regime of enforcement of foreign judgments, this chapter suggests that it can serve as one of the means of enforcing ECCJ judgements in the common law (dualist) countries in West Africa. Courts in South Africa which also has common law heritage have successfully relied on the common law regime of enforcement of foreign judgments to implement or enforce decisions arising from sub-regional judiciaries.[121]

Official data on the enforcement of ECCJ judgments is not readily available online. Therefore, compliance rates by countries are difficult to determine due to the lack of available and reliable data.[122] Abebe contends that despite that the EACJ has adjudicated on a plethora of human rights cases, 'information is not readily available on whether the nations found in violation of human rights treaties have taken steps to comply with the EACJ's judgments.'[123] The ECCJ also suffers from official information deficit. Due to the fact, that no Member State in the ECOWAS has communicated to the ECCJ the status and compliance with of judgements and decisions so far, the ECCJ 'has been able to get unofficial information from lawyers and parties involved in some cases'.[124] To mitigate this information deficit, this chapter suggests

[118] Adigun (n 47)
[119] *Government of the Republic of Zimbabwe v Louis Karel Fick* para. 53. Also cited in Oppong and Niro (n 95)15
[120] Christian Okeke, 'The use of International Law in the Domestic Courts of Ghana and Nigeria' (2015) 32 (3) *Ariz. J. Int'l & Comp. L.* 371, 383 states that common law in Ghana has evolved with time. Hence some scholars such as Nwauche advocates for the development of common law regimes unique to the specific countries in Africa (such as Ghana and Nigeria). Generally, see Enyinna Nwauche, 'The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana' (2010) 25 (1) *Tul. Eur. & Civ. LF* 37
[121] Generally, see Oppong and Niro (82)
[122] Abebe (n 31) 554
[123] *ibid*
[124] Anene-Maidoh (n 76) 59

that official online data-bases should be created by the sub-regional organisations (especially ECCJ) showing various cases and their implementation status in Member States. Also, this information should be readily and freely available online.

There is a chronic failure in the enforcement or implementation of the decisions or judgments of sub-regional judiciaries (especially ECCJ) in Africa.[125] One way of improving the implementation of ECCJ judgments is that the ECOWAS should apply political pressure on the dualist countries in the sub-region to domesticate the Revised Treaty and the Protocol on the ECCJ into their national laws. This will enhance the implementation of the ECCJ judgments in the sub-region. Arguably, the solution lies in the political will of the governments in the sub-regions – the governments need to be committed to the implementation of the decisions or judgments arising from the sub-regional judiciaries.

[125]Generally, see Paul Kagame,'The Imperative to Strengthen Our Union' *Report on the Proposed Recommendations for the Institutional Reform of the African Union* (2017)

Reference list

Abebe, D 'Does International Human Rights Law in African Courts make a difference?' (2016) 56(3) *Virginia Journal of International Law* 527.

Addaney M, Boshoff E and Nyarko M, 'Protection of Environmental Assets in Urban Africa: Regional and Sub-Regional Human Rights and Practical Environmental Protection Mechanisms' (2018) 24 (2) *Australian Journal of Human Rights* 182.

Adigun M 'Enforcing ECOWAS judgments in Nigeria through the common law rule on the enforcement of foreign judgments' (2019) 15 (1) *Journal of Private International Law* 130, 133.

African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania, Ref. No. 9 of 2010, Judgment, East African Court of Justice at Arusha First Instance Div. ¶ 64 (Jun. 20, 2014).

Anene-Maidoh T, 'Enforcement of Judgments of ECOWAS Court of Justice' (2018) 1 (1) *Journal of Law Review National Institute for Legislative and Democratic Studies* 58

Chuma-Okoro H, 'The Nigerian Constitution, the ECOWAS Treaty and the Judiciary: Interplay of roles in the Constitutionalisation of Free Trade' (2015) 4(1) *Global Journal of Comparative Law* 43

Ebobrah S, 'Sub-Regional Judicial Enforcement of Economic, Social and Cultural Rights' in Chirwa D and Chenwi L (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (CUP 2016) 274-302

Ebobrah S, 'Courts of Regional Economic Communities in Africa and Human Rights Law' in Kadelbach S, Rensmann S and Rieter T (eds), *Judging International Human Rights* (Springer 2019) 223-254

Ebobrah S, 'The Uneven Impact of International Human Rights Law in Africa's Subregional Courts' in Martin Scheinin, (ed). *Human Rights Norms in 'Other' International Courts* (Cambridge University Press 2019)

Gathii J, 'Saving the Serengeti: Africa's new international judicial environmentalism' (2016) 16 (2) CJIL 386

Gathii J, 'Variation in the use of Subregional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice' (2016) 79(1) *Law & Contemp. Probs* 37

Giacomini G, 'Niger Delta People v Nigeria: A Missed Occasion before the ECOWAS Court of Justice' Focus Africa (2018) < https://www.federalismi.it/nv14/articolo-documento.cfm?artid=35993 > accessed 12 November 2019

Government of the Republic of Zimbabwe v Louis Karel Fick and Others [2013] ZACC 22.

In the Matter of an Application to Enforce the Judgment of the Community Court of Justice of the ECOWAS against the Republic of Ghana and In the Matter of Chude Mba v. The Republic of Ghana, Suit No. HRCM/376/15 (High Court, Ghana, 2016) (unreported)

Lando V, 'The domestic impact of the decisions of the East African Court of Justice' (2018) 18 (2) *African Human Rights Law Journal* 463

Milej T, 'Human Rights protection by international courts–What role for the East African Court of Justice?' (2018) 26(1) *African Journal of International and Comparative Law* 108

Nwauche E, 'The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana' (2010) 25 (1) *Tul. Eur. & Civ. LF* 37

Obadan M, 'Introduction' in Hamalai L and Obadan M (eds) 40 Years of ECOWAS (1975-2015) (NILS 2015) 26-44

Olawoyin A, 'Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) 10(1) Journal *of Private International Law* 129

Oppong R and Niro L, 'Enforcing Judgments of International Courts in National Courts' (2014) 5(2) *Journal of International Dispute Settlement* 344

Oppong R, 'The High Court of Ghana declines to Enforce an ECOWAS Court Judgment' (2017) 25 (1) *African Journal of International and Comparative Law* 127

Osaghae and others v Republic of Nigeria ECW/CCJ/JUD/O3/17

Possi A, 'An appraisal of the functioning and effectiveness of the East African Court of Justice' (2018) 21(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1

Republic v High Court (Commercial Division) Accra, Ex parte Attorney General, NML Capital and the Republic of Argentina Civil Motion No J5/10/2013 (Supreme Court, Ghana, 2013).

SERAP v Federal Government of Nigeria Judgment No. ECW/CCJ/JUD/18/12

Voigt C and Grant E, 'The Legitimacy of Human Rights Courts in Environmental Disputes' (2015) 6 (2) *Journal of Human Rights and the Environment* 131