Measuring the Quality of the International Judiciary:

The ECOWAS Community Court of Justice

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Abstract

The ever-growing and increasingly important role played by international courts in the administration of justice has necessitated the assessment of the quality of their decision-making process and other concepts relating to the performance of these courts, even more so in the case of the ECOWAS Community Court of Justice (the ECOWAS Court or the Court), the regional court for West Africa, which has become a go-to alternative for litigants who do not have faith in the judiciaries in their member states. Yet, the quality of these international courts has not attracted substantial scholarly attention. With a primary focus on the ECOWAS Court, this thesis assesses the independence, accountability and transparency of the judiciary as variables for measuring the quality of international courts.

This thesis critically analyses the quality of the ECOWAS Court in terms of the composition of the Court, its decision-making process, and its judgement in comparison to the European Court of Human Rights and the domestic courts in the ECOWAS member states. It aims to provide a thorough examination of the quality of the ECOWAS Court while considering its legal regime, the practices within the Court, and its interaction with the parent organisation, ECOWAS, and other stakeholders.

This thesis adopts the doctrinal approach of legal research to analyse the various treaties, protocols, supplementary protocols, directives and decisions of the ECOWAS Court and those of the other courts assessed. To achieve a synthesised comparison between the ECOWAS Court and other international and domestic courts, comparative methodology, which investigates the legal implications of a legal issue in different jurisdictions or institutions, is adopted.

Ultimately, this thesis identifies the gaps in the Court’s legal regime and offers recommendations for enhancing its quality and initiating reforms in the legal regime of the ECOWAS Court.
Dedication

To

Adewole Adeosun

and

Titoluwa Adeosun
Acknowledgement

The success of this thesis is only possible because of the encouragement and contributions of many. I wish to use this opportunity to show my appreciation.

Firstly, I want to appreciate my supervisors, Dr Marjan Ajevski, Dr Olga Jurasz and Professor Simon Lee, for their devotion to the successful completion of my PhD. I also thank Dr Miriam Mbah for her encouragement and guidance.

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PART I

CHAPTER 1

1. INTRODUCTION

1.1. Background

The Convention for the Pacific Settlement of International Disputes in 1899 marked a remarkable starting point for international adjudication.\(^1\) It was closely followed by the establishment of the first international court, the Central American Court of Justice, in 1907 with the main objectives of conflict resolution and control among its five member states.\(^2\) There has since been a multiplication of international courts invested with the mission of adjudicating cross-border issues.\(^3\) Starting with the Permanent Court of International Justice established in the Hague in 1922 which was succeeded by the International Court of Justice (ICJ) and is regarded as the most important international court\(^4\), to the more recent Court of the Eurasian Economic Union established in 2012.\(^5\)

In recent years the international legal system has gained prominence and importance, and currently, about 30 international courts across the globe adjudicate a variety of matters.\(^6\) With the increase in the number of international courts comes an increased readiness on the part of the member states to submit to the jurisdiction of the courts, a broadening of the range of issues adjudicated by them, and the increasing willingness of nations of the world to


\(^2\) Manley Hudson, ‘The Central American Court of Justice’ 26 (1932) AM. J. of Int’l L 759, 763


\(^4\) Robert Kolb, The International Court of Justice (Bloomsbury Publishing, 2013)


accept the roles of international courts in political relations. A trend towards the compulsory jurisdiction of international judiciaries for specific areas of international law is evident.

As an aftermath of the proliferation of international courts, there has been an expansion of the range of matters bothering on the enhancement of compliance with specific treaty obligations. Also, non-state actors such as individuals, groups, and organisations, have become dominant participants in international adjudication as parties to suits. The continent of Africa has also experienced a proliferation of international courts; every region of Africa has a regional court. The ECOWAS Court, which is the focus of this thesis, is one of those courts. It plays an essential role in the West African region, adjudicating matters of regional integration and human rights protection. Thus, the quality of the Court is paramount for ensuring that member states and their citizens have access to justice.

International courts are an integral part of the international legal system. Traditionally, they are designed predominantly to provide unbiased fora for the settlement of disputes between states. This traditional role remains one of the most important ones. However, the functions performed by international courts now transcend the resolution of disputes between states, and the enforcement of treaty obligations. Similarly, although the traditional setup of international courts suggests an exclusive forum for nations, the member states no longer have a monopoly on international adjudication, and this is evidenced by the number of international courts opened to non-state parties. The ECOWAS Court, for instance, has evolved from adjudicating solely matters of regional integration to hearing matters relating to the protection of human rights in the region and from being open to state parties and ECOWAS institutions only to giving access to private litigants.

The views on the reformulation of the function of international courts have continued to evolve towards global governance to include stabilizing normative expectations, re-

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10 See for instance, the ECOWAS Court, the African Court of Human and Peoples’ Right, the East African Court of Justice and the European Court of Human Rights.
establishing the validity of international law, and ensuring its enforcement,\textsuperscript{11} law-making,\textsuperscript{12} controlling and legitimating authority,\textsuperscript{13} issuing advisory opinions,\textsuperscript{14} and protecting human rights\textsuperscript{15}. With the increase in the usage and capacity of international judicial institutions, it has become crucial to evaluate the various concepts tied to the functioning of international courts. These concepts include the legitimacy of the courts, the effectiveness of the courts, the performance of the judicial officers, and international judicial quality.

A plethora of studies assessing various areas of international adjudication mostly focus on their jurisdiction, role, growth, legitimacy, performance, and effectiveness. However, little or no research has been done on the quality of these courts. The concept of quality is difficult to define, especially when it relates to the judiciary. The definition and defining parameters can be largely subjective. It can be considered as the quality of the decisions of the court’s judges, i.e., the legal process and motivation for reaching a court’s decision. It can also be examined in terms of a court’s performance or assessed from the viewpoint of the operation of the underlying values of the judicial institutions in a particular court. The growing attention to the quality, efficiency and effectiveness of international courts must be considered a positive development. By channelling attention to these issues, the overall performance of a court comes under scrutiny, thereby motivating the judges and other members of the courts to carry out their duties efficiently.

Courts, whether domestic or international, do not operate blindly. They are guided by certain fundamental values and principles. These values include independence, impartiality, fairness, accessibility, and openness. The operation of these values varies from one court to another, and the variations are informed by different factors. In African international courts, the progression and development of these values are influenced by factors such as colonialism\textsuperscript{16}

\textsuperscript{12} Ibid 55
\textsuperscript{13} Ibid 57
and military administrations. In Nigeria, for instance, the history of military administration and the adoption of a military-influenced constitution deposits power and authority in the executive. This gives the executive arm of the government ample control over the affairs of the judiciary.

Also, across the continent of Africa, one of the aftermaths of colonialism is the adoption of the colonial masters’ judicial systems and structures, with most African countries partly or entirely disregarding the pre-existing mechanisms of conflict resolution. The legal systems of the countries of the continent vary depending on whether they were colonised by the English, French or Portuguese, resulting in social, legal, and cultural conflicts. These dynamics caused by post-colonial divides also feed into the regional courts, which represent a blend of legal systems struggling to achieve a balance. Consequently, the operation of the core values of the judiciary is understood differently by each member state.

This thesis measures judicial quality based on the presence and levels of some of these values—Independence, accountability, and transparency. In national courts, these core values are mostly laid out in the law, usually the constitution. In international judiciaries, it is not as straightforward. The assessment of the operation of these values in international courts involves the examination of treaties, protocols, directions, recommendations, and other legal documents. In the ECOWAS Court, the assessment of the values is even more tasking not only because the legal regime of the Court is still evolving and developing but also because of the challenge of accessing relevant up-to-date legal documents.

The multiplication of international courts and the expansion of their role has attracted scholars to examine and understand these courts. These scholars typically assess the international court as a unitary institution. International law scholars focus mostly on the

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19 Joireman (n 16) 596.
21 Adebusuyi Adeniran, ‘Regional Integration in the ECOWAS region: Challenges and Opportunities’ (2012) 19 AfricaPortal Backgrounder 3 Backgrounder_No._19.pdf (africaportal.org)
jurisprudence of the courts, the jurisdictional and procedural issues and other law-making
functions of the courts.\textsuperscript{22} Similarly, international relations scholars are generally interested in
the relationship between the international courts as unitary entities and other stakeholders,
mainly member states.\textsuperscript{23} Most scholars in both fields have shown minimal interest in delving
deeper into the functioning of international courts.

Factors affecting international courts’ day-to-day running and inner workings, such as the
deliberation and decision-making process, the relationship between members of the
international courts, and members of the international courts and other stakeholders, were
relatively understudied. However, recent scholarships have expanded the understanding of
the importance of lifting the veil and assessing international courts in their component
parts.\textsuperscript{24} This is what Dunoff and Pollack termed the opening of the ‘black box’ of international
courts.\textsuperscript{25}

This thesis assesses the ECOWAS Court as a disintegrated entity rather than a unitary unit. It
separates the institution of the Court from its members and staff, and even further, each
member of the Court, their behavioural accountability, independence and transparency as
individual judges. Assessing these variables as they relate to the members of the Court helps
to achieve an assessment that goes beyond the outcome of the Court to understand the
practices and underlying causal processes and mechanisms that affect judicial decisions and
quality.

In most of the rapidly expanding body of literature assessing courts, the concept of judicial
quality and its indicators are considered either as a synonym for or a subset of the
effectiveness of the courts rather than as separate concepts.\textsuperscript{26} In the assessment of

\textsuperscript{22} Armin von Bogdandy and Ingo Venzke (eds.), \textit{International Judicial Lawmaking: On Public Authority and
Democratic Legitimation in Global Governance} (Springer, 2012); Chiara Giorgetti (ed.), \textit{The Rules, Practice, and
Jurisprudence of International Courts and Tribunals} (Brill, 2012)

\textsuperscript{23} Erik Voeten, ‘International Judicial Independence’, in \textit{Interdisciplinary Perspectives on International Law and
International Relations}’ in Jeffrey L. Dunoff, and Mark A. Pollack (eds.) \textit{Interdisciplinary Perspectives on
International Law and International Relations : The State of the Art} (Cambridge University Press, 2012)

\textsuperscript{24} Cesare Romano, Karen J. Alter, and Yuval Shany, \textit{The Oxford Handbook of International Adjudication} (Oxford
University Press, 2014)

\textsuperscript{25} Jeffrey L. Dunoff and Mark A. Pollack, \textit{International Judicial Practices: Opening the “Black Box” of

\textsuperscript{26} See for instance, European Commission For Efficiency Of Justice (CEPEJ) Checklist for promoting the quality of
justice and the courts adopted at its 11th plenary meeting (Strasbourg, 2-3 July 2008); see also, the European
international courts, in particular, the terms have been used interchangeably.\textsuperscript{27} Shany for instance, in his research on the effectiveness of international courts, analysed judicial independence and judicial impartiality, both of which are indicators of judicial quality as indicators of the effectiveness of international courts.\textsuperscript{28}

The position in this thesis is that judicial effectiveness and judicial quality, although ultimately tied to the performance of international courts, are two different concepts and are measured using different sets of variables or indicators. Judicial effectiveness represents the ability of a court to carry out its mandate. Some indicators have been suggested for measuring the effectiveness of international courts. They include the judicial output, compliance with court decisions, usage rate, and impact of court decisions on state conduct.\textsuperscript{29} The most common definition of organisational effectiveness is the goal-based approach, which follows the rational-system approach. It simply connotes that an organisation is effective if it accomplishes its mandates.\textsuperscript{30}

Judicial quality, on the other hand, refers to the merit, richness, and value of a court’s decisions. When assessing the quality of an international court, the definition is a key conceptual hurdle. However, it is measured through the value of the process leading to the decisions. To assess the value of the process, the personnel involved in a court’s administration and decision-making, their suitability, guiding principles, protection, and other issues of how they carry out their duties must be examined. These issues are covered by the independence, accountability, and transparency of the court. This thesis focuses on the

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{27} Yuval Shany, \textit{Assessing the Effectiveness of International Courts} (Oxford University Press, 2014); Yuval Shany, ‘Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions’ Hebrew University of Jerusalem Legal Research Paper (September 22, 2015) 15-27 ; Philippe Couvreur, \textit{The International Court of Justice and the Effectiveness of International Law} (Collected Courses of the Xiamen Academy of International Law, 2017); Harlan Grant Cohen et al. (eds), \textit{Legitimacy and International Courts} (Cambridge University Press, 2018); Geir Ulfstein, ‘International Courts and Judges: Independence, Interaction, and Legitimacy’ (2013) \textit{46 NYUJ Int’l L. & Pol.} 849
\item\textsuperscript{28} Shany (ibid) 97
\item\textsuperscript{29} Ibid 227
\item\textsuperscript{30} James L. Price, ‘The Study of Organizational Effectiveness’ (1972) \textit{13 SOC. Q.} 3, 3-7
\item By personnel, this thesis refers to members and staff of the Court. However, this thesis focuses on the judges of the ECOWAS Court.
\end{enumerate}
\end{footnotesize}
quality rather than the effectiveness of the judiciary, and the former should not be taken to encompass the latter or vice versa.

In assessing the effectiveness of a court, the first step is usually to identify the aims and objectives of the court, followed by an assessment of whether these aims and objectives have been met. This is otherwise known as the outcome assessment. Another dominant indicator applied in the assessment of the effectiveness of international courts is the rate of compliance with their decisions.\(^{32}\) Shany defined compliance as “a causal relationship between judicial decisions and state practice, leading to a convergence of the two”.\(^{33}\) It has been described as the litmus test of judicial effectiveness.\(^{34}\)

However, as a high level of compliance has been recorded in both effective and ineffective international courts, compliance may not be a dependable indicator of judicial quality.\(^{35}\) Another limitation to the viability of compliance as a reliable indicator of judicial effectiveness or quality is that it is not straightforward. It is hinged on and shaped by political and social dynamics and therefore not reliable for measuring either concept.\(^{36}\) Additionally, as it does not reflect the value of the process of deciding by the court, it does not provide a suitable variable for measuring judicial quality.

The impact of an international court on the rule of law and the legal regime of member states is another indicator used to measure the effectiveness of courts.\(^{37}\) This indicator measures how the decisions of a court have informed government policies and judicial and legislative reforms. It is suggested that the impact of international courts is the best way to measure their effectiveness.\(^{38}\) Alter, inclined in favour of impact, argues that “the real effectiveness test....is not compliance but the counterfactual of what the outcome would have been absent

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\(^{32}\) Yuval Shany, ‘Compliance with Decisions of International Courts as Indicative of their Effectiveness: A Goal-Based Analysis’ International Law Forum Research Paper No. 04-10 (October 2010)

\(^{33}\) Ibid 3


\(^{35}\) Ibid 261

\(^{36}\) Alexandra Huneeus, Compliance with Judgements and Decisions in Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (eds) The Oxford Handbook of International Adjudication (2014) 438


\(^{38}\) James Thuo Gathii (ed), The Performance of Africa’s International Courts (Oxford University Press 2020)
the international court. Those concerned with effectiveness should ask whether the international court contributed to moving a state in a more law-complying direction”. The use of impact as an indicator of effectiveness is not without criticism.

The major limitation of this indicator is the difficulty of crediting a change in government policies solely to court decisions as that is only one of many variables that may have resulted in the change. Also, the ability of international courts to impact policies and reforms in member states varies from one court to another. Factors such as legitimacy, sovereignty, political will, and social differences play a huge role. Thus, the use of impact as an indicator does not provide consistency. While the impact of the decision of an international court may reflect the quality of its judgement, this is merely a possible result rather than evidence of judicial quality. In other words, while the quality of an international court's decision may impact policy changes in member states, the failure or refusal of member states to embed a court’s decisions in their policies does not necessarily indicate that the decisions lack the necessary level of quality.

Three key variables are identified in this thesis for measuring the quality of international judiciaries. They are judicial independence, judicial accountability, and judicial transparency. To put it succinctly, to achieve a quality court, judicial independence must be present alongside an effective legal framework of checks and balances to equalize independence. This is where judicial accountability and transparency come into play.

This thesis measures the quality of the international judiciary while focusing on the ECOWAS Court and comparing the same to other international courts and national courts across West Africa. It includes a critical literature review that reflects the legal and political science scholarship on the subject matter; a detailed study of the key concepts and factors that determine international courts’ quality, and a detailed analysis of the relationship between the international courts and other actors of the international judiciary. These issues are


explored from a conceptual and methodological perspective. This research undertakes doctrinal and comparative studies and analyses of various national courts and international judiciaries.

1.2. Research Questions, Aims and Objectives

1.2.1. Aims and objectives

The research in this thesis was primarily born out of the perceived gap in the existing body of literature on the variables and concepts connected to the quality of international courts. As noted above, the focus of scholarship has been skewed towards other related yet different concepts such as the effectiveness\(^{42}\) and the legitimacy\(^{43}\) of international courts. Also, the body of work available on all of these concepts is focused on the more developed ICJ, the International Criminal Court (ICC), and the European Court of Human Rights (ECtHR). Other less developed courts, including the ECOWAS Court, have not enjoyed a similar level of attention.

Thus, this thesis aims to contribute to the existing literature on the variables of judicial quality by providing holistic analyses of all three. By focusing on the ECOWAS Court, the thesis aims to bridge the gap in scholarly attention directed toward the Court.

1.2.2. Research questions

To bridge these gaps and achieve the aim of this thesis, this research seeks to answer the following research questions:

1. What is judicial quality, and how is it measured?
2. What are the variables for measuring the quality of international judiciaries, and how are these variables interrelated?
3. How do these variables apply to and operate in the ECOWAS Court?


4. What possible reforms are needed to improve the quality of the ECOWAS Court?

1.3. Research Methodology

This thesis aims to make a novel contribution to the literature on the quality of the international judiciary, specifically the ECOWAS Court. The attention of scholars is mostly directed to more developed supra-national courts, such as the ECtHR, and they have been assessed using diverse methodologies which offer different perspectives. These methodologies include the socio-legal methods where researchers interview judges and other actors to gain their insight. In contrast, there is very limited literature assessing the ECOWAS Court, its legal regime and its rapidly growing body of case law.

In this largely unexplored territory, therefore, this thesis adopts the traditional methodologies of doctrinal analysis and comparative law, opening up new vistas. Later studies might well deconstruct judgments from diverse vantage points but first, there is a value in examining the legal regime of the Court, opening up the treasure-trove of judgments from ECOWAS, and comparing them to the jurisprudence of other regional courts.

Accordingly, the starting point of this thesis is to analyse the provisions of the ECOWAS Court regime and establish the current provisions on judicial independence, accountability, and transparency. To achieve this, the first and most important methodology adopted is doctrinal legal analysis, identifying, analysing and synthesising the main themes. As Hutchinson and Duncan stated, the doctrinal research method best typifies a distinct legal approach to legal research. It provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps predicts future development. The doctrinal research method is intrinsic to legal research. It is the most dominant method used in law research and more often than not, the starting point for legal research.

The first of the three research questions discussed in Section 1.2.2. above requires an analysis of the concept of judicial quality and the identification of its variables. To do so, the doctrinal method is used to collect and assess academic articles, international standards, and various...

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44 Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do : Doctrinal Legal Research’ (2012) 17 Deakin Law Review 83, 84

45 Mike McConville and Wing Hong Chui, Research Methods for Law (Edinburgh University Press 2007)
web articles. In terms of the second research question, the doctrinal method is used to assess statutes, court protocols, codes of conduct and ethics, resolutions, directives, and other instruments to understand the operation of the variables in the selected court. These analyses help identify the gaps in the ECOWAS Court regime and inform recommendations for reform. The doctrinal method is also used to critically analyse various provisions of international courts, rules of conduct, and case law, all of which are then synthesised to determine the empirical and theoretical research.

With comparative legal analysis, laws, legal doctrines, and their operation transcend barriers erected by languages, legal systems, and borders.46 In the words of Adams,

“Nearly any claim we make as lawyers, as well as every distinction we draw, will implicitly or explicitly be set against something else. A legal arrangement can only be qualified as satisfactory or good because there is another arrangement by which it can be measured......comparing, in other words, is a fundamental principle of legal research”.47

The comparative legal method enhances legal research by improving communication between legal systems. It highlights their similarities, legal transplants48, and differences, identifies the gaps and seeks to bridge them.49 It also expands the mind of the legal researcher. In answering the question on the importance of comparative law research, Glenn50 stated that it is a vital instrument of learning and knowledge and an instrument of evolutionary and taxonomic science.51 He also stated that it helps to contribute to one’s legal system and to achieve the harmonization of law.52

49 Uwe Kischel and Andrew Hammel, Comparative Law (Oxford University Press, 2019) p.47
51 Ibid 65
52 Ibid
The basis for comparative legal analysis in this thesis is functionalism which approaches comparative research from the angle that although the legal regimes of the compared jurisdictions differ, their aims on a particular subject matter are similar.\textsuperscript{53} The comparative research method is used here to achieve an evaluation of the understanding of the quality of the judiciary in different legal regimes. In this thesis, to measure the quality of the ECOWAS Court, its independence, accountability, and transparency are compared to those of other international courts, particularly the ECtHR. The yardstick for the comparison with the ECtHR is the similarity in their jurisdiction. Both the ECOWAS Court and the ECtHR are regional courts that adjudicate mostly and solely, respectively, on matters of violation of human rights. The ECOWAS Court is also compared with the national judicial systems of the ECOWAS member states based on the relationship between the states and the Court and the similarities in their legal interests. This comparison aims to establish which courts have the best provisions in terms of quality and whether the legal regime of the ECOWAS Court needs to be reformed.

In comparing the ECOWAS Court with domestic judiciaries, this thesis focuses on the judiciaries of anglophone West African countries, especially the Federal Republic of Nigeria. The decision to do so is influenced by a couple of reasons. First is the language barrier faced by the author. Being from Nigeria and having no knowledge of French or Portuguese, the author would be required to employ the service of an interpreter to understand the legal regime in other West African countries. Also, this may affect the ability of the author to conduct research and analysis on the legislation in the francophone and lusophone member states. Secondly, the legal regime of the ECOWAS Court is closely modelled after those of the anglophone member states, particularly Nigeria. Thus the judiciaries in anglophone member states offer the best comparators.

This is not to deny the value there will be in later analyses of the ECOWAS Court from diverse critical theorists. It is important, however, to be clear that doctrinal and comparative law methodologies are themselves both theoretical and critical. They are efficient in terms of the limits of time, funding and accessibility which face a doctoral student. Also, the level of bureaucracy involved in assessing the judges for interviews makes it almost impossible for doctoral students and other early researchers. An established professor of an American law

school will find African judges and other court officials open to being interviewed, for example, but a doctoral student could commit much time and effort to seek interviews without success.

However, the main reason for concentrating on the doctrinal and comparative law methodologies is not the drawbacks of other approaches. It is a positive need to transform awareness of the role of the ECOWAS Court beyond West Africa, to show how a new Court in this particular region faces significantly different challenges and opportunities to those of better-known courts, and to address the judicial trilemma as the most urgent priority, given how this Court can set standards for its member states’ domestic legal systems.

1.4. Contribution to Existing Knowledge

This introductory part of this thesis has so far identified the aims and objectives of the research while attempting to place it within the existing literature on the subject area. As this thesis will show, the available scholarship and legal documents related to the quality of international courts focus mostly on global and European courts while the literature available on the ECOWAS Court focuses mainly on its human rights jurisdiction.

Earlier works on the independence, accountability and transparency of international courts have been assessed, for the most part, as separate non-related concepts. This thesis contends that the three concepts must be assessed interrelatedly and interconnectedly and that all three must be maintained simultaneously to measure the quality of a court. The interconnection and interrelation of these three concepts are the foundation upon which the arguments in this thesis are made.

The thesis will conclude that the quality of the ECOWAS Court rests on the simultaneous operation of the three concepts. Judicial independence presents judges with the freedom to decide matters based on facts and law while being free from all forms of influence. Judicial accountability ensures structural checks on the enjoyment of the freedom gained from independence while judicial transparency provides mechanisms for openness.

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54 A scholarly work which attempts to examine all three concepts is one by Dunoff and Pollack in their article ‘The Judicial Trilemma’ An in-depth analysis of this article is presented in Part IV below. Jeffrey L Dunoff and Mark A Pollack, ‘The Judicial Trilemma’ (2017) 111 AM. J. of Int’l L 225
Thus, the first contribution of this thesis to the body of literature is to establish that to assess the quality of the court, all three concepts must be assessed individually and as a triad to provide an analytical and synthesised account of various concepts and factors that determine the quality of an international judiciary and establish their interconnections.

The second contribution this thesis aims to make is to assess the quality of the ECOWAS Court specifically. As earlier stated, the decision to focus on this Court was borne out of the obvious gap created by the availability of limited literature on the Court. Although human rights protection is a vital aspect of its many contributions to the region of West Africa, the continuous focus on this area of the Court’s jurisdiction has resulted in a neglect of other equally important areas. As earlier stated in Section 1.1, the quality of the Court is vital to its performance therefore, more attention must be paid to it.

As will be discussed in Part II of this thesis, the recent scholarship by Gathii is a celebrated and refreshing attempt at assessing the performance of the Court. However, the approach adopted in this book simply highlights the contributions of the various African international courts outside the achievement of their goals. It is safe to conclude that there have been no scholarly writings on judicial quality in the ECOWAS Court.

To bridge this gap, this thesis will analyse the independence, accountability, and transparency of the Court in a bid to assess its quality and ultimately recommend possible reforms to enhance the same.

1.5. Research Structure

This thesis is divided into five broad parts, with a total of 11 chapters. The first part contains two chapters. The current chapter comprehensively introduces the research. It provides a background context for the research in the thesis, sets out the aims and objectives and highlights the research questions. The chapter also discusses the research methodology and the intended contribution to existing scholarship. In Chapter 2, this thesis provides a critical literature review that analyses the existing scholarship on the subject matter in both the field of law and social sciences. The literature review sets the tone for situating the thesis within the existing scholarship.

55 Gathii (n 38)
Part II of this thesis focuses on providing a comprehensive introduction to the ECOWAS Court. It encompasses a history of the Court’s establishment and development from inception. It also analyses the Court’s legal and structural framework and the role of the Court in the development, peace, and security in the region. Lastly, Part II enumerates the challenges and limitations of the Court while appreciating its successes.

Part III assesses the independence of the ECOWAS Court. It is divided into 5 chapters. The first provides a background to the concept of judicial independence while the other chapters go in-depth on the selected indicators of independence i.e., selection of judges, security of tenure, privileges and immunity, and financial security. In Part IV this thesis assesses the accountability and transparency of the ECOWAS Court and analyses the indicators of both variables. The final part, Part V, interrogates the relationship between independence and accountability and the interrelation between all three variables. It also concludes the thesis and provides recommendations.

1.6. Limitations of the Thesis

The quality of the judiciary is a broad concept for which various interpretations are possible. The angle taken in this thesis is one of many. Other viewpoints include the assessment of the quality of the decisions of the courts in terms of their ability to influence law reforms and modify behaviour in member states. It may also be examined from a goal-based angle i.e., the ability of a court to achieve the aim for which it is established regardless of how it is done. While this thesis recognises these other viewpoints, it is impractical to assess them all due to the limited time and word count in this thesis. They are, however, viable angles that may further expand the understanding of the concept of judicial quality.

Another limitation of this thesis relates to the narrowing of the scope of the assessment to the independence, accountability, and transparency of judges only. The other members of international courts i.e., registrars, prosecutors, interpreters, translators, office managers, and other clerical staff play key roles in the operation of the courts, their day-to-day functioning, and the achievements of their aims. It is vital, therefore, that they perform their duties independently and transparently while being accountable for their conduct and behaviour. Thus, it is important to examine their independence, accountability, and transparency and how these affect the quality of the courts. While this thesis cannot include
this assessment due to the limited time available and word count permitted, it is another viable research topic that will further enhance the understanding of the quality of a court.

Lastly, the research in this thesis was conducted between October 2018 and April 2022. Therefore, academic articles, legal instruments, policies, international standards, and other relevant literature published after the above date are not included in the research.
CHAPTER 2

2. LITERATURE REVIEW

2.1. Introduction

The last few decades have seen a significant increase in the number of international courts.¹ A correlating effect of this increase is the expansion of their jurisdictional borders and the broadening of the scope of their activities². The international courts currently play more prominent roles in the adjudication of international disputes than ever before with international courts judges adjudicating matters ranging from social and political disputes to economic and human rights issues, with international courts covering the fields of nuclear energy disputes³, human rights claims⁴, genocide and war crimes⁵, and trade disputes⁶. Also, on the increase is the establishment of hybrid tribunals set up on the account of specific events such as the Extraordinary African Chambers situated in Dakar, Senegal, established in 2013 by an agreement between the African Union and Senegal for adjudicating matters of international crimes committed in Chad between 1982 and 1990⁷.

It is not farfetched that the developments in the spheres of the international judiciary have resulted in increased attention on several issues surrounding the activities, structure, effectiveness, legitimacy, quality, and credibility of these international courts and the suitability of the judges and other officers of the court. This is because the multiplication of

² See, for instance, the East African Court of Justice established in 2001, the International Criminal Court established in 2002, the SADC Tribunal established in 2005, the Caribbean Court of Justice established in 2005, the African Court on Human and People’s Rights established in 2006, the Special Tribunal of Lebanon established in 2009 and the African Court of Justice established in 2009 amongst others.
³ See, European Nuclear Energy Tribunal
⁴ See, African Court on Human and Peoples’ Rights; European Court of Human Rights.
⁵ See, the International Criminal Court
⁶ See, COMESA Court of Justice and the Appellate Body of the World Trade Organisation.
⁷ See the Special Court for Sierra Leone 2002-2013; Extraordinary Chambers in the Court of Cambodia 2006- to date; and the Special Tribunal for Lebanon 2009- to date.
international courts has a huge effect on international law and international relations. In this thesis, the quality of these international courts vis-à-vis the national courts is of particular interest. It has been argued severally by scholars like Mahoney, Mackenzie, and Sands that there is a need to harmonise the activities of the international judiciary with the principles that contribute to guaranteeing an effective and well-functioning judiciary.

It has been suggested that to analyse the overall performance of the international judiciary, the same must be placed on the standards expected of that of domestic judiciaries. What these claim fails to consider, however, is the fundamental differences in the organisation, structure, jurisdiction, and source of legitimacy between the international judiciary and the domestic judiciaries which may pose stumbling blocks when trying to apply the standard of domestic courts to international courts. Domestic courts operate within a unified legal system with a clear hierarchy and established enforcement mechanism while international judiciaries usually lack a hierarchical system and an enforcement mechanism.

Therefore, they depend on the member states in many aspects of their operation. Another major factor that makes it difficult to transpose domestic judicial independence to international courts, at least in the case of the ECOWAS Court, is the variety of legal systems represented within the Court which makes it difficult to select which member state’s judiciary should be used as a benchmark. The inevitable role played by the member states in certain aspects of the operation of international courts such as the selection of judges and their remuneration is also a limitation. Thus, the independence of domestic courts cannot be strictly transposed to their international counterparts. However, the logic of independence in domestic courts can provide a guide for assessing judicial independence in international courts.

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10 Mahoney (n 9) 315 and 326; Eric Posner and John C Yoo, ‘Judicial independence in International Tribunals’, (2005) 93 CALIF. L. REV. 1, 12
11 ibid
The international judiciary has been said to thrive only with a perfect interplay of some pivotal concepts. The first and most prevalent is the concept of judicial independence, the second, which is often closely linked to the first, is the concept of judicial accountability, and the third is judicial transparency. All principles that play roles in ensuring the quality of international law are connected to one or more of these concepts. This literature review will, therefore, establish the current scholarships on and around these principles in international courts. It will also provide an analysis of the current state of scholarship on the ECOWAS Court in a bid to establish the gap existing in terms of assessing the concepts relating to its quality.

A major scholarly influence on this thesis is the work of Dunoff and Pollack, “The Judicial Trilemma” which offers a refreshing challenge to prevailing narratives about the judicial decision-making process in international courts and tribunals. In summary, the authors argue that in a bid to maintain judicial independence, transparency, and accountability judicial systems face inherent trade-offs, such that any given court can maximize two, but not all three, of these concepts. The main contribution of the article is the holistic account of the interconnectedness of the three concepts. Before this, these concepts have been analysed in an isolated matter thereby leading to a total lack of balance.

This thesis aligns with the position of the authors and suggests that the more an international court can balance these three concepts, the better the quality of the court. Also, the concepts must be assessed with their interconnectedness in mind. To put simply, Judicial independence ensures judges are free from influence and control. However, it cannot guarantee that they decide disputes only upon the facts and the law, without any ideological considerations. Indeed, an independent judge will not be influenced by the ideological convictions of other actors. However, even a highly independent judge might still apply the law through the lens of his ideological views, which he cannot simply set aside. Therefore, an independent judge is not free to decide disputes solely upon the facts and the law, thereby discarding all ideological considerations. Judicial independence only solves one aspect of the problem of law application in an ideology-free way. In other words, judicial independence is merely a necessary but not a sufficient indicator for measuring judicial quality.

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13 Dunoff and Pollack (ibid) referred to the first three concepts as the judicial trilemma
14 Dunoff and Pollack (n12)
Judges are not empty vessels that the litigants fill with content. Instead, all judges are influenced by the values they grew up with. Socialization in the country of origin will inevitably shape the legal and moral understanding of a judge and thus also influence them during their time on the bench. This is where the concepts of judicial accountability and transparency come to play. A more detailed evaluation of the Judicial Trilemma is presented in section 2.5.2. below.

2.2. Judicial Independence

A key attribute of a successful and quality judiciary is independence. Following the provisions of the United Nations Basic Principles, the Bangalore Principles, the Beijing Statement and the Burgh House Principles, the concept of judicial independence encapsulates the ability of judges to adjudicate without the interference of other actors (i.e., member states, intergovernmental organisations, private litigants, and civil society).

Before going further into the concept of judicial independence and its indicators, it is important to analyse the debate on the desirability or otherwise of judicial independence. The nature of the relationship between international courts and the states that create them continues to be an issue for debate among scholars, and their arguments have been crystallised into two theories – the Principal-Agent (P-A) theory and the Principal-Trustee (trusteeship) theory. There is a long-standing debate among scholars as to the proper qualification for the relationship between international courts and the member states that create them. While some scholars, like Hawkins, Jacoby, Elsig, and Pollack, consider it a P-A relationship, Alter analyses it from a trustee-beneficiary perspective. The two theories disagree on the nature and degree of control the states retain over the affairs of the international courts and the rationale for delegation.

15 Posner and Yoo (n 10) 1
The P-A theory, which is dominant is based on the rational actor theory used by political scientists in analysing domestic and international politics.\textsuperscript{19} The P-A theorists argue that rational actors - voters, legislators, or in the case of the international judiciary, member states - delegate power to either executive or judicial agents to lower the transaction cost of policymaking.\textsuperscript{20}

Hawkins and Jacoby describe the P-A relationship as a “conditional grant of authority from a principal to an agent in which the latter is empowered to act on behalf of the former”.\textsuperscript{21} The states, being the principal, are the authors of the contract and have the sole power to influence the contract while the international courts as the agent are dependent on and derive their authority from the principal who may change the contract at will.\textsuperscript{22} The P-A theory has been used to contend that member states control what merely appears to be independent international courts.\textsuperscript{23} The P-A theory postulates that the principal retains leverage over the agent.\textsuperscript{24} In the case of international courts, the member states exercise this power through the appointment and reappointment process, remuneration, the sanctioning and disciplinary process, or cutting of the international courts’ budget.\textsuperscript{25} This theory suggests that the motivation behind the establishment of international courts is the desire to establish a fair third-party judicial system largely protected from political influences and enjoy an ample but not absolute degree of independence.\textsuperscript{26}

The P-A theory is intuitively compelling as it does not seem logical to delegate such important judicial power to independent actors who are not agents of the delegator. However, where the goal of delegation is to enhance the credibility of the principal by appointing and empowering independent qualified professionals, the P-A theory fails to serve the purpose.


\textsuperscript{21} Hawkins and Jacoby (n 16) 5

\textsuperscript{22} Alter (n 18) 138


\textsuperscript{24} Elsig and Pollack (n 20) 396

\textsuperscript{25} Alter (n 23) 34

\textsuperscript{26} Ibid
The P-A theory has been criticised by trusteeship theorists who propose that the delegation of power to international courts differs from other types of delegation. These theorists consider the delegation to international courts as a distinct logic of delegation with the courts considered as trustees independent of the states. Alter describes the P-A theory as “clear, fairly parsimonious and commonsensical”, but adds that it is a slippery theory.

Alter argues that international courts are not to be considered agents because the control mechanism accentuated by P-A theorists is not probable as a means of influencing the international courts. She alternatively considers international courts as trustees elected based on their reputation and qualifications, conferred with authority to exercise judicial powers independently on behalf of the state members who are the beneficiaries. The trusteeship theorists consider the analysis of the P-A theorist allowing the principal control over the affairs of the judicial agents ineffective. They alternatively propose that the powers of the member-states principal are limited, and more importance should be placed on the legitimacy and independence of the court. The core of the trusteeship theory is that the presumptions should be geared in favour of the independence of the international courts and not the controlling power of the member states.

However, no one theory is suitable for defining the relationship in all international courts. The positions taken by these scholars are largely influenced by whether a court being accessed is a full-representation court or a selective representation court. For instance, Elsig and Pollack concluded, while carrying out their analysis on the Appellate Body of the World Trade Organisation (WTO AB), that the relationship between the parties is a principal and agent one. The WTO AB has only seven seats on the bench which means not every member state is represented thus the judges are considered agents of all the member states. Going by the argument of Elsig and Pollack, this would not be the case for a full representation court with seats on the bench equal to the number of member states in which case all member

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27 Elsig and Pollack (n 20)
28 Alter (n 23) 39
29 Alter (n 18) 138
30 ibid 139
31 Elsig and Pollack (n 20) 393
32 Alter (n 23) 55
33 Elsig and Pollack (n 20) 399-400
states are equally represented, and judges are trustees of member states. Alter, on the other hand, suggests that the appointment power of member states has been “radically decentralised”, and each state can only influence the nomination of its own candidates, thereby making it difficult for member states to influence the bench.

To apply the position of these schools of thought to the ECOWAS Court, although as Alter stated, the promise of delegation to international courts is that they provide a legal and political space where regular politics and power disparities between parties do not influence the interpretation and application of the law, the autonomy and independence of the ECOWAS Court from its member states cannot be established. As the autonomy of the trustee is at the core of the trusteeship debate, the Court cannot be considered a trustee of the member states.

The prominent role played by the Heads of States and Governments of ECOWAS member states in the functioning, remuneration, dismissal, and sanctioning of the judges presents a P-A relationship. However, as a member state or a collection of member states cannot directly influence the Court or change the terms of the employment of the judges, the P-A debate does not apply stricto sensu. In either case, P-A or trusteeship, the judiciary is expected to be accorded independence albeit in varying degrees.

Judicial independence encompasses a series of factors that promote the autonomous functioning of the judiciary from other actors. A recurring feature in the definition of judicial independence is the delivery of legal opinions by the judges without constraint from the influence of other actors. It covers the internal independence of the international courts and external independence. Internal independence suggests that every judge must retain a level of independence from others even within their judicial system. External judicial

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34 Alter (n 18)
independence is the more familiar of the two. It suggests that international courts and their judges should be independent of all external factors and actors.\(^{37}\)

The issue around the concept of judicial independence is regarded as a recent development highlighted by some events such as the controversy surrounding the disruption of the reappointment of a member of the WTO AB by the United States in 2016.\(^{38}\) Similarly, in September 2018, Bolton, the National Security Adviser to the President of the United States, referred to the ICC as illegitimate and wished for death on the Court. He stated, “\textit{we will let the ICC die on its own.....after all, for all intents and purposes the ICC is already dead}”.\(^{39}\) He threatened that judges would not be allowed into the United States and might be prosecuted if they launched an investigation into American citizens.\(^{40}\) These statements came at a time when the ICC was planning to investigate the American soldiers in Afghanistan for war crimes, torture and genocide.\(^{41}\)

The aftermath of this incident was the resignation of a permanent judge of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Christoph Flugge. Flugge, who had served as a permanent judge on the ICTY from 2008 until his resignation in January 2019, stated that the nonchalance of the UN towards the removal of Judge Aydin Sefa Akay from the International Residual Mechanism for Criminal Tribunals based on the allegations of the Turkish government “had set an alarming precedent”.\(^{42}\)

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Indeed, in April 2019, Fatou Bensouda, Prosecutor of the ICC, confirmed that the United States authorities had revoked her visa for entry into the United States of America.43 The ICC subsequently released a press statement, which can be regarded as succumbing to pressure mounted by the US government, stating that the Pre-Trial Chamber II of the ICC had unanimously rejected the prosecutor’s request to proceed with the investigation of war crimes in Afghanistan on the basis that to go on with the investigation will not serve the interest of justice.44

Unlike domestic courts, which have been extensively analysed in this aspect,45 interest in the independence of the international judiciary only grew in the last couple of decades.46 Judicial independence is expedient to the quality of the judicial process and for the existence of a system governed by the rule of law.47

In the past, international organisations have attempted to establish and amplify the standard for judicial independence. The results of most such efforts are channelled primarily towards domestic courts. The United Nations Basic Principles on the Independence of the Judiciary (UN Principles)48 is an example that readily comes to mind. The UN Principles were adopted in 1985 and established basic principles purported to guide member states of the UN in securing and improving the independence of their national judiciaries. They provide, among other things, for the enshrinement of judicial independence in the constitutions of member


46 Mackenzie and Sands (n 9)


states and place an obligation on the governments, their institutions and other actors to recognize and comply with the provisions of the law.\textsuperscript{49} They further provide that judges be free to decide matters impartially without any direct or indirect restrictions, influences or pressure from other actors.\textsuperscript{50} Also, they provide for the qualification and selection process of judges\textsuperscript{51}; the freedom of expression, belief, and association of judges\textsuperscript{52}; the tenure of office and condition of service\textsuperscript{53}; conditions and process of suspension or removal of judges\textsuperscript{54}; and the immunity of judges\textsuperscript{55}.

Since its adoption, the UN Principles have informed the establishment of other principles, opinions, and rules of conduct aimed at establishing basic standards and rules to ensure the independence of the judiciary. The Bangalore Principles of Judicial Conduct which draw from, among other source materials, the UN Principles, were adopted in 2002 by the Judicial Group on Strengthening Judicial Integrity. It is an attempt to provide standards of ethical conduct for judges; guide the regulation of judicial conduct and assist others to understand and support the judiciary.\textsuperscript{56} The Bangalore Principles provide more detailed protection of judicial independence. Like the UN Principles, it provides for the exercise of judicial function independently and free of interference, threats, inducements, pressure, and influence.\textsuperscript{57} It, however, extends the requirement to the independence of a judge from other judges and other officers of the court.\textsuperscript{58} It also places the duty of impartiality, integrity, propriety, equality, and diligence on the judges.\textsuperscript{59}

Also informed by the UN Basic Principles on the independence of the judiciary is the Consultative Council of European Judges’ Opinion No1 on the Standards for the Independence of the Judiciary and the Irremovability of Judges. It contains recommendations for European Union member states and covers the rationale of judicial independence and the level of its

\begin{center}
\textsuperscript{49} Ibid Paragraph 1
\textsuperscript{50} Ibid Paragraph 2
\textsuperscript{51} Ibid Paragraph 10
\textsuperscript{52} Ibid Paragraph 8
\textsuperscript{53} Ibid Paragraphs 11-14
\textsuperscript{54} Ibid Paragraphs 17-20
\textsuperscript{55} Ibid Paragraphs 15 and 16
\textsuperscript{56} Bangalore Principles (n 47).
\textsuperscript{57} Ibid value 1
\textsuperscript{58} Ibid
\textsuperscript{59} Ibid values 2-6
\end{center}
guarantee; the appointment process; tenure; irremovability; the process of sanctioning judges; remuneration; and internal independence.  

The only attempt to elaborate on the principles of general application of judicial independence in international courts is the Burgh House Principles. They are the product of research carried out by the International Law Study Group on the Practice and Procedure of International Tribunals and the University College London’s Centre for International Courts and Tribunals. Before this, no attempt had been made to establish any common set of minimum standards for the independence of the international judiciary.

While the Burgh House Principles set out vital and relevant standards, They did not take into consideration the structure and affairs of most international courts. They only articulates the opinions of the study group. Most of the Members, advisers, and observers in the group were European jurists, scholars, judges and former judges and their African, Asian, and South American counterparts were largely excluded. They, therefore, considers mainly the ICC, ICJ, WTO AB and the European Union Courts.

However, the group, taking cognizance of the challenges faced in the selected international judiciary; the peculiarities of the courts and the general principles of international law, proposed a set of principles on the independence of the international judiciary to apply to international courts and their judges that covers an array of standards on independence and freedom from interference. While the ECOWAS Court and other African courts were not necessarily considered in the establishment of the Burgh House Principles, as the general principles of international law are duly considered, the standards and indicators of judicial independence proposed provide a suitable starting point.


61 Mackenzie (n 8) 247

62 ibid


64 Burgh House Principles (n 37) appendix 6


2.2.1. Elements of judicial independence

As per the recommendations of the Burgh House Principles, a few factors have been recognised by scholars as aiding the interference of the international courts’ independence.\(^{65}\) These include the appointment process, tenure and reappointment, service and remuneration, and privileges and immunity. All these factors work together to determine the independence or otherwise of an international court or international judicial system. Most often, the statutes and rules establishing international courts and their various protocols set out the general terms such as the criteria for qualification of judges, the selection process, the requirements for independence and impartiality and sometimes gender parity. Often, these protocols are accompanied by more detailed rules of conduct. However, while some international courts have strict rules to cover these elements, others have more flexible rules and rely largely on international law provisions.\(^{66}\)

2.2.1.1. Appointment and selection process

The selection process of judges for international courts is significant to the operation and efficacy of that court. The smooth and effective delivery of the duties of an international court is best achieved when the bench is comprised of the most qualified judges elected on merit.\(^{67}\) Also, the appointment process is considered the first and most pressing source of threat to the independence of the judiciary.\(^{68}\) Various models of selection with different factors play a role in the model used by each court.\(^{69}\) However, as Mackenzie rightly posits, there is a dominating role of politics in the structure of the international courts and the selection process.\(^{70}\)

Generally, the appointment of judges to international courts involves two separate processes. The selection process of international judges is typified by control from member states of the establishing organisation.\(^{71}\) The first process, nomination, involves a domestic process while

\(^{65}\) Mahoney (n 9); Mackenzie and Sands (n 9) 276; Cesare Romanò, Karen J. Alter, and Yuval Shany, *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014)

\(^{66}\) The Rome Statute of the International Criminal Court.

\(^{67}\) Sands et al (n 63) 4

\(^{68}\) Mahoney (n 9)


\(^{70}\) ibid

\(^{71}\) Mackenzie (n 69) 6
the other, election, is an international process, thereby making both the member states and their governments as well as the international organisation active actors in the selection process.\textsuperscript{72}

i. Nomination

In most international courts, candidates for the bench are nominated by member states. The nomination process plays a vital role in determining the quality of judges eventually appointed to the bench. Although there are statutory requirements for the qualification of candidates for judicial office, most of the statutes, protocols, and rules of international court are mostly mum about the domestic nomination process.\textsuperscript{73} The rules governing the nomination process are often open-ended and without specific required procedures. As Alter stated, “there is no common education and no collective nominating process. International judicial appointees come from very different legal systems and backgrounds, and states have unilateral control over who they nominate”.\textsuperscript{74} In the ICC, for instance, judges may be nominated through the same procedure used in their member states to select domestic judges for their highest judicial offices.\textsuperscript{75}

Although this domestic nomination process is intended as a means of involving member states in the selection of judges adjudicating their matters, it has become highly politicised. Mackenzie et al found a deep involvement of government interference in the nomination process of the candidates, in a bid to influence the composition of the courts to favour their political preferences.\textsuperscript{76}

Arguments have been put forward by scholars to justify the role of member states in international judicial selection. Perez argued that the dominant part played by the member states in the appointment process is linked to their sovereignty.\textsuperscript{77} As international courts are created by the states, it is logical that the states attempt to establish systems to ensure that

\textsuperscript{72} ibid
\textsuperscript{74} Alter (n 18) 139
\textsuperscript{75} Rome Statute of the ICC (n 66) art 36 (4)(a)(i)
\textsuperscript{76} Mackenzie, Malleson and Martin (n 8) 65
\textsuperscript{77} Perez (n 38)
they have some control over some of the courts’ affairs.\textsuperscript{78} Mackenzie similarly stated that international courts are created by the member states, therefore, they are the principal and by extension, are entitled to play a role in the selection of the judges.\textsuperscript{79}

It has also been argued that the role of member states in the appointment of judges is a means for accountability\textsuperscript{80} and a mechanism for checks and balances.\textsuperscript{81} Perez further believes that the nominating power of member states is a good mechanism for promoting acceptance of the decisions of the courts.\textsuperscript{82} She, however, concedes that the process is prone to abuse by the member states.\textsuperscript{83} In a similar vein, McKenzie recognised the problem posed by the nomination process to the independence of the international judiciary. She stated that the international background of the judicial systems of international courts makes it challenging to rule out politics in the selection process.\textsuperscript{84}

The nomination process is highly politicised both in full and selective representation courts. It involves a great deal of lobbying and vote trading. The result of this is that judges are selected mainly on a political basis rather than based on their competence or qualifications. This leaves potential loopholes in the legitimacy and independence of the court.\textsuperscript{85}

The existing literature on the selection of international court judges has argued both for and against the involvement of member states in the nomination of judges. The focal points of the arguments have been the problem of politicisation of the process and the legitimacy enjoyed by the courts as a result of trust earned from the member states. What the arguments put forward so far have failed to consider is how the suitability or otherwise of the nominees affects the quality of the Court.

The involvement of member states in the nomination process is important in terms of the legitimacy of the courts and the sovereignty of the states. Thus, questions that need to be

\begin{footnotes}
\item[78] Laurence R Helfer and Anne-Marie Slaughter, ‘Why States Create International Tribunals: A Response to Professors Posner and Yoo’ [2005] 93 Cal L Rev 899
\item[79] Mackenzie (n 8)
\item[80] Ibid page 4
\item[81] Perez (n 38) 190
\item[82] Ibid 188
\item[83] Ibid 190
\item[84] Mackenzie (n 69)
\item[85] Perez (n 38) 189
\end{footnotes}
answered are whether or not the politics embedded in the nomination process across various international courts have been seen to affect the ability of the nominees to carry out their duties in accordance with the law; whether or not independent vetting bodies are needed to ensure that the most qualified candidate is nominated; and whether there is need for an internationally accepted minimum standard for the nomination process.

ii. Election

While the nomination of judges is done by states domestically, their nominees are subjected to an election process conducted by intergovernmental bodies. All international courts have an intergovernmental body charged with the responsibility of conducting elections of judges.\(^86\) Although the election process may seem less political than the nomination process or even free from political interference, it is equally filled with political lobbying and similar practices. First, the intergovernmental bodies conducting the elections are comprised of member states making the influence of their interests inevitably embedded in the elections. Also, the election of nominated candidates often involves a degree of regional and bilateral bargaining. States usually enter into voting agreements within their regions or subregions.\(^87\)

In the words of Patrick Lipton Robinson, the presence of political lobbying and bargaining in the election process cannot be denied. The former president of ICTY stated:

“There is, in my view, no significant difference between this process of election of judges of the Tribunal and the process of the election of persons to other UN bodies which do not carry out judicial functions. In both cases, intensive lobbying is done at the UN, and for those of you who are familiar with it, this would be done in the famous Indonesian lounge and in capitals. The judicial candidates take a seat in the lounge with their countries’ ambassadors to the UN or with the Missions Elections Officer. In a typical day, they would lobby twelve to fifteen countries…… Of course, as I said, lobbying is done in the capitals, and candidates from countries with embassies and consulates in a large number of countries have an advantage. But here’s the point: the

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\(^86\) In the International Court of Justice, the elections are conducted in the General Assembly and the Security Council; in the International Criminal Court, the Assembly of State parties to the Rome Statute of the ICC; in the ECOWAS Community Court of Justice, the Authority of Head of States and Governments

\(^87\) Mackenzie (n 8)
principal factor in a UN election, whether it is for a judicial or a non-judicial post, is not the profile of the candidate; it is the political profile of his country.”

He stated further that it is not to say that a candidate’s profile is altogether irrelevant, but a qualified candidate’s chance, no matter how qualified can be adversely affected by his or her country’s political standing and international relation. Lipton also acknowledges the presence of vote trading agreements between member states. He termed this horse-trading. Although the problem surrounding the selection process has been widely acknowledged, a solution has not been identified and, the judicial selection process in the international courts is left with a toxic system. The governing instruments of international courts generally stipulate the criteria for the nomination and selection of judges.

However, rules on how these criteria are adopted are not clear, as anecdotal evidence indicates that elections in international courts are highly politicised. Scholars have attempted to proffer solutions to this problem. Mackenzie suggests two possible solutions to this challenge. The first is to accept the politics involved in state nominations but devise a mechanism to make the process public and openly regulated. The second is to devise a system where the political influence is concealed and unilateral.

For Perez, there is a list of possible mechanisms to tackle this issue with reference to the CJEU and the ECtHR. According to her, the involvement of parliamentary bodies is a good mechanism for ensuring that the states’ nomination process is fair, and advisory panels for screening candidates and reviewing their qualifications and suitability. In the ECtHR, the Parliamentary Assembly of the Council of Europe (PACE) is the body that serves this function. Similarly, in the CJEU, a seven-person Advisory Panel, composed of former CJEU members, supreme court judges of member states and prominent lawyers, was set up in 2010 to present opinions on nominated candidates and their suitability. In the ICC, the Assembly of States

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89 Ibid 68
90 Ibid 71
91 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human and Peoples, Rights, art 11-14; Rome Statute of the ICC (n 66), art 36; Statute of the International Court of Justice, art 4; European Convention on Human Rights, art 21
92 Mackenzie et al (n 8) 4
93 Perez (n 38) 183
Parties established an advisory committee in 2011 to ensure that the best-qualified nominees are appointed.\textsuperscript{94}

The available body of scholarship has been thorough in examining the various selection processes in selected international courts and the political lobbying involved. However, the selection processes of judges in the various courts in Africa have not been considered in the existing literature. Also, there is a need to shift the scholarly focus away from the process and the inevitable political influence involved, to the establishment of independent bodies to review the selection and ensure that the selected judges meet the criteria for office. In courts where this has been established, the composition of this independent body and their alienation from the selected party are factors that must be assessed.

\textit{2.2.1.2. Security of tenure}

The tenure of judicial appointees varies from one international court to another. While some international courts have fixed terms of office or tenure for life\textsuperscript{95}, others have short renewable terms of office.\textsuperscript{96} The Bangalore Commentary defines secure tenure as a tenure for life, until the age of retirement, or for a fixed term; free from interference from the executive or other appointing authority in a discretionary or arbitrary manner.\textsuperscript{97} In a similar vein, the Beijing Statement provides that in securing the tenure of an international court judge, his or her tenure must not be subject to any form of alteration that would be to his or her disadvantage. It further states that disciplinary actions such as removal or suspension shall be determined in accordance with established standards of judicial conduct.\textsuperscript{98}


\textsuperscript{95} See, for instance, Article IX(3) of the Agreement Establishing the Caribbean Court of Justice \url{www.sice.oas.org/Trade/CCME/agreement_CCJ.pdf} which provides that judges would hold office until the age of seventy-two; Also, in the International Criminal Court, judges are elected for a non-renewable fixed term of nine years (Rome Statute of the ICC (n 66) art 36(9)(a)

\textsuperscript{96} See, for instance, Article 13(1) of the Statute of the ICJ (n 91), which provides that members of the Court shall be elected for a renewable 9-year term. Also, the judges of the European Court of Justice are elected for a renewable 6-year term (Article 253 of the Treaty on the Functioning of the European Union) \url{https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj}

\textsuperscript{97} Bangalore Principles (n 47) value 26(a).

\textsuperscript{98} Articles 21 and 22 of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region
Scholars seem to agree that shorter renewable terms of office are one of the factors affecting the independence of international courts. Different scholars have expressed their concerns about short renewable terms. Mackenzie opined that evidence exists, albeit, based on hearsay, that member states may use the process of reappointment to sanction judges who have failed to protect or comply with their national interest in their previous tenure. To ensure reappointment, some judges are therefore inclined to be loyal to the national and political interests of their nominating state.\(^\text{99}\) Voeten opines that to secure their jobs, judges are likely to decide in favour of their nominating states when adjudicating matters involving them.\(^\text{100}\) Apart from the relationship between the judge and the state, the other factors that may affect the reappointment of judges to the international courts include, the change in the government of the nominating states\(^\text{101}\) and regional problems\(^\text{102}\).

On the other hand, some scholars have argued against long non-renewable terms. They perceived that although short renewable terms may affect the independence of the court, the longer non-renewable terms would affect the accountability of the judges and for this reason, longer non-renewable terms are less popular. It has also been argued that longer non-renewable terms may hinder renewability, selective representation, and diversity.\(^\text{103}\) Assessment of the security of judges’ tenure in relation to how the same affects the overall quality of a court goes beyond the length and renewability of the tenure. Although this thesis acknowledges the importance of these factors and is more inclined to the short non-renewable term for the protection of the independence of the judges, it considers how tenure affects other variables of judicial quality and other factors affecting the security of tenure.

The discipline and removal of judges are other factors that have a great effect on the security of judges’ tenure and their ability to reach a quality decision in accordance with the law. The

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\(^\text{99}\) Mackenzie (n 69)
\(^\text{101}\) Mackenzie (n 69) 13
\(^\text{102}\) For instance, in 2017, British judge, Sir Christopher Greenwood failed to be re-elected, making it the first time in 71 years that the UK did not have a judge on the ICJ bench. This occurrence was linked to the move by the UK to exit the bloc, therefore causing the European Union not to feel the need to automatically support the United Kingdom anymore. Owen Bowcott, ‘No British Judge on the world court for the first time in its 71-year History’ The Guardian (20, Nov 2017) https://www.theguardian.com/law/2017/nov/20/no-british-judge-on-world-court-for-first-time-in-its-71-year-history.
\(^\text{103}\) Perez (n 38) 200
process of disciplining and removing defaulting judges, the standards to which the judges are
held, and the mechanism for enforcing the standard are major determinants of the security
of their tenure. These factors also represent a vital connection between judicial independence
and accountability. The available literature on the security of judges’ tenure focuses only on
the length of tenure, thereby leaving a gap that needs to be filled. This thesis, therefore,
examines all relevant factors to assess how the quality of the Court is affected by this
indicator.

2.2.1.3. Service and remuneration
One of the three minimum conditions for judicial independence as stated in the Bangalore
Commentary is financial security.\(^\text{104}\) It is defined as the right to a salary and a pension that is
established by law and not subject to arbitrary interference by the executive in a manner that
could affect judicial independence.\(^\text{105}\) Similarly, the Burgh House Principles enumerate
conditions to ensure the independence of international courts through service and
remuneration: the conditions of service (remuneration and adequate pension arrangement)
must be clearly specified in a legally binding instrument\(^\text{106}\); the conditions of service as
enumerated should not be subject to adverse changes during a judge’s tenure\(^\text{107}\); the
remuneration must be adequate and should be reviewed periodically to suit the cost of living
at the seat of the court.\(^\text{108}\)

While scholars have not paid much attention to the remuneration of judges in relation to its
effect on the quality of the courts, the inadequacy of judicial remuneration has been raised
within the courts on a few occasions, recently in the ICC. Although the remuneration of judges
is provided for in the Rome Statute of the ICC, the Assembly of States Parties still has a
substantial influence on the matter.\(^\text{109}\) In 2004, the Assembly adopted a resolution reviewing
the conditions of service and compensation that covers salaries, allowances, pension, health

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\(^\text{104}\) United Nations office on drugs and crime Commentary on the Bangalore Principles on Judicial Conduct
rinciples_of_Judicial_Conduct.pdf

\(^\text{105}\) Ibid 26(b)

\(^\text{106}\) Burgh House Principles (n 36) principle 4.1 and 4.4

\(^\text{107}\) Ibid 4.2

\(^\text{108}\) Ibid 4.3

\(^\text{109}\) Rome Statute of the ICC (n 66) , art 49
insurance, travel costs, and relocation cost for both full-time and part-time judges. Thirteen years later, in 2017, some judges of the ICC filed a claim against the court seeking a review and adjustment of their terms of service, i.e. their salary and health insurance. In December 2020, a judicial remuneration panel set up to make a recommendation on the matter issued its first report, making recommendations for the review and adjustment of the remuneration of full-time and part-time judges. However, on 7 December 2020, about two and a half years after the claim was filed, the Administrative Tribunal of the International Labour Organization dismissed it. The issue here is whether the living conditions in the Hague were static from 2004 to 2020. This is a question to be considered in other international courts as well.

The proper and adequate remuneration of judges affects the quality of judges in two major ways. It attracts qualified candidates to the judiciary and ensures that current judges are not influenced by monetary motivations. The current scholarship on the conditions of service of judges is sparse and does not assess them in relation to how they affect the quality of the judges. In this thesis, a connection is made between the condition of service, the independence of judges and how they eventually affect the quality of international courts. Issues such as the adequacy of the remuneration and other conditions of service in the ECOWAS Court and the lack of a formal mechanism for reviewing the conditions of service will be assessed in this thesis.

2.2.1.4. Privileges and immunity

The conferment of diplomatic privileges and immunity on international judges is imperative to the enhancement of their independence. These protections enable them to carry out their duties without fear of being sued or prosecuted for doing so.

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110 Resolution ICC-ASP/3/Res.3 Strengthening the International Criminal Court and the Assembly of States Parties (adopted at the 6th plenary meeting, on 10 September 2004, by consensus), Article 4 Microsoft Word - Res.3.doc


113 H. & Ors v ICC International Labour Organization Administrative Tribunal 131st Session Judgement No. 4354 triblexmain.fullText (ilo.org)

114 Mahoney (n 9)
The privileges and immunities accorded international court judges are usually provided for in the courts’ instruments.\textsuperscript{115} The Burgh House Principles, however, suggest minimum standards for the conferment of privileges and immunity. It provides that judges should have full diplomatic immunity, especially from claims arising from carrying out their judicial duties. It also provides for the protection of the judges and their families from adverse measures connected to the exercise of their duties.\textsuperscript{116} It further provides that the immunity of the judges can only be waived by the Court and only in exceptional cases where failure to do so would cause an obstruction of justice.\textsuperscript{117}

Although international courts provide for privileges and immunity to protect the judges and other officers of the court, the challenge is that member states sometimes fail to respect the rights conferred on the judges by these provisions. Thus, whether these provisions sufficiently protect the judges is highly debatable. Also, although absolute immunity may not be considered feasible, functional immunity leaves a loophole for other actors to exploit. Since the immunity does not extend to acts carried out outside of their official duties, other actors can fabricate claims on acts carried out outside of the performance of their duties.

For instance, in 2016, a judge of the International Residual Mechanism for Criminal Tribunal (MICT), Judge Aydin Sefa Akay, was arrested for allegedly being a member of a terrorist organisation responsible for a coup attempt in Turkey, raising speculations about his immunity. The president of the MICT made a request to the UN in October 2016, following which the UN asserted the diplomatic immunity conferred on the judge and requested his release and the cessation of all proceedings against him. Also, in January 2017, the president of the MICT ordered the Turkish government to release Akay from detention and to cease all proceedings against him, but the Turkish government failed to comply on both occasions.\textsuperscript{118}

The Turkish government through its permanent representative to the UN stated that the charges brought against Akay were not related to his judicial functions as a judge of the MICT. He stated also that the applicable instruments, including Article 29 of the Statute of the MICT

\textsuperscript{115} See, for instance, of the Rome Statute of the ICC (n 66), art 48
\textsuperscript{116} Burgh House Principles (n 36) principle 5
\textsuperscript{117} ibid
do not confer judicial immunity from the Turkish judicial authority for acts performed outside his judicial duties.\textsuperscript{119} He was subsequently convicted by a Turkish criminal court and sentenced to seven years and six months in prison. \textsuperscript{120}

In the case of Judge Aydin like many other cases, the problem is that the judges are only accorded functional immunity.\textsuperscript{121} The most disturbing turn of events, in this case, is the failure of judge Aydin to be re-elected. This, according to Asar “is a backwards step for the international criminal justice system”.\textsuperscript{122} This shows the openness of the MICT to state intervention thereby questioning its independence. The legal regime of international courts thus needs to adequately protect judges to avoid this type of occurrence in the future.

Like the case of conditions of service, the privileges and immunity of international court judges are yet to be sufficiently examined. Some questions still need to be answered: Does functional immunity sufficiently protects the judges? Do member states respect the provisions on the immunity of judges? When and how should their immunity be waived? Most importantly, how does the level of privileges and immunity enjoyed by judges enhance their independence? This thesis examines the privileges and immunity of judges in relation to the quality of the courts. It argues that international court judges should enjoy the same privileges and immunity as diplomatic agents and that there must be a mechanism in place to ensure that member states do not breach the provisions on privileges and immunity for judges.

2.3. Judicial Accountability

The accountability of the judiciary is linked with its governance and involves the relationship between the judiciary and other actors of a court i.e., member states, judicial councils, international institutions, litigants, and the public. It helps feed the public’s confidence in the


\textsuperscript{121} Article 29 of the MICT Statute

The notion of judicial accountability can be understood from two perspectives. The first is accountability as a normative concept, which is simply a set of standards or rules guiding the behaviour of judicial officers.\textsuperscript{123} The second, which covers a broader spectrum is judicial accountability as a mechanism for the operation of the relationship between courts and the member states, in which the court is obliged to justify its affairs to the member states.\textsuperscript{124}

Mahoney categorised the accountability of the international judiciary into five forms: financial accountability (owed to the budgetary authority); case management accountability; personal accountability (owed by individual judges and other officers of the court); process accountability (which relates to the procedures of the court); content accountability (for individual judgements).\textsuperscript{125}

Judicial accountability is usually adequately provided for in national judiciaries.\textsuperscript{126} However, as Perez rightly states, the concept of accountability becomes tricky when applied to the international judiciary and it raises a lot of questions such as what it entails, the standards to be applied, to whom the courts should be accountable, who should be held accountable and who sets the standard of accountability.\textsuperscript{127} Also, the concepts of judicial independence and judicial accountability seem to be conflicting,\textsuperscript{128} therefore the clash or overlap of the two variables must be considered. To ensure that international courts are accountable for the exercise of their discretionary power without undermining their independence, there must be set standards for judicial conduct and a corresponding oversight mechanism for accountability.\textsuperscript{129}

The establishment of normative standards for international law dates back to the 1900s with the provisions of the Convention on the Pacific Settlement of International Dispute which

\textsuperscript{123} Mark Bovens, ‘Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism’ in Accountability and European Governance (Routledge 2014) 946, 949
\textsuperscript{124} ibid
\textsuperscript{125} Mahoney (n 9) 339
\textsuperscript{126} See, for instance, the rules on the Accountability of the Judiciary in England and Wales https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/accountability.pdf
\textsuperscript{127} Aida Torres Perez, ‘From Judicial Independence to Interdependence in the International Sphere’ [2017] 24 Maastricht Journal of European and Comparative Law 462, 473
\textsuperscript{128} Martin Shapiro, Courts: A Comparative and Political Analysis (University of Chicago Press 2013) p.34
\textsuperscript{129} Perez (n 127)
prohibited the members of the Permanent Court of Arbitration from acting as agents, counsels or advocates.\textsuperscript{130} Also, the Statute of the Permanent Court of International Justice states that the judges of the court must be independent\textsuperscript{131} and require them to make a solemn declaration in open court to exercise their power impartially and conscientiously\textsuperscript{132}. Unlike the national courts, however, these rules and standards were vague and ambiguous as they failed to define the specific standards of accountability expected of the courts and judges.

In recent times, there has been an increased interest in the establishment of clear and specific rules of judicial ethics in international adjudication.\textsuperscript{133} In a bid to make these changes, many international courts have complemented the provisions of their statutes by adopting specifically designed codes of conduct and ethics\textsuperscript{134} and rules of procedure\textsuperscript{135} to establish specific standards and obligations. Although these rules and standards have evolved, they are still not devoid of flaws. They are still vague and have been criticised as giving room for judicial self-governance.\textsuperscript{136} They have also been criticised as being mere guidelines with no binding power and as insufficient to cover all the relevant aspects of accountability.

Seibert-Fohr opined that ultimately, the codification of judicial ethical standards can only go as far, because “ethics transcend normative rules and codes”.\textsuperscript{137} Similarly, a former judge of the ICJ, Thomas Buergenthal, stated that “Judicial ethics are not matters strictly for hard and fast rules—I doubt that they can ever be exhaustively defined—they are matters of perception and of sensibility to appearances that courts must continuously keep in mind to

\textsuperscript{130} Convention on the Pacific Settlement of International Dispute of 1907, art. 62
\textsuperscript{131} Statute of the Permanent Court of International Justice, art. 2
\textsuperscript{132} Ibid, art. 20
\textsuperscript{133} Dinah Shelton, ‘Legal Norms to Promote the Independence and Accountability of International Tribunals’ [2003] 2 Law and Practice of International Courts and Tribunals 27, 29

European Court of Human Right Resolution on Judicial Ethics https://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf
\textsuperscript{135} See, for instance, European Court Human Right Rules of Conduct https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf
\textsuperscript{137} Anja Seibert-Fohr, ‘International Judicial Ethics’ in The Oxford Handbook of International Adjudication (2014)
preserve their legitimacy”.

The provision of rules of ethical standards is therefore not the only answer to judicial accountability.

These standards are usually embodied in the international treaty establishing the court, the statute of the court, the rules of procedure, the codes of conduct and ethics. The general standards of accountability in all international courts can be categorised into impartiality, diligence, and conflict of interest. The content and degree of application vary from one court to another.

2.3.1. Impartiality

Impartiality deals with the internal predisposition of the adjudicator in the matters in dispute, the adjudicator’s relationship with the parties and their positions on the matters before them. The Bangalore Principles state that impartiality is a fundamental element for the appropriate execution of judicial duties. The importance of establishing formal rules and procedures for ensuring impartiality was reiterated by the ECtHR in the case of Meznaric v. Croatia. The standards of impartiality prohibit all forms of actual bias and prejudice. It requires that judges perform their duties without favour, bias or prejudice. Judges are also required to conduct themselves in a manner that enhances the confidence of the public in the court. Forms of bias or prejudice include but are not limited to ex parte communications; acting as agents, counsel or advocates in a matter; and adjudicating in a matter where the judge was previously a party or counsel. It has been argued that impartiality may emanate when a judge holds or expresses personal opinions about the subject matter of the case. The ECJ Code of Conduct requires that judges

139 Perez (n 127) 473
140 Seibert-Fohr (n 137) 765
141 Bangalore Principles (n 47) value 2
142 Meznaric v. Croatia No.71615/01 ECtHR 2005 paragraph 29-33
143 Bangalore Principles (n 91) value 2.1
144 Ibid Value 2.2
145 See the WTO Dispute Settlement Rules of Conduct, VII.2.
146 See Statute of the ICJ (n 91) art 17; Rome Statute of the ICC (n 66), art 40; European Court of Justice Code of Conduct, art 4.
147 See Statute of the ICI (n 91) art 17; Rome Statute of the ICC (n 66), art 41; Article 6 of the ECJ Code of Conduct (n 146); and ECtHR Rules of Court (n 135), rule 4.
refrain from making statements that may be considered the adoption of a position by the court. Similarly, in the ECtHR, judges are required to refrain from making public statements and remarks that may undermine the authority of the ECtHR or give rise to reasonable doubt about their impartiality.

The level of expression and opinion varies across the different international courts. For instance, the ICJ appears to be more reluctant to disqualify a judge based on general statements and prior activities. In 2004, Israel objected to the participation of Judge Nabil Elaraby in the advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian Territory. The contention was his service as a diplomatic representative of his country and a controversial newspaper interview he granted. Neither of these was considered enough reason to exclude him from participating in the case.

2.3.2. Incompatible extra-judicial activities

International court judges are usually required to avoid activities that may be incompatible with or impair the exercise of the courts’ functions. The scope of incompatibility of these activities varies among courts. While some courts expressly prohibit specifically outlined activities, others give a general standard and leave their applications to the facts of each case. This latter approach has been considered detrimental to meaningful international adjudication.

The Bangalore Principles of Judicial Conduct enumerates some compatible activities which should be permitted subject to the proper performance of judicial duties. These include writing; lecturing; and acting as members of official bodies, government commissions, committees, or advisory bodies.

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148 See ECJ Code of Conduct (n 146) art 1.3
149 Resolution VI of the ECtHR Resolution on Judicial Ethics (n 134). See also, ICC Code of Judicial Ethics (n 134), art 9.1; and Burgh House Principles (n 36), principle 7.1
150 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Par.5 Order of January 2004 https://www.icj-cij.org/files/case-related/131/131-20040130-ORD-01-00-EN.pdf

152 Bangalore Principles (n 47) value 4.11
153 Ibid
In the ICJ and ICC, there is an absolute bar on engaging in any political or administrative functions or engaging in any professional occupation. 154 In the ECtHR on the other hand, judges are permitted to engage in these activities as long as they are compatible with the demands of their judicial duties. 155 Judges in the ECtHR are, in addition, expected to declare any additional activities to the president of the court. 156 In the CJEU, judges may engage in these activities only when granted an exception by the council.

In some international courts, these restrictions are extended to former judges, by providing post-service limitations. Seibert-Fohr believes that the rationale for the extension is to protect the current judges from the influence of the former judges. 157 Also, the inside information that judges obtain during their terms of office in pending cases may result in undue benefit if they are allowed to act as counsel after their term. 158 In the ECJ, judges are prohibited from appearing before the court as counsel or representative before European courts for up to three years after the expiration of their term of office. 159 Former judges are also obligated to consider their integrity when accepting appointments and benefits after they cease to hold office. 160

2.3.3. Conflict of interest

International judges are required to avoid taking part in cases when an actual conflict of interest or a perception of the same may rise. This includes proceedings where the judge: has personal knowledge of the disputed evidentiary facts of the proceedings; previously served as a lawyer; is a material witness in the matter, or where a member of his/her family has an economic interest in the outcome of the matter. 161

In the CJEU, this rule also applies where the judge has previously acted as an agent or adviser or has acted for either party to the case. The president of the CJEU has an additional duty of

154 Statute of the ICJ (n 91) art 16 (1); Rome Statute of the ICC (n 66) art 40 (3).
155 ECtHR Rules of Court (n 146) rule 4(1)
156 Ibid 4(2)
157 Seibert-Fohr (n 137) 764
158 Ibid 765
159 See Article 6(2) of the Code of Conduct of the Court of Justice of the European Union
160 See also, Article 4 of the Statute of the Court of Justice of the European Union 2010
161 Bangalore Principles (n 47) value 2.5
notifying a judge if he considers the judge unfit to sit on a particular matter. In the ECtHR, the judges are prohibited from presiding in a matter where either party to the case is the contracting state which elected them or their country of nationality.\textsuperscript{162}

It is safe to say that the standards for personal accountability for judges in international courts are generally recognised and specified. However, there are lapses in the mechanism put in place to ensure compliance with the rules of accountability. For instance, in the ICC, even with its express prohibitions, the court voted for Judge Kuniko Ozaki, a Japanese national who was appointed as Japan’s ambassador to Estonia, to continue to serve as a judge while she carries out her diplomatic duties, thereby violating the provisions of Article 40 of the Rome Statute of the ICC.\textsuperscript{163} international courts also fail to provide for restrictions or prohibitions for other officers of the court. A former ICC prosecutor, Luis Moreno Ocampo, was found to have links with a Libyan billionaire who was an ally of Gaddafi and allegedly a supporter of war crimes in Libya.\textsuperscript{164}

The existing literature on the accountability of judges focuses on a few standards, leaving out many other vital standards that apply in different courts. In this thesis, other standards of judicial accountability are examined especially those specifically provided for in the ECOWAS Court legal regime. Also, to achieve accountability, the courts need not only establish the standards that apply but also to put in place an effective mechanism for ensuring that the standards are adhered to. Thus, the mechanism for enforcing these standards must be assessed. Typically, the enforcement is either carried out internally within a court or externally by specially established bodies. While many courts have a system in place, they have not been considered in relation to the effectiveness of the mechanisms.

Furthermore, there has been no attempt to connect the accountability of judges to their quality. The quality of international judiciaries cannot be measured without assessing the

\textsuperscript{162} ECtHR Rules of Court (n 146), rule 13
accountability of the judges. Lastly, the assessment of the accountability of judges cannot be done in isolation. The concept of judicial accountability when considered in isolation potentially undermines the independence of the court. The diversion and convergence of these concepts must therefore be considered. In this thesis, the relationship between these concepts is examined, and how to strike a balance between them is assessed in Part V.

2.4. Judicial Transparency

In every institution, transparency is an important virtue. In judicial institutions, transparency is ensured by three distinct but related features. As Rogers put it, the requirement for transparency is satisfied by granting access to the public to attend a court’s proceedings, the availability of the rules governing a court process and court files and an accurate comprehensive judicial opinion disclosing the reasons for a court’s decision.¹⁶⁵

These concepts are usually blurred into one term, transparency.¹⁶⁶ The most prominent of the three features is the issuance of opinion. Dunoff and Pollack defined transparency in the judiciary as “mechanisms that permit the identification of individual judicial positions, primarily through the publication of separate votes or opinions”.¹⁶⁷ To evaluate the transparency of a court, one must define the ambits of these concepts and their overlaps.¹⁶⁸

2.4.1. Public access to court

The access of the public to court proceedings in national courts is a right recognised in many countries.¹⁶⁹ In the United States, it is a constitutional right protected by the first amendment.¹⁷⁰ Rogers asserts that while it is regarded as a personal right, its main aim is to facilitate checks of judicial officers against possible abuse of power and to enhance the quality of the judiciary.¹⁷¹

¹⁶⁶ ibid 1303
¹⁶⁷ Dunoff and Pollack (n 12) 226
¹⁶⁸ Rogers (n 165) 1304.
¹⁶⁹ ibid 1304
¹⁷¹ Rogers (n 165) 1305
In international courts, public access to the proceedings is not uncommon. Rogers, however, stated that “public access is a mechanism for promoting transparency, but it is not a necessary feature of transparency”.\textsuperscript{172}

### 2.4.2. Issuance of opinions

Transparency in the judiciary is tied to the issuance of judicial opinions. Over the last few years, judicial opinion-issuing practices have evolved around the world to make room for the globalisation of legal systems.\textsuperscript{173} The debate on whether judges in collegial courts should deliver individual opinions has been amplified.

Brennanz Jr asked, “when a multi-member collegial court renders a decision does it speak as a single institutional entity or as a group of individual judicial officers?”.\textsuperscript{174} According to him, a court is a sort of paradox: It is both the whole and its constituent parts.\textsuperscript{175} A ‘court’ may thus refer to the entity and its members, simultaneously.

So, should judges deliver separate opinions, especially dissenting ones, alongside the opinion of the court? As in many other cases, scholars have divided opinions on the issue. Scholars who criticise the issuance of dissenting opinions argue for the primacy of a court as a single entity over the individual opinions of its members, and that when a court decides unanimously its legitimacy is enhanced.

However, as Brennan stated, “although unanimity underscores the gravity of a constitutional imperative, unanimity is not in itself a personal virtue”.\textsuperscript{176} That being said, the level of transparency in the judicial deliberation process, outcomes, and opinions across courts vary globally.\textsuperscript{177} Currently, in the European Union, almost all 18 member states with constitutional courts expressly authorise their judges to issue separate opinions alongside the general opinion of the court.\textsuperscript{178} However, the level of transparency varies across these states,

\begin{footnotes}
\item 172 Ibid 1308
\item 175 ibid
\item 176 ibid
\item 177 Entrikin (n 173) 60-61
\item 178 Katalin Kelemen, Judicial Dissent in European Constitutional Courts: A Comparative and Legal Perspective (Routledge 2017) 10
\end{footnotes}
including whether a court’s decision identifies the concurring and dissenting judges by name, whether the judges can issue their individual opinions anonymously, whether dissenting opinions need to state the reason for disagreeing with the opinion of the court, whether judges concurring with the court need to issue individual opinions, and whether voting records are fully, partly or not disclosed.  

In national supreme courts, common law countries tend to authorise judges to issue separate opinions while those in civil law jurisdictions lean more towards maintaining the unanimity of the court. Courts in this jurisdiction view dissenting opinions as a threat to institutional consensus. Although this is a general position, the practice, whether common law or civil law jurisdiction, varies from one country to another.

Similarly, in international and supranational courts, the practice varies. In the CJEU, individual judges do not issue dissenting opinions. Although the Statute of the CJEU does not provide express provisions prohibiting the issuance of dissenting opinions, the requirement of secrecy of deliberations has been interpreted to prohibit the issuance of individual opinions. The Rules of Procedure of the CJEU require that the judges involved in the deliberation of a case must sign the judgement, implying that the judgement represents the opinion of the whole court, and judges do not get to issue individual opinions.

In 2012, the European Parliament Committee on Legal Affairs, in response to scholars urging the CJEU to change the longstanding practice of prohibiting dissenting opinions, initiated a study of the practice in national courts of member states to recommend reforms for the CJEU. The result of the study was published in the same year but did not recommend any

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179 Entrikin (n 173) 123 
182 Statute of the CJEU (n 160) art 35 
reform to the existing provisions and to date, the CJEU has continued to issue single unanimous decisions.\textsuperscript{185} A similar provision applies in the ECOWAS Court.\textsuperscript{186}

On the other hand, the ICJ permits its judges to issue separate opinions concurring with or dissenting from the decision of the court. This rule is specifically provided for in the statute: “If the judgement does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion”.\textsuperscript{187} The statute does not make it obligatory for judges to file their written opinion, whether concurring or dissenting but where a judge elects to do so, they must be identified by name.

The rules of the ICJ as amended in 2005 provide more specific rules: The judgement must include some details including the names of the participating judges and the number and names of the judges constituting the majority.\textsuperscript{188} The judges, under this rule, are allowed but not mandated to file a separate opinion and if a judge wishes to record his or her opinion without giving a reason, they may do so in the form of a declaration.\textsuperscript{189}

Similarly, in the ECtHR, the Court’s convention expressly permits judges to file a separate concurring or dissenting opinion.\textsuperscript{190} The judgement must state the names of the judges involved in the case, must indicate whether it is a unanimous decision or represents the opinion of the majority and how many judges constitute the majority.\textsuperscript{191}

Similar rules apply in the ICC\textsuperscript{192}, the ICTY, the International Criminal Court for Rwanda (ICTR)\textsuperscript{193} and the International Tribunal for the Law of the Sea (ITLOS).\textsuperscript{194}

2.4.3. Disclosure

The third feature of transparency in judicial institutions is the disclosure of the reason for a court’s decision. The disclosure of a court’s reasoning, like the other features, is a norm in

\begin{footnotesize}
185 Ibid 39
186 ECOWAS Community Court of Justice Protocol (A/P.I/7/91), art 19
187 Statute of the ICJ (n 91), art 57
188 Rules of Court of the International Court of Justice as amended, art 95
189 Ibid, art 95(2)
190 Rules of Court of the ECtHR (n 146) rule 74(2)
191 Ibid rule 56(1) and rule 74(1)
192 Rome Statute of the ICC (n 66) art 83(4)
193 Rules of Procedure and Evidence of the United Nations Mechanism for International Criminal Tribunals 2012 (as amended), rule 144(B)
194 Statute of the International Tribunal for the Law of the Sea, art 29 & 30
\end{footnotesize}
most national courts. In international courts, there is a variation in the practice of disclosure. In most international courts, a court’s decision must state the reason on which it is based. The ITLOS, for instance, specifically requires that the court include a statement of reason. The rule provides, in addition, that judgements must identify the decision of the court and the rationale of each judge. Similar provisions apply in almost all international courts.

The transparency of international courts is seldom considered as a whole concept. Mostly, the components—public access to court, issuance of separate opinions, and disclosure of the court’s reasoning—are examined separately. As judicial transparency is geared towards achieving openness of a court and ensuring that stakeholders are exposed to how a court reaches its decision, the position in this thesis is that the transparency of a court cannot be assessed without considering all three indicators.

In this thesis, the three indicators are examined collectively concerning how they affect the quality of the ECOWAS Court. Also, the connection between judicial transparency and the two other variables of judicial quality is examined.

2.5. The Dilemma and Trilemma Situation

2.5.1. The judicial dilemma

The relationship between judicial independence and judicial accountability presents a dilemma. In principle, when member states establish international courts, they seek to empower independent judges to act as unbiased third parties in the settlement of disputes thereby making judicial independence a cornerstone of the quality of the judiciary. Thus, judicial independence is an important principle for the legitimacy, effectiveness, and quality

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195 Ibid art 30(2)
196 See ECOWAS Court Protocol (n 186) art 19 (2) ; Rules of Procedure and Evidence of MICT (n 193), rule 144; Statute of the Inter-American Court of Human Rights, art 24(3); Rules of Court of the ECtHR (n 146) rule 56(1); and Rules of Court of the African Court on Human and Peoples’ Rights, rule 61.
of an international judiciary, however, the establishment of a robust system for the checks and balances of the power bestowed by the independence is equally fundamental.

Although more attention is placed on the independence of the judiciary\textsuperscript{199}, both concepts are equally important. The concepts of judicial independence and judicial accountability have one fundamental similarity i.e., both are aimed at the same end goal, which is the promotion of the effectiveness, credibility, and quality of the judiciary\textsuperscript{200} and upholding the rule of law\textsuperscript{201}.

Given the important role played by the independence of a court in protecting judges and upholding the rule of law, the focus on the preservation of judicial independence is not altogether amiss. However, it leads to failure to acknowledge and balance the interdependence of judicial independence, judicial accountability, and other relevant concepts vital to the quality of the court.\textsuperscript{202}

An attempt to maintain the concepts of judicial independence and judicial accountability continues to create a dilemma in most judicial systems, both national and international judiciaries. As will be discussed in 9.1. below, the major challenge posed by attempting to maintain the two variables is how to find an optimal balance between the operation of the two concepts.\textsuperscript{203} The question, therefore, remains, ‘what is the relationship between judicial independence and judicial accountability, especially in international courts?’.

There are two main arguments on this issue. The first is that the relationship between the two concepts is complementary. The scholars who are inclined to the complementarity position maintain that although judicial independence and judicial accountability are two


\textsuperscript{200} Dinah Shelton, ‘Legal Norms to Promote the Independence and Accountability of International Tribunals’ (2003) 2 Law & Prac Int’l Cts & Tribunals 27, 53-54

\textsuperscript{201} Paul Mahoney, ‘The International Judiciary -Independence and Accountability’ [2008] 7 Law & Prac Int’l Cts & Tribunals 313, 320


\textsuperscript{203} The International Bar Association Judicial Integrity Initiative: Judicial Systems and Corruption (May 2016) 1, 15
different and distinct concepts, they are two sides of the same coin.® They therefore should not be considered contradictory or conflicting concepts, rather they operate to complement each other. When considered as complementary, judicial accountability is simply an adjunct to the enjoyment of judicial independence and both concepts also define the ambit of each other.

However, judicial independence is not served by the perception of unaccountability.® Mahoney described judicial independence and judicial accountability as two strands which when properly woven together, make the cloth of effective administration of justice.® Judicial independence protects the effectiveness and quality of the judiciary from external influence. Where the quality of a court is undermined by internal weakness or personal excesses of individual judges, judicial accountability becomes vital.® The scholars who take the position of complementarity are of the opinion that the two concepts can coexist, and that optimal balance can be attained.

Yet, the idea of holding an independent judiciary accountable is considered by some scholars as an oxymoron.® The opponents of the idea that an optimal balance is achievable maintain that these two concepts cannot operate simultaneously. The International Bar Association Judicial Integrity Initiative, for instance, stated that there is no perfect system that maximises both concepts at the same time.® The basis of this argument is that there are a lot of trade-offs between some of the indicators of judicial independence and the mechanisms for enforcing the accountability of judges and that these trade-offs make it impossible to strike the required balance. The overall conclusion of these opponents is that measures of judicial accountability can cast a shadow on the independence of a judiciary thus judicial systems

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206 Mahoney (n 201) 347
207 Mayne (n 202) 41
209 The International Bar Association Judicial Integrity Initiative (n 203)
always emphasise judicial independence over judicial accountability and other relevant concepts.\textsuperscript{210}

It is undeniable that there are inherent trade-offs between the concept of judicial independence and judicial accountability. For instance, the discipline and removal of judges are measures of accountability that may conflict with the security of tenure of the judges or the enjoyment of their privileges and immunity and therefore create interference with the independence of judges. Another trade-off is that posed by the involvement of external actors, mostly through the use of preestablished external bodies. The role played by the other actors or bodies raises the issue of whether the process of accountability undermines the independence of a court by exposing judges to the risk of retaliation from disgruntled member states.

On the other hand, leaving the accountability of a court to internal mechanisms, although it protects the independence of that court, raises questions as to the viability of the measures of accountability set in place. Keeping the operation of these concepts at equilibrium is vital to the prevention of the threat posed by the trade-offs between independence and accountability.

However, while it may be correct that many legal systems do not maximise both concepts, it is inaccurate to conclude that this is the case in all judicial systems or that it is unachievable. The balance between judicial independence and judicial accountability has been achieved in many national and international courts. In the Court of justice of the European Union (CJEU) for instance, the Treaty on the European Union\textsuperscript{211} and the Treaty on the Functioning of the European Union\textsuperscript{212} ensure the independence of the judges of the CJEU by providing that the judges shall be chosen from persons whose independence is beyond doubt.

To reinforce this provision, judges take an oath to perform their duties impartially and conscientiously when assuming office.\textsuperscript{213} At the same time, the Code of Conduct of the CJEU presents a detailed codification of standards of accountability for members and former members of the CJEU\textsuperscript{214} as well as the mechanism and process for enforcing the prescribed

\textsuperscript{210} Jennifer Hillman, ‘Independence at the Top of the Triangle: Best Resolution of the Judicial Trilemma’ (2017) 111 AJIL Unbound 364, 367
\textsuperscript{211} Treaty on European Union (TEU) art 19(2)
\textsuperscript{212} Treaty on the Functioning of the European Union (TFEU) art 253
\textsuperscript{213} TEU (n 211) art 2
\textsuperscript{214} Code of Conduct for Members and Former Members of the Court of Justice of the European Union, Art 2-9
standards. Thus, the CJEU does not only enjoy independence from “court curbing mechanisms” that political actors may deploy, but it is also highly accountable. The independence of a court without a counter-balance through mechanisms of accountability will potentially lead to the anarchical reign of power and a miscarriage of justice. In a similar vein, the presence of judicial accountability without measures in place to ensure independence will create a court that is significantly dependent on the other actors. To achieve this balance, all the relevant trade-offs between the two concepts must be juxtaposed while designing a judiciary’s legal regime. To take the interaction and connection even further, the introduction of a third variable—judicial transparency, introduce more trade-offs making it even more difficult for courts to strike a balance. This is what Dunoff and Pollack described as the judicial trilemma.

2.5.2. The judicial trilemma

The relationship between judicial transparency and the other two concepts has hardly been given any scholarly attention. In the case of judicial transparency and judicial accountability, the few scholars who have considered them usually treat transparency as a subset of judicial accountability rather than a separate and distinct concept. The works of Dunoff and Pollack in the field of international adjudication are quite remarkable, especially on the concepts of judicial independence, accountability and transparency. In their article, “the judicial trilemma”, the authors introduced a holistic view of these three concepts and examined their

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215 Ibid, Art 10
217 Dunoff and Pollack (n 198) 244
218 Dunoff and Pollack (n 198)
219 Gar Yein Ng, Quality of Judicial Organisation and Checks and Balances (Antwerp: Intersentia, 2007) 18
interconnection. They advanced a novel theoretical framework for examining the relationship between the three concepts.

On the interaction between the three concepts, Dunoff and Pollack concluded based on their research and interviews conducted with judges, former judges, and officials of selected courts that the three concepts are in tension and that an international court cannot maximize all three concepts simultaneously.²²¹ The fundamental argument of the authors is that in an attempt to maximize the three concepts, international judicial systems face a series of potential trade-offs which makes it possible to maximize up to two but not all three of these concepts. They maintained that it is particularly difficult to maintain judicial independence and accountability. Dunoff and Pollack made it clear that their analysis is premised upon the rational design theory, which is used to usually analyse treaty designs, as well as the idea of judicial politics.²²²

Dunoff and Pollack’s model proposes three ideal responses of international judiciaries to the interaction between judicial independence, accountability and transparency. Their model predicts that international courts with a high level of independence and accountability will downplay judicial transparency.²²³ They suggested the CJEU as an example of a court with this ideal response. Similarly, according to them, international courts with a high level of judicial independence and transparency will exhibit a low level of accountability. They considered the ICC and the ECtHR as courts under this category.²²⁴

The last ideal response predicted by the authors is the presence of a high level of judicial accountability and transparency which according to them inevitably lead to a low level of judicial independence.²²⁵ To illustrate this ideal response, the authors examined the International Court of Justice (ICJ). They proposed that the ICJ being a highly accountable court that also exhibits a high level of transparency must lag in the enjoyment of judicial independence.

²²¹Dunoff and Pollack (n 220) 242
²²² Ibid 227
²²³ Dunoff and Pollack (n 220) 237
²²⁴ ibid 239
²²⁵ ibid 329-241
Dunoff and Pollack’s article is a great starting point for the assessment of the three essential concepts. It has also changed the way these three concepts are examined and has provoked a reassessment of the concepts, as the authors formulated a great lens through which to view the relationship between judicial independence, accountability and transparency and how it works in international courts.

This thesis aligns with the position of the authors to the extent that the concepts of judicial independence, accountability and transparency are essential concepts that must be examined as interconnected rather than isolated concepts. Also, the arguments of the authors on the trade-offs existing between these concepts are very valid. Various trade-offs exist in the operation of these concepts which may pose challenges when attempting to balance them. These trade-offs mostly emanate from the fact that in the process of drafting the courts’ statutes and other legal instruments, international courts do not bear in mind the possible counter-effects of the elements of these three concepts. Therefore, they make fundamental design choices which then determine the relationship between the three concepts. On many occasions, international judiciaries have subsequently adjusted the provisions in their legal regime to address the trade-offs.

In the ECtHR for instance, the term of office of the judges was changed from nine to six years in a bid to enhance the accountability of the judges. This posed a threat to the ECtHR’s independence. Thus in 2004, the term of office was readjusted to a nine-year non-renewable term. Similarly, in the ECOWAS Court, the instruments and body establishing and enforcing judicial accountability were not enacted until 2006, over a decade after the Court was

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228 Protocol No. 14 to the Convention for the Protection of Human Rights and fundamental Freedoms, Amending the Control System of the Convention, art 23
established.\textsuperscript{229} Also, to ensure accountability, the term of office was changed from five years (renewable for another five years)\textsuperscript{230} to a non-renewable four-year period\textsuperscript{231}.

Dunoff and Pollack’s trilemma model is not without its shortcomings. To start with the examples put forward for the third ideal response, it is quite surprising that the authors suggest that the ICJ’s standard of judicial independence is low as the court, based on the provisions of its legal regime is as independent as the ECtHR and the CJEU which are categorised as highly independent by the same authors.\textsuperscript{232} Although Dunoff and Pollack did state that the ICJ represents an ambiguous portrait of the trilemma,\textsuperscript{233} they nonetheless concluded based on the assumption that almost all international judges are motivated by the desire to ensure that they attain and sustain their appointment or reappointment, that judicial independence in the ICJ is low. According to them, the process of standing for reappointment creates pressure on judges, and that threatens the court’s independence.\textsuperscript{234} The conclusion of the authors was backed by the opinion of Kenneth who stated that his electoral campaign lasted for more than two years and involved visiting over thirty capital and three trips to New York.\textsuperscript{235} They also drew from the work of Mackenzie and Sands who stated that the re-election of a judge sometimes focuses on the cases decided by the judge.\textsuperscript{236}

While the analysis of the independence of the ICJ by Dunoff and Pollack may be a representation of the reality in the ICJ, it is rather surprising that the authors did not examine the election of the judges of the ECtHR and the CJEU in the same light as they examined the

\begin{footnotesize}
\textsuperscript{229} The Judicial Council of the ECOWAS, charged with holding judges accountable was established under Decision A/DEC. 2/06/06.
\textsuperscript{230} ECOWAS Court Protocol A/P.1/7/91, art 4 (1)
\textsuperscript{231} ECOWAS Court Supplementary Protocol A/SP.2/06/06, art 4 (1)
\textsuperscript{232} First of all, the Statute of the International Court of Justice provides that the court shall be composed of independent judges selected from among persons of high moral character and requisite qualifications. Statute of the International Court of Justice, art 2; The Statute also provides for additional elements that enhance the independence of the court such as the protection of judges from arbitral dismissal or removal. The Judges also enjoy the privileges and immunity necessary for the independent exercise of their duties. See art 18 and 19
\textsuperscript{233} Dunoff and Pollack (n 198) 259
\textsuperscript{234} Ibid 258
\textsuperscript{236} Mackenzie and Sands (n 8) 279.
\end{footnotesize}
ICJ. They simply concluded that the judges of the ICJ find their independence under pressure that the CJEU and the ECtHR judges do not experience.\textsuperscript{237}

Another fundamental flaw of Dunoff and Pollack’s model is that it represents an attempt to fit international judiciaries which are complex type institutions into ideal type models. The ideal type modelling or analysis is a methodology invented by Max Weber over a century ago\textsuperscript{238} and used in sociological research. The ideal type is designed as a tool for revealing the basic causes of a social phenomenon to link the interpretations of the ways people think and act to a logical causal explanation for those thoughts and actions.\textsuperscript{239} As Swedberg stated, when using a methodology such as the ideal type modelling, one must not “force empirical reality into a concept as into a procrustean bed”.\textsuperscript{240}

While the ideal type modelling may be considered suitable for sociological research, it is not suited for legal research because of its lack of accuracy. Weber himself considered the ideal type to be “sketchy and therefore perhaps partially incorrect”.\textsuperscript{241} The use of ideal types is an acceptable approach for crystalising the principles by which a phenomenon or an organisation is piloted and the ideal types are a good basis for the evaluation or critique of the reality in international courts. However, international courts cannot all fit into the three ideal type responses proposed by the authors.

The authors’ definition of the key concepts also creates a fundamental flaw in their model. Although they proffer a sufficiently broad definition of judicial accountability,\textsuperscript{242} in analysing the accountability of judicial institutions they seem to measure judicial accountability solely based on the prospect of reappointment\textsuperscript{243}, ignoring the other elements that contribute to the accountability of international judiciaries. Also, the authors construed the concept of judicial transparency narrowly. They measured judicial transparency solely based on the

\textsuperscript{237} Dunoff and Pollack (n 196) 260
\textsuperscript{238} Max Weber, ‘The Objectivity of Sociological and Socio-political Knowledge’ (1940)
\textsuperscript{239} Richard Swedberg, ‘How to use Max Weber’s Ideal Type in Sociological Analysis’ (2018) 18 Journal of Classical Sociology 181, 186
\textsuperscript{240} Ibid 184
\textsuperscript{241} Hans Henrik Bruun and Sam Whimster (eds) Max Weber Collected Methodological Writings (Routledge 2012)
\textsuperscript{242} Dunoff and Pollack stated that judicial accountability “means that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of those standards, and to impose sanctions if they determine that these responsibilities have not been met”. Dunoff and Pollack (n 255) 233
\textsuperscript{243} Hillman (n 210) 364.
ability of judges to issue separate opinions whether dissenting or concurring. The two other elements of judicial transparency, access to court and availability of documents are not considered. With this conceptual limitation, the accuracy of the authors’ model is questionable.

Another major shortcoming of the article is that the authors contradicted themselves on whether or not there is a hierarchical preference for the ideal responses. They stated that one of the aims of the article is to examine the three concepts and the logic of their interaction without taking a stance on the hierarchy of importance of the concepts.244 However, the authors presented their normative preference and clearly lean more in favour of judicial independence over the other two concepts.

Lastly, the authors failed to assess the judicial trilemma in international and regional courts in Africa, Asia, and the Caribbean, most likely because courts in these parts of the world are not as prominent as the ICJ, WTO Appellate Body, ICC, ECtHR, and the likes. This casts doubt on the accuracy of the ideal responses for international courts across the globe. In paragraph 10.4. below, the operation of the judicial trilemma as proposed by the authors, in the ECOWAS Court will be assessed.

2.6. The ECOWAS Court

In the last two decades or so, the continent of Africa has experienced an increase in the establishment of international courts. Currently, the continent has more international courts than any other continent.245 The ECOWAS Court is one of these courts, which Alter has described as “European style international courts”.246 It was established in 1991 for the sole purpose of regional integration. Although the Court had a rough start, upon the expansion of the jurisdiction of the Court to accommodate the adjudication of cases of violation of human rights and the granting of access to non-state litigants in 2006, the Court has become one of

244 Dunoff and Pollack (n 198) 272
245 Peter Brett, Human Rights and the Judicialisation of African Politics (Routledge, 2018)
the busiest courts in Africa. In the year 2021 alone, despite the disruptions caused by the pandemic, the Court issued a total of 25 decisions.247

Despite the expanding scholarship on international courts, African courts have been largely left out.248 The scholarship available on these African courts, although gradually gaining ground, is still considered sparse, with most targeted at the human rights and regional trade jurisdiction of the courts. The focus of the existing scholarship on the ECOWAS Court has been geared, for the most part, toward the human rights jurisdiction of the Court.249 The literature covers issues like the legality of the human rights mandate,250 the suitability of the Court to exercise its human rights jurisdiction,251 and other issues surrounding the repurposing of the Court.252 The role of the Court in the protection of the rights of women has also been the focus of scholarly writing.253 The problem of enforcement of the Court’s decisions and non-compliance by member states is another aspect that has attracted attention from scholars.254 The role of the Court in the enhancement of the integration of the West African region, in

247 ECOWAS Community Court of Justice website CCJ Official Website | Decisions (courtecowas.org)
terms of relationships between member states, issues arising from treaty obligations, interstate trade, immigration, and interstate disputes have also been widely assessed.²⁵⁵

The human rights jurisdiction of the Court, and its role in the integration of the region, are vital issues, but other important aspects of the Court such as its legitimacy, performance and quality have been less examined. However, the works of a few scholars, most recently the work of Gathii and Akinkugbe²⁵⁶ and a body of extensive research on the performance of African international courts edited by Gathii²⁵⁷ have expanded the scholarship on the Court to a different aspect of its operation. This creates motivation for further exploration of the ECOWAS Court.

This book on the performance of Africa’s International Courts assesses how the regional courts in Africa use litigation to impact political, legal, and social change.²⁵⁸ It is a robust piece of work that covers assessments of different subject matters in the regional courts in Africa. The book consists of eight chapters, which assess substantive subject matters related to the performance and impact of the courts. The subject matters assessed include the normative and procedural resources provided by the ECOWAS Court to pro-poor activists to help them overcome socio-legal and economic hurdles they would have otherwise faced in their domestic judiciaries.²⁵⁹

The normative resources examined include the role played by the ECOWAS Court in the expansion of the growing jurisprudence on the protection of human rights, specifically in West Africa. Other normative resources are the Court’s application of an endless range of international human rights treaties that have been ratified by the relevant member states; the analysis of details of the general laws of the ECOWAS community; and the assertion of

²⁵⁷ James Thuo Gathii (ed), The Performance of Africa’s International Courts (Oxford University Press 2020)
²⁵⁸ ibid
the existence and justiciability of certain fundamental rights which are otherwise non-justiciable in member states.\textsuperscript{260}

Another subject matter assessed in chapter 4 of the book, by Akinkugbe, is the political jurisprudence of the ECOWAS Court.\textsuperscript{261} The Court has evolved from a court focused on cases on regional integration into a multi-faceted one. The focus on this subject matter is an exceptional scholarly work which is a deviation from the norm when it comes to the literature available on the Court, most of which focuses solely on the human rights jurisdiction of the Court. Another major contribution of this chapter is the extensive analysis of the ECOWAS Protocol on Democracy and Good Governance which enshrines recommended practices for democratic regimes, such as separation of powers, parliamentary immunity, judicial independence, and free, fair, and transparent election in member states.\textsuperscript{262} It also examines the judicialization of high-profile cases arising from the electoral process in member states in a manner that is entwined into the Court’s traditional functions.\textsuperscript{263}

In chapter 5, “Africa’s Sub-Regional Courts as Back-Up Custodians of Constitutional Justice”, Ebobrah and Lando examine the role of Africa’s international courts as a backup mechanism for supporting national courts in the protection of constitutional order.\textsuperscript{264} Like the other authors in this book, Ebobrah and Lando in this chapter look beyond the low level of compliance to analyse the impact of the international courts’ decisions and litigation process on constitutional justice in member states. This chapter examines the four ways in which the courts including the ECOWAS Court protect constitutional justice i.e. (a) by flagging violations and acting as an early warning system, (b) by expanding the normative and institutional scope of human right protection, (c) by developing norms, and (d) by setting boundaries of acceptable behaviour.\textsuperscript{265}

\textsuperscript{260} Ibid 113
\textsuperscript{261} Olabisi D. Akinkugbe, ‘Towards an Analyses of the Mega-Political Jurisprudence of the ECOWAS Community Court of Justice, Towards an Analyses of the Mega-Political Jurisprudence of the ECOWAS Community Court of Justice’ in James Thuo Gathii (ed), The Performance of Africa’s International Courts (Oxford University Press 2020)
\textsuperscript{262} Ibid 154
\textsuperscript{263} Ibid 158-173
\textsuperscript{265} Ibid 206-210
While the ECOWAS Court and its counterparts do have the potential to impact the member states in these ways, without compliance and enforcement, it is ultimately of no effect and does not deter further violations in member states. For instance, flagging human rights violation exposes defaulting member states and attract international and media attention thereby forcing such member states to do better. However, it is apparent that the ECOWAS Court continues to struggle to impact member states in this way as member states continue to ignore cases of human rights violations.

In conclusion, it is undeniable that the book is a rich, interdisciplinary addition to the literature on international and regional courts in Africa and is a worthy addition to the library of every international law academic. The other chapters not analysed in this thesis also present very important arguments on viable subject matters such as the role of the East African Court of Justice (EACJ) as a coordination device for an opposition party; the EACJ as a transnational justice mechanism in Burundi; and the backlash against international courts in Africa. Additionally, the last chapter of the book provides a comprehensive reference guide to all the international courts in Africa.

Generally, the book successfully puts the international courts in Africa on a separate pedestal from international courts in other continents and points out the importance of impact in measuring the performance of international courts. However, the authors in the book have heavily downplayed the importance of the quality of the courts, as well as compliance and implementation in the impact of these courts. Holistically, the book argues that compliance and effectiveness do not adequately measure the impact of international courts in the African socio-legal and political setting. While compliance, implementation, effectiveness, and more importantly judicial quality are not the only factors tied to the performance and impact of the courts, they are very key and indispensable factors.

The focus of this thesis is to measure the quality of the ECOWAS Court. In the context of this thesis, judicial quality, which is the quality of the process leading to the decisions and judgments of the Court, is considered one of the factors that determine the eventual performance of the Court. As the impact of an international court is a valid factor which feeds into the performance of the court, this section is not a criticism of the approach or point of

266 Gathii (n 256) 2
view of the authors of this book. It simply seeks to establish that by focusing on the quality of
the court, this thesis takes a different angle and assesses a novel factor affecting the
performance of international courts, specifically the ECOWAS Court.

Also, unlike the approach taken in this book which is that as international courts in Africa
operate in different legal and political contexts from regional courts in Europe, the
benchmarks used in the latter should not be transposed to the former,267 this thesis compares
the ECOWAS Court to European international Courts. While this thesis shares the opinion that
the ECOWAS Court operates in a peculiar legal and political climate, it maintains that the
quality of the Court can only be measured, not only based on minimum international
standards which guide international courts but by comparing it with other courts with similar
geographical and subject matter jurisdiction. This thesis draws a comparison between the
ECOWAS Court and other international courts, including the ICJ, CJEU, Caribbean Court of
Justice, the WTO AB, but majorly the ECtHR which the ECOWAS Court is modelled closely
after. Thus, summarily, while the impact of a court may be tied primarily to the peculiarity of
the geographical jurisdiction of the court, the quality of the process leading to the decision of
the court is to a very large extent measured through universal standards, although the
application of the standards may vary slightly from one court to the other. A more detailed
assessment of the ECOWAS Court, its jurisdiction, structure, contributions, successes, and
limitations are presented in Part II of this thesis. The importance of measuring the quality of
the Court is also discussed in Part II.

267 Ibid 1
PART II

CHAPTER 3

3. THE ECOWAS COMMUNITY COURT OF JUSTICE

3.1. Introduction

The ECOWAS Community Court of Justice (ECOWAS Court or the Court) is a regional court established to enhance regional integration of the West African states and the protection of human rights in the region. As significant as the role of the Court is, it has attracted less attention than it deserves. A few scholars have examined the Court, but these studies are mostly related to human rights.\(^1\) Other important areas of the Court’s functioning such as its effectiveness, legitimacy, and quality are yet to be subjects of scholarly assessment and discussions.

The western part of the African continent is an evolving region with countries sharing invisible borders erected by their colonial masters. Although the countries are divided by borders, with each sovereign from others, their historical, cultural, language, religious and economic ties remain strong. Before colonialism, the area now known as West Africa was home to empires and kingdoms that spanned centuries, including Ghana, Mali Songhai, Wolof, Oyo, Benin and Kanem Bornu.\(^2\)

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\(^2\) ECOWAS Court, ‘History’ Economic Community of West African States’ [History | Economic Community of West African States(ECOWAS)] accessed 4January 2022
There are over one thousand languages spoken in West Africa by its over one thousand tribes. Some of the largest tribes and most spoken languages in Africa are from the region. The Hausa language, for instance, is spoken by a total of about 74 million people of the same tribe spread across Nigeria, Niger, Benin, Côte d’Ivoire, Ghana, Togo, and Burkina Faso. Another major tribe and language in West Africa is Yoruba, with over 47 million speakers in Nigeria, Benin, and Togo.

The countries of the region also share strong economic ties, with the interdependence of economies through trade, services, and manpower. Also, eight out of the 17 countries in the region share a common currency. The region’s cultural, linguistic, and ecological ties present a solid basis for a formal regional integrating organisation.

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4 OECD, ‘Atlas on Regional Integration in West Africa: Languages’ 38409537.pdf (oecd.org)
5 Benin, Burkina Faso, Côte d’Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo have the CFA Franc as their currency
Map 2: Languages spoken across West Africa (Source: SWAC/OECD)

Map 3: ECOWAS states that have adopted the CFA Franc as their official currency (Source: BBC)
The ECOWAS is a regional institution established for the integration in West Africa. The treaty establishing the ECOWAS was signed in Lagos, Nigeria on 28 May 1975 by the Heads of States and Governments of West African States, and consisted of 15 member states; namely, Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, the Gambia, Ghana, Guinea, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo. Later the same year, Guinea Bissau acceded to the treaty. In 1979, Cape Verde joined the ECOWAS as the sixteenth member. In December 2000, Mauritania withdrew its membership bringing the total number of member states to 15.

It is important to clarify at this point that two other countries are sometimes categorised as part of West Africa, i.e., Cameroon, and Equatorial Guinea. The Republic of Cameroon is located in West and Central Africa and shares a border with Nigeria to the northwest, while Equatorial Guinea is located in the Western African Coastal area and is bordered by the Bight of Biafra. Both countries identify as Central African states and are members of the Communauté Économique et Monétaire de l’Afrique Centrale (Economic and Monetary Community of Central Africa), which was established to achieve a Central African common market and promote regional development.

The ECOWAS was established mainly to promote cooperation and development in all areas of economic activities to raise the standard of living of the citizens of its member states, by increasing and maintaining economic stability and fostering better relationships among member states. The ECOWAS aims to contribute to the progress and development of the region and the continent as a whole and promote cooperation and development in various fields of economic activities in the region.

To achieve the aims of the Community, the ECOWAS Treaty set out a fifteen-point plan which serves as a guide for its affairs and guides the member states. This plan essentially strives to achieve the harmonisation of various aspects of the member states’ policies to promote

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6 Treaty of the Economic Community of West African States (ECOWAS Treaty)
8 Revised Treaty of the Economic and Monetary Community of Central Africa, preamble
9 ibid art 2
10 ibid art 2(1)
integration.\(^\text{11}\) It also seeks to promote the establishment of joint production enterprises and a common market\(^\text{12}\) and cross-border investment.\(^\text{13}\) The fifteen-point plan includes the adoption of common economic, financial, social, and cultural policies\(^\text{14}\), the creation of an enabling legal environment\(^\text{15}\) and the establishment of a Community fund\(^\text{16}\) amongst others. The Treaty, however, provides that this fifteen-point plan is non-exhaustive,\(^\text{17}\) thereby leaving room for the expansion of the plan.

To further the objectives of the ECOWAS, at the core of the operation of the Community are 11 fundamental principles. They include equality, interdependence, solidarity, collective self-reliance, interstate cooperation, maintenance of regional peace, peaceful settlement of disputes among the member states, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights, recognition and observance of the rules and principles of the Community, promotion and consolidation of a democratic system of governance in each member state, and the equitable and just distribution of the costs and benefits of economic cooperation and integration.\(^\text{18}\)

The United Nations Economic Commission for Africa has described the ECOWAS as a pillar upon which the integration process as advocated by the African Union is based.\(^\text{19}\) However, the success of the ECOWAS in achieving its aims remains highly debatable. The Community has continued to strive to achieve its aims with varying success in different areas. For instance, the ECOWAS had considerable success in combatting security threats and terrorism within West Africa\(^\text{20}\) by establishing various peace and security mechanisms such as the ECOWAS Ceasefire Monitoring Group (ECOMOG) which was established to intervene in security crises.

\(^{11}\) Areas of targeted integration includes food, agriculture and natural resources, industry, transport and communications, energy, trade, taxation, human resources, education, information, science, technology, services, health, and tourism.

\(^{12}\) ECOWAS Treaty (n 6) art 3 (2) (d) (i-iii)

\(^{13}\) ibid art 3 (f)

\(^{14}\) ibid art 3 (e)

\(^{15}\) ibid art 3 (h)

\(^{16}\) ibid art 3 (n)

\(^{17}\) ibid art 3 (o)

\(^{18}\) ibid art 4 (a-k)

\(^{19}\) Osaore Aideyan, ‘ECOWAS’ in Robert E. Looney (ed), Handbook of International Trade Agreements Country, Regional and Global Approaches (Routledge 2018)

\(^{20}\) Abdel-Fatau Musah, ECOWAS and Regional Responses to Conflicts in Thomas Jaye, Dauda Garuba, and Stella Amali (eds) ECOWAS and the Dynamics of Conflict and Peace Building (CODESRIA 2011)
in Liberia and Sierra Leone, and the ECOWAS Mission in Côte d'Ivoire (ECOMICI). Other commendable areas of success, despite the many challenges faced by the ECOWAS, include its efforts towards maintaining democracy\textsuperscript{21} within its member states and tackling drug trafficking in the region.

To promote peace, security and good governance, the ECOWAS also serves the function of holding member states in check by imposing sanctions for non-fulfilment of treaty obligations.\textsuperscript{22} The sanctions may include suspension of loans or assistance, exclusion from nominating candidates for statutory positions, suspension of voting rights, and suspension from participating in other Community activities. \textsuperscript{23} In 2021, following a military takeover in Guinea, the ECOWAS suspended the member state from Community activities while imposing sanctions on individuals involved.

Similarly, on 9 January 2022, at an extraordinary meeting in Accra, the Heads of States and Governments decided that the borders of all member states be closed to Mali and all diplomatic ties severed in response to the refusal of Mali to hold an election after a coup in 2020.\textsuperscript{24} The ECOWAS also imposed economic sanctions including:

a) Recalling of ambassadors accredited to Mali by the ECOWAS member states;
b) Closure of land and air borders between ECOWAS member states and Mali;
c) Suspension of all commercial and financial transactions between the ECOWAS member states and Mali;
d) Freezing of assets of the Republic of Mali in ECOWAS Central Banks;
e) Suspension of Mali from all financial assistance and transactions with all financial institutions, particularly, ECOWAS Bank for Investment and Development and The West African Development Bank. \textsuperscript{25}

\textsuperscript{22} ECOWAS Treaty (n 6) Chapter XVI
\textsuperscript{23} Ibid art 77
\textsuperscript{24} Christian Akorklie and Tiemoko Diallo, ‘West African Nations Sever Links with Mali over Election Delay’ (Reuters, January 10 2022) \textit{West African nations sever links with Mali over election delay} | Reuters
\textsuperscript{25} ECOWAS Commission, Final Communique at the 4th Extraordinary Summit of the ECOWAS Authority of Heads of State and Government on the Political Situation in Mali (Accra, Ghana 9 January 2022), para 9 \textit{Final-Communique-on-Summit-on-Mali-Eng-080122.pdf} (ecowas.int)
However, the effectiveness of the sanctions imposed by the Commission as either punitive or deterrent measures is questionable. Not only have member states continued to fail to fulfil their treaty obligations, but the sanctions also do not seem to be received with remorse. Mali, for instance, condemned the sanctions imposed by ECOWAS as illegal and in retaliation closed its borders and recalled its ambassadors.\(^{26}\) Also, in the recent ECOWAS Communique, the Authority noted that despite the sanctions imposed on Guinea, they are concerned about the slow progress of transition in the nation.\(^{27}\)

In the area of economic integration, the ECOWAS has failed to make any considerable impact. The initiatives of the ECOWAS to create a common market and currency, eliminate trade barriers and ensure the free movement of people have failed, and trade barriers and movement barriers continue to be a big challenge. However, the failure of the ECOWAS in this area is not for lack of effort. For instance, the ECOWAS, to enhance the free movement of citizens throughout the 15 member states, adopted the issuance of a common ECOWAS passport and attempted to introduce the ECO Visa, which is a Schengen-type visa for non-ECOWAS citizens both of which failed.\(^{28}\) Also, ECOWAS has proposed the adoption of a single currency. However, member states have not taken to the idea of monetary integration.\(^{29}\)

One of the major factors contributing to the failure of the ECOWAS in economic integration is the lack of incentives for member states to encourage the aligning of their fiscal policies. A good example of such incentives is those provided by the European Central Bank.\(^{30}\) Another

\(^{26}\) Annie Risemberg, ‘Mali: Protest ECOWAS Sanctions’ (VOA News, 14 January 2022) Malians Protest ECOWAS Sanctions (voanews.com); Aljazeera, Mali ‘strongly condemns’ ECOWAS sanctions; Closes Land Borders, (Aljazeera, 10 January 2022) Mali ‘strongly condemns’ ECOWAS sanctions; closes land borders | News | Al Jazeera

\(^{27}\) ECOWAS Commission Final Communique (n 25) para 16


\(^{30}\) These incentives include monitoring of the price stability and the promotion of a smooth payment system as well as the management of currency reserves for member states.

See, Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank
major factor is the failure on the part of member states to cooperate with the missions and efforts of the ECOWAS, especially in the pursuit of a common market and common currency. For instance, the President of the Federal Republic of Nigeria, one of the economic powerhouses of the West African region\(^{31}\) cautioned the Authority against the pursuit of monetary integration.\(^{32}\) Cases of the unilateral closure of borders by the more powerful and economically buoyant member states\(^{33}\) have caused a huge hindrance to the free movement of persons, goods, and services among member states.

At its inception, the ECOWAS Treaty established institutions to carry out its aims and promote its fundamental principles.\(^{34}\) They are the Authority,\(^{35}\) composed of the Heads of States and Governments of all member states, which is responsible for the general direction and control of the Community\(^{36}\); the Council of Ministers (COM),\(^{37}\) which is composed of two representatives from each member state\(^{38}\); and the Executive Secretariat,\(^{39}\) which is headed by the Executive Secretary, who is the principal executive officer of the Community and all its institutions and the legal representative of the institutions of the Community.\(^{40}\)

The 1975 Treaty also established specialised technical commissions to foster the maintenance of the fundamental principles of the Community, including commissions for food and agriculture; science, technology, and energy; environment and natural resources; trade and


\(^{34}\) ECOWAS Treaty (n 6) art 6 (1) (a-i)

\(^{35}\) ibid art 7 -10

\(^{36}\) ibid art 7 (2)

\(^{37}\) ibid art 10-12

\(^{38}\) ibid art 10 (2)

\(^{39}\) ibid art 17

\(^{40}\) ibid art 18
customs; political, judicial and legal affairs, regional security and immigration; and administration and finance.\textsuperscript{41}

The final institution established under the Treaty was a tribunal for the Community that was responsible for the settlement of disputes that might arise among member states concerning the interpretation and application of the provisions of the Treaty. The operationality of the tribunal was dependent on the exercise of the power bestowed upon the Authority of Heads of States and Governments under Article 11(2) of the same Treaty, a power which was not exercised therefore the tribunal did not see the light of day. The roles played by the relevant institutions of the ECOWAS in the operation of the Court are further examined in Section 3.3.1. below.

3.1.1. The emergence and growth of the ECOWAS Court

Over a decade after the establishment of an ECOWAS Tribunal, the Authority, exercising powers vested in it by Article 5 of the 1975 Treaty, adopted Protocol A/P.1/A.1/1991,\textsuperscript{42} establishing the Community Court of Justice (ECOWAS Court or the Court) to serve similar functions as the tribunal, with the additional responsibility of settling disputes arising between the member states and the institutions of the Community.\textsuperscript{43} Two years after the 1991 Protocol came into force, a Revised Treaty of the ECOWAS was adopted, re-stating the establishment of the ECOWAS Court.\textsuperscript{44} It mainly reiterated the provisions of the Protocol on the establishment, composition, functions, and jurisdiction of the ECOWAS Court. At this point, the ECOWAS Court was not accessible to individual citizens and organisations of the member states.

For over a decade after its establishment, the Court sat idle, as member states and Community institutions failed to approach the Court for settlement of disputes, perhaps because member states were more comfortable exploring other dispute settlement mechanisms. However, in 2003 the Court adjudicated its first case, \textit{Afolabi Olajide v Federal

\textsuperscript{41} ibid art 22

\textsuperscript{42} ECOWAS Protocol A/P.1/A.1/1991 of the Community Court of Justice

\textsuperscript{43} The tribunal established under Article 56 of the 1975 Treaty is empowered to settle only disputes amongst member states. ECOWAS Treaty (n 6) art 56

\textsuperscript{44} The other institutions established by the Treaty are the Community Parliament, the Economic and Social Council and the Arbitration Tribunal. ECOWAS Treaty (n 6) art 6 and 15
Republic of Nigeria, which was instituted by a Nigerian trader against the government of his own country for the unilateral closure of the border between Nigeria and Benin Republic.45 The plaintiff, whose business was gravely affected by the border closure, instituted an action, asking the Court for a declaration that the unilateral closure of the border was unlawful and amounted to a breach of Article 3(2)(d)(iii) and Article 4(g) of the Revised ECOWAS Treaty; a declaration that the border closure was a violation of his right to freedom of movement of goods and persons within ECOWAS and his right of ingress and egress as guaranteed under the Revised ECOWAS Treaty; an order of injunction restraining the Federal Republic of Nigeria from further closure of the Seme Border; and the award of a cost of 5 million Naira in favour of the plaintiff.46 Upon receiving the plaintiff’s claims the Federal Republic of Nigeria filed a preliminary objection on the ground that the Court lacked jurisdiction to entertain the suit because the plaintiff had no right of direct access to the Court.

Having examined all the arguments of both parties, the Court decided that one of the conditions for the competence of the Court is that the action must be initiated by due process of the law. In accordance with Article 34 of the Revised ECOWAS Treaty and Article 9(3) of the Protocol of the Court, the Court emphasised that only member states may be parties to cases instituted in the Court. Although the Court acknowledged that the case touched on one of the fundamental essences of the creation of the ECOWAS, it decided that the Court lacked jurisdiction to adjudicate the matter.47

The decision in the Afolabi case drew attention to a gap in the Court’s legal regime that leaves the rights of citizens of the ECOWAS member states, under the Treaty and other protocols, at the mercy of their government. After the decision in the Afolabi case, extensive legal arguments were raised by the Court, lobbying for a reform of its jurisdiction.48 Shortly after, the Court, non-governmental organisations and Community officials launched a campaign for

46 ibid para 7
47 ibid para 47-55
48 Alter et al (n 1) 750
the expansion of the Court’s jurisdiction, as a result of which a Supplementary Protocol49 was adopted.

The Supplementary Protocol changed the initial design of the Court and widened the de jure jurisdiction of the court. The traditional role of the Court was expanded to include the interpretation, application, and determination of the legality of subsidiary legislation and legal instruments of the Community.50 The Court was also empowered to consider the failure of member states to honour the ECOWAS Community obligations.51 In addition to broadening the traditional jurisdiction, the Supplementary Protocol conceived a new jurisdiction, empowering the Court to determine matters of human rights violations that occur in member states.52 This provision gives the Court limitless human rights jurisdiction as the violation need not be a result of a failure to implement a provision of the ECOWAS Treaty or other instruments. This gives the ECOWAS Court the scope to grow its de facto jurisdiction and it is arguably the only two-in-one hybrid international court.53 The human rights jurisdiction will be assessed in more detail in 3.6.1. below.

The Supplementary Protocol also broadened access to the Court by extending access beyond member states and the Authority to include individuals and corporate bodies.54 By the provisions of this Supplementary Protocol, access to the Court is now open to individuals and organisations who seek relief for violations of human rights that took place in a member state. The only caveat is that the submission of the application must not be anonymous, nor be made while the same matter has been instituted before another international court for adjudication. However, individuals and corporate bodies have no access to the Court in matters of economic integration disputes55, or matters on the act or inaction of member states or Community officials, unless such act or inaction violates the rights of the individual or corporate body. As the ECOWAS Community does not have a specific human rights

49 ECOWAS Court Supplementary Protocol (A/SP.1/01/05)
50 ibid art 3(1)
51 ibid art 3(1)(d)
52 ibid art 3(4)
53 Solomon T. Ebobrah, The ECOWAS Community Court of Justice: A Dual Mandate with Skewed Authority, in International Court Authority (Oxford University Press 2018).
54 Supplementary Protocol A/SP.1/01/05 (n 49) art 4
legislation or treaty, litigants can evoke a wide range of international human rights instruments as a basis for their action as long as the defendant member state has ratified the instrument evoked. Since the beginning of the business of the Court in the Afolabi case, and the subsequent expansion of the jurisdiction of the Court, there has been a steady inflow of cases in the ECOWAS Court. The Court has reported a total of over 152 decided cases, most of which involve human rights violations.\textsuperscript{56}

3.2. The Composition of the Court.
The ECOWAS Court is composed of seven judges selected from nationals of member states by the Authority and who are persons of high moral character and meet other qualification criteria.\textsuperscript{57} In reality, in the past few years, there have been only five sitting judges in the Court. The rationale behind the reduction of the required number of judges is not clear. However, as the wording of the Court Protocol states that “the Court shall consist of seven members”, there is a clear breach of the provisions of the Protocol. The current number of judges does not affect the formation of a quorum by the Court; therefore, it seems to raise no issue that the Court is short of two judges. To form a quorum, three judges must be present, the president of the Court and two other judges.\textsuperscript{58} Thus, the current composition of the Court does not result in a quorum deficit.

3.3. The Organisation of the Court
The day-to-day administration and organisation of the ECOWAS Court outside the adjudication of cases involve several organs of the ECOWAS institution and different departments of the Court. This section will briefly introduce these organs and departments, their composition, and their roles and functions in the Court’s affairs.

3.3.1. The major organs of the ECOWAS Community involved in the Court’s administration
As stated in Section 3.2. above, at inception, the ECOWAS established institutions for the promotion of its aims and objectives. All these institutions perform vital functions in the


\textsuperscript{57} ECOWAS Court Supplementary Protocol A/SP.2/06/06, art 2; the process and criteria for selection of judges are assessed in detail in Part III of this thesis.

\textsuperscript{58} Ibid, art 2 (3)
integration and enhancement of the region. However, there are three major institutions involved in the operation and administration of the ECOWAS Court.

i. The Authority of Heads of States and Governments

The Authority of Heads of States and Governments, a primary organ of the Community (the Authority) is the supreme organ of the ECOWAS and is composed of all Heads of States and/or Governments of the ECOWAS member states. The main role of the Authority is the general direction and control of the ECOWAS and to ensure the progress and development of the Community as well as the realisation of its objectives. Other functions of the Authority include the determination and regulation of policies and guidelines of the Community and the issuance of directives. It also coordinates and harmonises the various policies across member states and manages the functioning of all Community institutions and follows up on the implementation of their objectives.

Additionally, the Authority performs the functions of appointment of other key organs such as the Executive Secretary, the Councils, and External Auditors. It has the power to refer matters to the ECOWAS Court when it determines that a member state or Community institution has failed to honour obligations or acted outside the purviews of its powers. The Authority may also request the ECOWAS Court to give advisory opinions on legal questions.

The Authority is headed by the office of the chairman who is selected by the Authority from within them. It meets at least once a year in an ordinary session. Extraordinary sessions may be convened by the chairman at the request of a member state. Depending on the subject matter at hand, the decisions of the Authority are reached by unanimous decision or by a two-thirds majority. The decisions of the Authority must be published in the official national gazette of member states within thirty days and are binding on member states and institutions of the Community.

Within the ECOWAS Court, the Authority performs several functions, the greatest of which is the establishment of the Court’s Protocol, regulations, decisions, and other legal documents.

59 ECOWAS Treaty (n 6) art 7 (1)
60 Ibid art 7 (2) (3)
61 Ibid art 7 (3) (d & e)
62 Ibid art 7 (3) (g & h)
which regulate the legal and administrative functioning of the Court. Other functions it performs within the Court include the appointment of judges, discipline and removal of judges, approval of the Court’s budget, and remuneration of judges. A more in-depth analysis of the functions of the Authority within the ECOWAS Court will be performed in the course of this thesis.63

ii. Council of Ministers

The Council of Ministers (hereinafter referred to as “the COM”), established under Article 10 of the Revised Treaty, comprises the ministers in charge of ECOWAS affairs in each member state.64 The functions of the COM include making recommendations to the Authority on any action aimed at attaining the Community’s objectives. It also appoints all statutory officers and appointees other than the Executive Secretary and makes recommendations to the Authority on the appointment of auditors. The COM adopts staff regulations and approves the organisational structure of ECOWAS institutions.65

It performs its duties by adopting Regulations on the subject matter at hand either by unanimous decision or a two-thirds majority vote depending on the subject matter.66 The bindingness of the regulations adopted by the COM is dependent on the approval of the Authority, after which they become binding on all ECOWAS institutions and member states.67

iii. Judicial Council

The Judicial Council of the ECOWAS Community is another essential organ involved in the Court’s administration. It was established under Decision A/DEC.2/06/06 of the Authority68 as a major part of the Court’s restructuring as encouraged by the COM in 2006. The Judicial Council was established to ensure the efficient and effective recruitment and discipline of judges and to guarantee that the most suitable candidates are selected for the position of judge and that their suitability is maintained throughout their tenure.69 The composition and

63 Ibid art 7 (3) (g-i)
64 Ibid art 10 (1) and (2)
65 Ibid art 10 (3) (a-i)
66 Ibid art 11 and 12
67 Ibid art 12 (3)
68 ECOWAS Court Decision A/DEC.2/06/06 Establishing the Judicial Council of the Community CEDEAO - Documents juridiques A/DEC. 2/06/06 (ecowas.int)
69 Ibid art 1
operation of the Judicial Council depend on the purpose of its sitting, i.e., whether the Judicial Council is sitting in its capacity as a selection panel or as a disciplinary body.\textsuperscript{70} The composition, operation, and functions of the Judicial Council will be further assessed in Part III below.

3.3.2. Structural organisation.

At the apex of the Court’s structure is the management (i.e., the Bureau) which comprises the president and vice-president, both of whom are elected by the members of the Court\textsuperscript{71}, and the oldest and longest-serving judge of the Court.\textsuperscript{72} The management plays a vital role in the day-to-day running of the Court and carries out administrative functions including the work programme and the Court budget. The management is also responsible for the internal organisation of the Court. A formal internal organisational structure of the Court was introduced by the Supplementary Protocol A/SP.2/06/06, to achieve the proper functioning of the Court. It consists of three departments: the Department of the Registry, the Department of Research, Communication and Documentation and the Department of Administration and Finance.\textsuperscript{73}

The Registry, described as the Court’s engine room, is primarily responsible for the receipt, processing, and service of court processes. The Registry also assists the judges with their caseload management and is responsible for keeping the Court’s record, and the translation and interpretation of the Court’s processes. For the performance of its functions, the Registry has five sections i.e., Judicial Process and Case Management; Judicial Certified Translation and Interpretation; Verbatim Reports; Judicial Records, Archives and Publications and Appeals, Arbitration and Enforcement.\textsuperscript{74}

The Research and Documentation Department, headed by the Director who is assisted by researchers, legal officers, librarians, and service staff is responsible for conducting research,

\begin{thebibliography}{9}
\bibitem{70} Ibid art 2
\bibitem{71} Ibid
\bibitem{72} Ibid art 3
\bibitem{73} Ibid Preamble para 6
\bibitem{74} ECOWAS Court, ‘The ECOWAS Court Registry Department’ (ECOWAS Community Court of Justice) Microsoft Word - DOCUMENTS FOR THE WEBSITE EXCEPT COMMUNICATION.DOCX (courtecowas.org)
\end{thebibliography}
drafting, vetting agreements, and compiling and updating legal texts. The department also runs the Court’s library and handles documentation.75

3.4. Legal Framework
The legal framework of the Court defines its scope and powers of the Court. To assess the scope and powers, this section covers the jurisdiction, competence, and legal regime of the Court within the ambit of the legal texts. The competence and jurisdiction of a court go to the root of its essence. The issue of jurisdiction is even more important in international courts as they are expected to function strictly within the scope of treaty agreements. The competence and jurisdiction of an international court are therefore defined by the treaties, protocols, and other legal instruments of the court and those of its parent organisation.

3.4.1. Jurisdiction of the ECOWAS Court
The term ‘jurisdiction’ has been assigned various meanings. It has been defined in relation to power, effects, and positive law.76 The definition of the term is complicated because of historical tensions, theorizing, and doctrinal inconsistencies.77 In this section, the concept of jurisdiction is approached from the standpoint of power, i.e., the power of a court to exercise jurisdiction in a given geographical area, the power of a court to adjudicate on particular subject matters, and the power of a court to adjudicate on specific cases.

The geographical jurisdiction of the ECOWAS Court is straightforward. Being a regional court, the jurisdiction of the Court is geographically limited to the West African region. The member states, citizens, organisations and residents of member states and institutions of the ECOWAS fall under the jurisdiction of the Court.

The jurisdiction of the Court as it relates to particular subject matters and/or specific cases is elucidated in the case of Falana v The Republic of Benin,78 where the Court stated that for it to be able to exercise its jurisdiction, the matter must be properly instituted, and all conditions precedent must be fulfilled. For instance, for cases relating to the interpretation or application of the provisions of the Treaty, a condition precedent is to show that there has

75 ECOWAS Court, ‘The Research and Documentation Department’ (ECOWAS Community Court of Justice)
76 Scott Dodson, ‘Jurisdiction and Its Effects’ (2017) 105 Geo. LJ 619,622
77 Ibid
been an attempt to settle the matter amicably and these attempts have failed\(^{79}\) and the subject matter of the case must fall within the legal purview of the Court as provided for under the legal regimes.

For the subject matter jurisdiction of the Court, by the combined effect of the provisions of the Revised Treaty, Protocol, and Supplementary Protocols, the ECOWAS Court has jurisdiction to hear and determine three classes of cases, i.e., advisory, contentious, and arbitral. As the judicial organ of the ECOWAS Community, the ECOWAS Court performs treaty supervision and oversight functions. The Court has jurisdiction to issue advisory legal opinions on matters that require the interpretation of the provisions of the Treaty, thereby playing a vital role in the prevention of disputes among member states, and between member states and ECOWAS institutions. The Court also operates as an administrative court for the ECOWAS Commission.\(^{80}\)

The Court is also competent to adjudicate on contentious matters relating to the failure by the member states to honour their obligations under Community law\(^{81}\); disputes relating to the interpretation and application of acts of the Community\(^{82}\); disputes between institutions of the Community and their officials\(^{83}\); cases dealing with liability for or against the Community; cases of violation of human rights that occur in any member state\(^{84}\); the legality of regulations, directives, decisions, and other subsidiary legal instruments adopted by ECOWAS\(^{85}\); action for damages against the Community institutions or an official of the Community for any action or omission in the exercise of official functions\(^{86}\).

Also, by the provision of Article 3 (5) of the Supplementary Protocol\(^{87}\), the Court is vested with the jurisdiction to act as arbitrator pending the establishment of the Arbitration Tribunal for

\(^{79}\) ECOWAS Court Protocol (n 42) art 9(3); Parliament of the ECOWAS v Council of Ministers of the ECOWAS (2004-2009) CCJELR p. 35-36
\(^{80}\) ECOWAS Court Protocol (n 42) art 9 and 10
\(^{81}\) Supplementary Protocol A/SP.1/01/05 (n 49) art 3 (1) (d)
\(^{82}\) ibid art 3 (1) (b)
\(^{83}\) ibid art 3 (3)
\(^{84}\) ibid art 3 (4)
\(^{85}\) ibid art 3 (1) (c)
\(^{86}\) ibid art 3 (1) (g) and 3(2)
\(^{87}\) ibid art 3 (5)
the Community provided for in the Treaty. A draft of the proposed Arbitration Rules has been submitted to the COM for its consideration and approval. The establishment of the arbitration tribunal was expected to be actualised as part of the Community’s ECOWAS Vision 2020. However, the tribunal is yet to be established. Also, the functions, status, composition, powers, procedure, and other issues connecting to the arbitration tribunal are not yet established. Thus, the arbitral jurisdiction of the Court is not defined.

3.4.2. Legal regime of the ECOWAS Court
The scope and parameters of access to the ECOWAS Court and the jurisdiction and procedures of the Court are defined by a body of legal instruments that are the sources of law in the ECOWAS as a whole. These instruments define the powers of the Court, its aims, mandate, objectives, and competence, all of which are at the core of the Court’s judicial process. Following the provisions of the legal regime is even more important in international courts because their powers are tied to the agreement entered into by the member states to cede some part of their sovereignty. Generally, the jurisdiction and powers of international courts are products of treaties and protocols, as well as other subsidiary instruments, and the same applies to the ECOWAS Court.

i. ECOWAS Treaty
The treaty establishing an international organisation always forms the legal foundation for the establishment and functioning of all its institutions and serves as their primary source of law. The ECOWAS Treaty that establishes the ECOWAS Court is a multilateral agreement signed by all ECOWAS member states in the year 1975 and subsequently revised in 1993. Article 15 of the Revised Treaty establishes the ECOWAS Court as one of the institutions of the ECOWAS. It provides for the adoption of a protocol to set out the status, composition, powers, and procedures of the Court.

The Treaty further provides for the independence of the Court and the binding nature of the Court’s judgement on the member states, other institutions of the ECOWAS, individuals, and

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88 ECOWAS Treaty (n 6) art 16
89 ECOWAS Court, ‘Mandate and Jurisdiction of the ECOWAS Community Court of Justice’ (ECOWAS Community Court of Justice) CCJ Official Website | Mandate and Jurisdiction (courtecowas.org)
90 ECOWAS Treaty (n 6)
91 ibid
corporate bodies. While the ECOWAS Treaty is the primary legal instrument of the Court, it is not the only instrument governing its operation. In addition to the ECOWAS Treaty, the Court’s Protocol, Supplementary Protocol, Rules of Court, and Practice Directions also play vital roles in the functioning of the Court.

ii. Protocol and Supplementary Protocols

The ECOWAS Court Protocol and subsequent Supplementary Protocols are legal instruments for implementing the provisions of the Treaty as it relates to the Court and therefore has the same force as the ECOWAS Treaty.92 The first Protocol of the Court was signed by the Authority in 1991.93 The Protocol defines the composition, competence, statutes, and other matters relating to the Court. The Protocol also sets out the organisational framework, powers, and functioning mechanism of the Court.

A Supplementary Protocol was signed by the Authority in 2005,94 amending the provisions of the Court’s Protocol as it relates to its jurisdiction. The Supplementary Protocol expanded the admissibility rules to accommodate disputes between individuals and their member states95 and introduced the Court’s human rights jurisdiction.96 It also amended the term of office of judges and the method of implementing the Court’s judgements.97 In 2006, an additional Supplementary Protocol was signed to amend the Court’s Protocol, providing for recruitment modalities based on criteria that allow for the selection and appointment of the most qualified candidates as judges and provide for details for the discipline, removal and resignation of judges.98

iii. Other legal instruments

Other legal documents provide more detailed provisions relating to the organisation of the Court, the working of the Court, and the rights and obligations of the agents and lawyers.99 They also provide procedural rules such as the summoning and examination of witnesses and

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92 Jerry Ukaigwe, *ECOWAS Law* (1st edn, Springer 2016)
93 ECOWAS Court Protocol (n 42)
94 Supplementary Protocol A/SP.1/01/05 (n 49)
95 ibid art 2
96 ibid J
97 ibid art 6
98 Supplementary Protocol A/SP.2/06/06 (n 57)
99 Rules of the Community Court of Justice of the ECOWAS, Title I
experts, service of processes, oral procedure, and discontinuance. Another major area covered by these documents includes guidance for the registry, agents, and lawyers representing parties before the Court. They provide instructions for the Chief Registrar on the running of the Court’s affairs.

The most recent legal instrument forming the legal regime of the Court is the Practice Directions of 2020, provisions of which became necessary due to lockdowns in the member states as a result of the outbreak of the COVID-19 pandemic. It introduced the use of electronic case filing and management systems and virtual sessions to guarantee continued access to justice and expeditious disposal of cases while avoiding, as much as possible, the risk of the spread of the virus. The provisions of these legal documents as well as their relevance to the quality and effectiveness of the Court will be assessed in-depth throughout this thesis.

3.5. The ECOWAS Court and the European International Courts

The ECOWAS Court is one of the CJEU-style courts that have sprung up across Africa. The CJEU-style international courts are a departure from the traditional international courts that are designed to adjudicate disputes between member states only. As Alter rightly observed, most common market systems tend to emulate the CJEU model. CJEU-style international courts are a means of promoting compliance with community laws and consequently enhancing integration and creating a formally binding oversight mechanism as a means for member states to show their commitment to regional integration.

Just as the CJEU was remodelled in the 1970s, the ECOWAS Court was remodelled in 2005. The similarities between the ECOWAS and the European Community go beyond the courts as most of the ECOWAS institutions are modelled after those of the European Community. However, the courts do have key differences.

100 ibid Title II and III
101 Instruction to the Chief Registrar and Practice Direction of the ECOWAS Community Court of Justice (2012)
102 Practice Directions on Electronic Case Management and Virtual Court Sessions (2020)
104 ibid 146.
105 Alter et al (n 1) 741
Firstly, unlike the CJEU, the ECOWAS still lacks the requisite mechanisms for enforcing its policies and fostering compliance with the ECOWAS Court decisions. For instance, while the decisions of the Court, the Authority, and those of the COM are binding, they have no legal force on member states who are merely encouraged rather than mandated to make efforts to model their laws and policies in ways that enhance the attainment of the aims of the Community.

Another major difference is the indeterminate human rights jurisdiction of the ECOWAS Court. Unlike the European Union and many other regional communities, the ECOWAS Community does not have a regional human rights charter. This is perhaps an attempt by the member states to avoid inciting political controversies concerning what rights the Court will enforce. However, this puts the Court in a place where its human rights jurisdiction is very broad, and the Court has broad powers to interpret and enforce any human rights charter or agreement to which the member state has ratified. Also, litigants are allowed to institute an action in the ECOWAS Court even when a suit is pending in a domestic court in the member state. This encourages forum shopping on the part of aggrieved citizens, residents, and organisations of member states.

When instituting an action, litigants who have the option to choose among different judicial institutions consider several factors i.e., they forum shop. These factors include the plaintiff-friendliness of the fora, the reputation of a court for awarding favourable damages, the expertise of a court, and the quality of a court’s judgement. Forum shopping gives litigants the chance to make strategic choices to litigate their claims in one of several fora or litigate identical claims in multiple fora at the same time or successively. The relationships and interactions among states in the modern world have resulted in the establishment of networks of international organisations, and bilateral and multilateral treaties to manage these relationships. With the increase in the number of international institutions including judicial institutions, the issue of overlap of purpose and jurisdiction arose.

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106 ECOWAS Treaty (n 6) art 3
107 Supplementary Protocol A/SP.1/01/05 (n 49) art 3(4) and 4
The expanding number of international courts is a hallmark of global governance.\textsuperscript{109} However, the relationship between them causes overlap and competition in their competence.\textsuperscript{110} A healthy degree of competition among courts may motivate them to improve the quality of their decisions and decision-making process while also provoking expedient disposal of cases. In the case of the ECOWAS Court, it presents an option for litigants who may not be satisfied with their national courts. As most of the member states of the ECOWAS face the challenge of a lack of functional judicial systems as a result of various social and political instabilities,\textsuperscript{111} the ECOWAS Court has become the favoured forum for most litigants in matters of violation of human rights. The most pressing concern with forum shopping among international courts is the issue of inconsistency in rulings which results in a lack of clarity of law and sanctions. The clarity of the law and its application are key characteristics of the rule of law. This lack of clarity and inconsistency threatens the stability and legitimacy of the courts.\textsuperscript{112}

The danger of allowing forum shopping has been recognised by the ECOWAS Court itself. Clearly, if it was intended for cases pending determination in national courts to be out of bounds of the ECOWAS Court, this would have been stated in Article 10(d)(ii) of the Supplementary Protocol of 2005. Thus, the pendency of a matter before the national courts of a member state does not affect the jurisdiction of the ECOWAS Court, at least according to the Protocols of the Court. However, efforts have been made on the part of the ECOWAS Court to maintain amity with national judiciaries.

The absence of the requirement of exhaustion of local remedies is another major difference between the CJEU and ECtHR on the one hand and the ECOWAS Court on the other. The rule of exhaustion of local remedies\textsuperscript{113} is a well-established rule of customary international law that is recognised in many regional and international courts.\textsuperscript{114} The purpose of the rule of

\textsuperscript{109} Aletta Mondré, \textit{Forum Shopping in International Disputes} (1st ed. 2015. ed., Transformations of the State).
\textsuperscript{111} Edefe Ojomo, ‘Competing Competencies in Adjudication: Reviewing the Relationship between the ECOWAS Court and National Courts’ (2014) 7 African Journal of Legal Studies 87, 89
\textsuperscript{113} The rule essentially requires that before instituting an action in an international court, an aggrieved party must first seek all the reliefs available to them in the domestic courts, agencies, and other avenues.
\textsuperscript{114} Lilian Chenwi, ‘Exhaustion of Local Remedies in the Jurisprudence of the African Court on Human and Peoples’ Rights’ (2019) 41 Human Rights Quarterly 374, 376.; Ikenna Ugboaja, ‘Exhaustion of Local Remedies and the FSIA
exhaustion of local remedies is to foster a complementary relationship between international courts and national courts, prevent the overburdening of international courts, and give national courts the chance to address human rights complaints, especially those instituted against the government of member states before they are dragged to international courts.

The rule of exhaustion of local remedies also prevents forum shopping and unhealthy competition between national courts and international courts. The governments of West African states have, on many occasions raised their concerns about the lack of the rule of exhaustion of local remedies. For instance, in the case of *Hadijatou Mani Koraou v. The Republic of Niger*, Niger stated that they consider the absence of the rule a gap that the Court should make efforts to fill in practice. The Niger’s counsel also argued that the rule of exhaustion of local remedy helps a court to decide whether a state adequately protects human rights at the national level and that the Court should only intervene where the states have failed to protect the rights of aggrieved persons.

On all occasions the Court rebuffed the arguments of the member states and reaffirmed that the lack of the rule is not an oversight or a flaw, rather it is a deliberate element of the Court’s design. For instance, in the case of *Essien v. Gambia & Another*, the Court stated that Article 50 of the ACHPR, which provides for the exhaustion of local remedies as a condition precedent to instituting an action in the ACtHPR, does not apply in the ECOWAS Court as the rule has “no relationship with the procedure of accessing the court”.

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*ibid* 88.

*Ojomo* (n 111) 90

*Hadijatou Mani Koraou v. The Republic of Niger*  ECW/CCJ/JUD/06/08 Judgement (ECCJ, 27 October 2008)

*Ibid* para 36.


*Professor Etim Moses Essien v. The Republic of the Gambia* ECW/CCJ/APP/05/05 Judgement (ECCJ, 14 March 2007)

*Ibid* para 13. See also, in the case of *Musa Saidykhan v. The Gambia* ECW/CCJ/APP/11/07 Ruling, (ECCJ, 30 June 2009) para., 43; Similarly, in *Hadijatou Mani’s case*, the Court stated that “it should not be considered that
exhaustion rule has led to the overloading of the Court with cases of human rights violations, the root cause of the overloading is the lack of faith of the citizens, residents, and organisations in the national courts and the overall judicial system of member states.

The Court’s Protocol does not provide expressly for cases where a matter before the Court is also a subject of litigation in a national court of member states. In the case of *Tidjani V Federal Republic of Nigeria*¹²³, the Federal Republic of Nigeria filed a preliminary objection arguing that the institution of the suit by the plaintiff was an abuse of court process as an appeal on the same matter was pending before the Nigerian Court of appeal. The Court upheld the preliminary objection, stating that to go ahead with the matter would mean acting as an appellate court in respect to the decision of the Nigerian High Court which would harm have an adverse effect on the comity existing between the Court and the judiciaries of the member state. Since the decision of the Court is an isolated one it is not clear whether the Court would maintain the same energy if the case were before a court of first instance.

3.6. Impact and Role of the Court

The ECOWAS Court plays an important role in the achievement of the Community’s objectives. The role of the Court in the region of West Africa can be categorised into two main areas. First, the Court’s main role at inception was to foster the integration of the region of West Africa. The second role of the Court, which was subsequently added, is the protection of the human rights of citizens and the residents of the member states.

Since its first decision in 2004, the ECOWAS Court has issued over a hundred judgements on a range of matters that have impacted the legal climate in the member states in one way or another. It is important to bear in mind that there is no agreed method for measuring the effectiveness or impact of an international court. As Gathii rightly pointed out, the ECOWAS Court and other similar regional courts in Africa operate in a legal and political climate different from those of the more established international courts.¹²⁴ Thus, the benchmark used for measuring impact in these courts may not apply in the ECOWAS Court.

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¹²³ *Tidjani V Federal Republic of Nigeria* ECW/CCI/APP/01/06 Judgement (ECCJ, 28 July 2007) p. 77
The lack of a complementary relationship between the ECOWAS Court and national courts in the member states is a distinctive characteristic of the legal regime that determines the climate in which the Court operates. The Court operates in competition with the national judiciaries. Generally, there are no accepted rules governing the nature of the relationship between national and international courts. However, it is suggested that they operate in different spheres to allow for clear regulations of the relationship between them.

The rule of exhaustion of local remedies is one such regulation. Another is the establishment and regulation of jurisdictional hierarchy to ensure complementarity. Establishing a hierarchical relationship structure negates the possibility of instituting parallel proceedings in national and international courts or viewing them as judicial alternatives to one another. In doing so, possible competition between the courts is eliminated. The rules regulating this hierarchical relationship are usually stipulated in the treaties establishing a court and include the rules on preliminary rulings, the doctrine of complementarity, and electa una via.

In the ECOWAS Court, the Treaty failed to establish a hierarchical relationship or indeed any relationship at all between the Court and national judiciaries of member states. By Article 10(d) of the Supplementary Protocol of 2005 the only limitations to the institution of an action in the ECOWAS Court are the submission of the anonymous application; and the pendency of the same suit before another international court. Thus when the issue of jurisdictional overlay arises, the Court is left to determine it on a case-by-case basis. This overlap of jurisdiction has jeopardised the relationship between the ECOWAS Court and the judicial systems in member states.

Various social, economic, and political factors also exist, and they feed the distinctive climate in which the Court and the entire ECOWAS Community operate. One of these factors is the colonial history of the region that divides the member states into anglophone, francophone, and lusophone countries. The influence of the colonial masters on the legal, cultural, and

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126 Yuval Shany, Regulating Jurisdictional relations Between National and International Courts (Oxford University Press, Oxford 2007)
127 Ibid p.6
128 Ibid p.88
129 Supplementary Protocol A/SP.1/01/05 (n 49) art 10(d)
economic setup of each member state not only makes it difficult to reach unification but also affects the economic strength of each member state thereby giving some an advantage over others. It has been suggested that the former British colonies outperform the former French and Portuguese colonies economically. The difference in economic strength inevitably leads to a power imbalance that makes regional integration very tasking.

Persistent economic instability in member states is another factor feeding the unique climate of the ECOWAS. The Community has failed to establish unilateral policies to help improve and stabilise the economies of the member states. Thus, every member state directs most of its effort and resources into developing its economy while its obligation to regional integration takes a back seat. This extends to their commitment to the enforcement of the decisions of the ECOWAS Court. In other words, the national interests of member states take precedence over the interests of the Community. The lack of an integration culture is another important factor feeding the uniqueness of the ECOWAS Court. Successful economic integration is highly dependent on the will of member states to work towards its attainment. In the ECOWAS region, the integration culture is yet to be imbibed and there are no incentives for this integration culture to grow.

Another major social factor determining the climate in the ECOWAS region is the incessant problem of insecurity. The insurgency, kidnapping, and police brutality in Nigeria and

Niger; the political crisis in Mali;\textsuperscript{136} and the recent coup in Guinea\textsuperscript{137} are some of the many insecurities in the region. These insecurities have vastly affected the free movement of citizens and the enforcement of cases related thereto. Language barriers, lack of proximity, and the multiplicity of policies are other factors that make the ECOWAS climate unique.

The traditional yardsticks for measuring the impacts of international courts are compliance rate and effectiveness, i.e., the movement of member states’ policies in the direction of a court’s decisions. Again, due to the legal and political context in which the ECOWAS operates which has invariably led to a lack of compliance and implementation of the Court’s judgement, the impact of the Court cannot be adequately measured by compliance or effectiveness.\textsuperscript{138} The impact of the ECOWAS Court goes beyond compliance and effectiveness and is best measured using a performance or goal-based approach. Basing the Court’s impact on any other standards will mean the Court has failed in its entirety.

The Court’s impacts will be divided into three main areas in this chapter, i.e., human, and socio-economic rights protection, economic integration, and political rights. Although socio-economic rights are a part of human rights, in this chapter, they are highlighted as a different set of rights. In the West African region, the protection of social, political, cultural, and economic rights is a major issue.\textsuperscript{139} Thus, it is important to assess the special role played by the Court in the enforcement of socio-economic rights in West Africa that are mostly non-justiciable in ECOWAS member states.\textsuperscript{140}

\begin{thebibliography}{9}
\bibitem{guinea} ‘Guinea Coup: Military Arrest President, Dissolve Government’ \textit{(Aljazeera, 6 September 2021)} \textit{Guinea coup: Military arrests president, dissolves government | Guinea News | Al Jazeera} accessed 21 September 2021
\bibitem{posner} Eric Posner and John C Yoo, ‘Judicial independence in International Tribunals’, (2005) 93 CALIF. L. REV. 1, 28
\bibitem{nigeria} In Nigeria for instance, the Constitution of the Federal Republic of Nigeria, Chapter 2 provides for socio-economic rights. The entire chapter of twelve sections containing political, social, economic, social, and developmental rights of the citizens of the nation. However, by virtue of section 6 (6) (c) of the same Constitution, these rights are non-justiciable. Thus, citizens of Nigeria cannot seek redress in the national courts for the enforcement of these rights. See also Chapter 6 of the Constitution of the Republic of Ghana
\end{thebibliography}
3.6.1. ECOWAS Court and West African regional integration

Similar to the CJEU of Justice within the European Union, the ECOWAS Court was established to be an instrument in the development of the Community. It was established as a principal institution of the Community to ensure adherence to the laws of the Community and to interpret and apply provisions of the Treaty and other legal documents. Establishing a judicial institution for the resolution of regional disputes, interpretation of community laws, and enforcing treaty obligations has proven functional in many other regionally integrated communities. Also, the establishment of a variety of complex bilateral and multilateral instruments, as well as inter-group and international interaction, has contributed to the importance of establishing regional and international courts. Another factor necessitating the establishment of regional courts is globalisation, which has introduced a new paradigm of relationships that causes nations to increasingly establish judicial institutions as typical features of international political and economic relations.

In Africa, the ECOWAS was a trailblazer in establishing judicial institutions to enhance the course of regional integration. The role of the ECOWAS Court in the process of integration of the West African States cannot be overstated. The Court not only functions as an institutional mechanism for the interpretation of treaties, protocols, and other legal instruments of the Community, but it also represents a crucial step in attempting to facilitate supranational enforcement of the obligations and commitments of member states.

However, the success of the Court in this role is debatable. The ECOWAS Court has been criticised for failing to deal with glaring contraventions of the free trade agreement by member states and also did not succeed in ensuring the enforcement of the common market provisions of the Community law. The ECOWAS Court has also failed in the area of ensuring the free movement of persons, goods, and services as provided for in the Treaty of the Community and all the supporting legal instruments. The failure of the Court in this area of regional integration is mainly a result of noncompliance with the Court’s decisions by the member states. The ECOWAS Treaty, although providing for the bindingness of the laws of

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141 ECOWAS Court Protocol (n 42) art 9(1)  
the Community and the decisions of the Court on member states, fails to provide an effective enforcement mechanism, thereby making the provisions on bindingness ineffective.  

3.6.2. Human and socio-economic rights protection

One of the most prominent areas adjudicated by the ECOWAS Court relates to cases of violation of human rights by the member states. Upon the amendment of the ECOWAS Court Protocol by the Supplementary Protocol of 2005, and by virtue of Article 9 of the amended Protocol, the Court took up a double mandate and has proven to be a promising human rights court. While the Court continues to actively litigate human rights cases, the ECOWAS organisation does not have a human rights charter or convention. However, the ECOWAS Treaty in Article 4(g) provides for the promotion, recognition, and protection of the rights of the people as enshrined in the provisions of the ACHPR. Additionally, the Court has established through case law, that the Court is not restricted to the ActHPR but covers all rights recognised and protected under any international human rights instrument under which the member states in question have an obligation. Thus, the list of applicable instruments is non-exhaustive.

The indeterminate human rights jurisdiction is a unique feature of the ECOWAS Court design. The lack of a specific designated human rights charter for the Court to apply seems to be an omission stemming from the assumption that the reference to the ACHPR in the ECOWAS Treaty implies that the Court’s human rights jurisdiction is limited to the Charter. Also, it has been suggested that the 2005 Supplementary Protocol, which vested human rights jurisdiction on the Court, entered into force on a provisional basis as it was intended to be further developed. Leaving the scope of the Court’s human rights jurisdiction open may also be a strategy to avoid provoking objections from member states over the purview of the Court’s human rights power.

The broad provision provides litigants with a viable judicial platform for the protection of their human rights. Also, the judges of the Court have stated that the lack of designated human rights instruments is a chance to define and determine the scope and parameters of the

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143 Ibid 512
144 ECOWAS Treaty (n 6) preamble para 4; art 4 (g)
145 Mojeed Alabi, ‘Analysis of the Role of the ECOWAS Court in Regional Integration in West Africa’ 2013 Diss. University of Leicester, 244
Court’s human rights jurisdiction. However, it opens the Court to various criticisms. The first, and most pressing is the issue of overburdening the Court with the responsibility of interpreting a vastly expansive and rapidly growing body of human rights instruments. Secondly, it creates a Court with no deep understanding or specialization in any specific human rights charters.

Lastly, as suggested by Alter et al, the indeterminate nature of the Court’s human rights jurisdiction opens it to the possibility of applying instruments that are not legally binding.\textsuperscript{146} The Court has indicated that the ACHPR is the primary human rights instrument of the court since all member states are parties to it. However, the Court also regularly enforces the provisions of the Universal Declaration of Human Rights and various UN Human Rights Conventions.\textsuperscript{147}

One of the Court’s most celebrated cases is the case of \textit{Hadijatou Mani Koraou v. The Republic of Niger}\textsuperscript{148} which relates to the right to human dignity and the prohibition of slavery. On the merits of the case, the Court decided that the plaintiff was a victim of slavery and that although this was not attributable to the defendant, the Republic of Niger, by its inaction is responsible. The Court, therefore, ordered that the sum of 10 million Francs be paid to the plaintiff by the Republic of Niger as reparation for the harm suffered. The judgement in the case of \textit{Hadijatou} is one of the few ground-breaking decisions of the Court that was complied with and implemented by member states as the Republic of Niger complied fully with the judgement.

The judgement in \textit{Hadijatou} is one of the first cases of slavery adjudicated in an international court. The Constitution of the Republic of Niger as amended in 2003 makes slavery a crime punishable with 10 to 30 years imprisonment and a fine of one to 5 million CFA attached.\textsuperscript{149} However, in practice, incidents of slavery in the country are not pursued. The proceedings before the Court and the judgement reached addressed some key issues. The first is the issue

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\textsuperscript{146} Alter et al (n 1) 754
\textsuperscript{147} Alade v Federal Republic of Nigeria ECW/CCJ/APP/05/11 Judgement (ECCJ, 11 June 2011) para 25
\textsuperscript{148} Hadijatou v. Niger (n 118)
\textsuperscript{149} Constitution of the Republic of Niger, art 4 and 6
\end{flushleft}
of admissibility. The Court’s rejection of the preliminary objection filed by Niger Republic arguing that the lack of exhaustion of local remedies clarifies a cogent issue of admissibility.\footnote{150 Hadijataou v. Niger (n 118) para 36-53}

A further key issue is the cultural practice of slavery in some parts of West Africa. The Court’s decision, in this case, re-established the prohibition of slavery by both domestic and international laws. The Court referred to the comments of the ICJ in the Barcelona Traction Case which affirms the erga omnes nature of the obligations pertaining to slavery i.e., it is an obligation owed to the international community. The Court in this case re-established its influence on the member states.

The Court has also adjudicated on matters bordering on the violation of the right to personal liberty, life, dignity and protection from torture. In the cases of Chief Ebrimah Manneh v. The Republic of the Gambia\footnote{151 Chief Ebrimah Manneh v. The Republic of the Gambia ECW/CCJ/APP/04/07 Judgement (ECCJ, 5 June 2008)} and Musa Saidykhan v. The Republic of the Gambia\footnote{152 Musa Saidykhan v. The Republic of the Gambia Suit No: ECW/CCJ/APP/11/07, Judgement No: ECW/CCJ/JUD/08/10 Judgement (ECCJ, 16 December 2010)}, both on the illegal arrest, continuous unlawful detention, and torture of journalists, the Court decided in favour of the plaintiffs and ordered that the Gambia release them from unlawful detention without delay. The Court also ordered that the plaintiffs’ human rights be restored, especially their freedom of movement and that the Gambia pays specific sums as damages.\footnote{153 Manneh v. The Gambia (n 151) para 44 (a-d); Saidykhan v. The Gambia (n 152) para 47 and 48} While the Gambia has failed to comply with and implement the decisions of the Court in both cases, these decisions have impacted domestic policies in the Gambia.

Firstly, in 2012 the Ministry of Justice of the Gambia implemented a capacity-enhancing document targeted at rebranding the human rights protection image of the Gambia.\footnote{154 Horace S Adjolohoun, ‘The ECOWAS Court as a Human Rights Promoter? Assessing Five Years, Impact of the Karaou Slavery Judgement’ (2013) 31 Netherlands Quarterly of Human Rights 342, 369} The ministry has also organised courses and training for Gambian law enforcement on how to effect arrest and detention while observing international standards. Also, the African Commission adopted a Resolution on the Gambia in which it called upon the government to
comply with and enforce the judgement of the Court in respect of the release of Chief Ebrimah Manneh from unlawful detention and pay all damages awarded by the Court.  

The Court has also contributed to the protection of socio-economic rights in member states. In the two cases of the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. The Federal Republic of Nigeria, the Court sought to protect the interest of the citizens of Nigeria. SERAP, in the first case, sought the enforcement of rights to basic education in the Federal Republic of Nigeria, while the second case relates to the protection of the environment, both of which fall under fundamental rights that are non-justiciable under the Nigerian Constitution. In both judgements, the ECOWAS Court decided that these socio-economic rights form fundamental rights and must be made justiciable, by the member state. In the SERAP Environmental Case, the Court ordered the defendant to restore the environment of the Niger Delta and prevent further damage to the environment while ensuring that perpetrators of the damage are brought to book.

In the SERAP Education Case, the Court decided that the right to basic education, although non-justiciable under the Nigerian Constitution, is justiciable under the ACHPR. The Court stated that “embezzlement or theft of part of the funds allocated to the basic education sector will have a negative impact as the shortage of funds will disable the sector from performing as envisaged by those who approved the budget. Thus, while steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is so that the Federal Republic of Nigeria should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.” The Court decided in conclusion that every Nigerian citizen, according to the provisions of the ACHPR, has a right to an education that must be protected by the Federal Republic of Nigeria.

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156 SERAP v. Federal Republic of Nigeria & Anor ECW/CCI/APP/08/08; ECW/CCI/07/10 Judgement (ECCJ, 27 October 2009) (hereinafter referred to as SERAP Education Case); and SERAP v Federal Republic of Nigeria ECW/CCI/JUD/07/10 Preliminary ruling (ECCJ, 10 December 2010) (hereinafter referred to as the SERAP Environmental Case)
157 SERAP Education Case (n 156) para 26
158 ibid para 28
The Court’s decision on socio-economic rights, particularly in the SERAP Education Case has attracted attention from the media and among legal scholars, with many calling for the implementation of the Court’s decision.

3.6.3. Political rights and good governance

The protection of political rights, good governance and democracy in the West African region is another area where the Court continues to impact jurisprudence in the member states. The judicialization of political disputes in the ECOWAS Court is an understated part of the impacts of the Court.

The legal regime of the ECOWAS Court does not vest the Court with jurisdiction over political cases. However, the Court has developed an innovative way to assume jurisdiction over political disputes. To assume jurisdiction, the case as presented before the Court must be intertwined with claims of violation of human rights. Fraudulent election processes, rigging of

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159 Reliefweb, ‘ECOWAS Court says Nigerians have a Legal Right to Education’ (reliefweb, 22 November 2009) <ECOWAS Court says Nigerians have a legal right to education - Nigeria | ReliefWeb> accessed 29 August 2021; ‘ECOWAS Court Orders Nigeria to Provide Free Education for Every Child’ (Vanguard, 30 November 2010) <ECOWAS Court orders Nigeria to provide free education for every child - Vanguard News (vanguardngr.com)> accessed 29 August 2021; Amnesty International, ‘Nigeria: ECOWAS Court Affirms Nigeria Accountable for Ensuring the Right to Education’ (Amnesty International Public Statement, 6 December 2010) <Nigeria: ECOWAS Court affirms Nigeria accountable for ensuring the right to education (amnesty.org)> accessed 27 August 2021


161 Vanguard, ‘Ask Jonathan to Act on Child Right to Education Now – SERAP’ (Vanguard, 1 August 2011) <Ask Jonathan to act on child right to education now - SERAP – Vanguard News (vanguardngr.com)> accessed 29 August 2021; Vanguard, ‘Education: Rights Group Asks ECOWAS Court to Execute Judgement Against FG’ (Vanguard, 7 March 2011) <Education: Rights group asks Ecowas court to execute judgement against FG - Vanguard News (vanguardngr.com)> accessed 29 August 2021

162 Akinkugbe (n 31) 150
elections, \textsuperscript{163} intra-party politics\textsuperscript{164}, breaches of electoral laws\textsuperscript{165}, incompetence of electoral bodies, and violence are some of the many issues plaguing the political atmosphere of the member states.\textsuperscript{166} In addition, the heavy influence of political superpowers on the courts of the member states is a major problem in the region.\textsuperscript{167} The judicialization of election disputes in West Africa has failed to create a political equilibrium; instead, it ends up preserving the incumbent government.\textsuperscript{168} This results in the uncertainty of assessing justice in the national courts of member states. The ECOWAS Court, considered more independent of political influence, is fast becoming an alternative forum for the enforcement of political rights.\textsuperscript{169}

The Court’s first involvement in a politically motivated case was in the case of \textit{Ugokwe v. Nigeria & Anor},\textsuperscript{170} where the plaintiff brought an application to the Court seeking redress for the violation of his right to a fair hearing by the Nigerian Election Tribunal and the Nigerian Court of Appeal. Relying on the provisions of Article 7 of the ACHR, the Universal Declaration of Human Rights, Article 9 (4) and 10 (d) of the Supplementary Protocol of 2005, and Section

\begin{itemize}
\item \textsuperscript{166} James Thuo Gathii and Obabisi D. Akinkugbe, ‘Judicialization of Election Disputes in Africa’s International Courts’ (2022) 84 Law and Contemporary Problems 181-218.
\item \textsuperscript{168} Gathii and Akinkugbe (n 166) 182
\item \textsuperscript{169} Ibid 186
\item \textsuperscript{170} Dr. Jerry Ugokwe v. The Federal Republic of Nigeria and Dr. Christian Okeke ECW/CCJ/JUD/03/05 Judgement (ECCJ, 7 October 2005)
\end{itemize}
36 of the Nigerian Constitution the applicant sought an interim order restraining the Nigerian Independent Electoral Commission (INEC) from invalidating his certificate of attestation. The first defendant, the Federal Republic of Nigeria, filed a preliminary objection challenging the jurisdiction of the Court to entertain election disputes, but the Court held that notwithstanding the political undertone of the case, the subject matter of the issue before it was the determination of the violation of the applicant’s human right, therefore, the Court has the requisite jurisdiction. This decision is what is now known in the ECOWAS Court as the *Ugokwe* doctrine. The Court went ahead to determine whether the rights of the applicant to a fair hearing was indeed violated. The Ugokwe case shows that citizens of ECOWAS member states consider the Court a forum for the mobilization of opposition politics and has become the foundation for the institution of similar suits. The Ugokwe doctrine has been successfully relied upon in many other politically motivated cases even though member states continue to ignore the decisions of the Court. The popularity of the ECOWAS Court for adjudicating political matters is not motivated by the success of the cases, but as the applicant’s counsel in the case of *Hope Democratic Party & Anor v Nigeria & Ors*, said the plaintiffs in these cases are motivated by the ability of the Court’s judgement to “serve as a deterrent to other would-be-violators of election laws on fairness and equality before the law”. Opposition political parties and politicians file election suits in the ECOWAS Court as a strategy to avoid weak national judiciaries influenced by incumbent governments which also presents an opportunity to embarrass the incumbent.

3.7. The Challenges Faced by the Court

Since its establishment in 1991, the ECOWAS Court has positioned itself as a dominant catalyst for the development of legal order in the West African region, especially in the area of human rights protection. Although it had a slow start and faced a plethora of challenges, the ECOWAS Court has become a force to reckon with in the entire continent of Africa. While

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171 Akinkugbe (n 31) 160
172 *Congrès pour la Démocratie et le Progrès (CDP) & others v. The State of Burkina Faso* ECW/CCJ/JUD/16/15 Judgement (ECCJ, 13 July 2015)
173 ibid para 19
175 Gathii and Akinkugbe (n 166) 217
the Court has been successful in many areas, it continues to face major challenges that limit its potential. This section will introduce some of the successes of the Court and assess some of the challenges faced by the Court one of which this thesis will assess in detail.

Apart from the continuous success of the ECOWAS Court in the protection and enhancement of human and socio-economic rights, which has been assessed in Section 3.6.2. above, the success of the Court is evident in a few other areas and deducible from various events. First is its resistance to attempted political revolution from disgruntled member states. Political backlash to the jurisdiction or the overall existence of regional courts is not limited to the ECOWAS Court. Indeed, across Africa, most regional judicial institutions have suffered the same fate. In the East African Court of Justice (EACJ), for instance, Kenya, upset by the decision of the EACJ in the case of *Anyang Nyong’o v. Attorney-General of Kenya*\(^{176}\), initiated a campaign to close down the court. However, the EACJ survived this backlash.\(^{177}\) The SADC experienced a similar issue but, in its case, the SADC was unlucky and did not survive the revolution.\(^{178}\)

In the case of the ECOWAS Court, the backlash against the Court’s human rights jurisdiction by the Gambia was triggered by the judgements issued against the member state in the cases of *Chief Ebrimah Manneh v. The Republic of the Gambia* and *Musa Saidykhan v. The Republic of the Gambia*.\(^{179}\) In response to these judgements, the Gambian government filed an official request to the ECOWAS Commission for the revision of the ECOWAS Court Protocol. Alongside the request, the Gambia presented the Commission with a draft of a proposed supplementary act which proposes six major amendments, i.e.,

a. The restriction of the Court’s human rights jurisdiction to cases relating to rights guarantees under instruments already ratified by the defendant member states.

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178 Ibid

179 *Manneh v. The Gambia* (n 151); *Saidykhan v. The Gambia* (n 152)
b. The requirement of the exhaustion of local remedies as a condition precedent to the institution of an action.

c. The requirement of instituting action not later than 12 months after the exhaustion of local remedies.

d. The prohibition of anonymous suits.

e. The prohibition of cases that are already a subject of litigation in another international judicial institution.

f. The establishment of an appeal procedure for the decisions of the Court.

Although the proposal from the Gambia presented the member states with an opportunity to limit the expansive human rights jurisdiction of the Court, with the efforts of various human rights organisations and lawyers, the member states rejected this proposal. Despite the political resistance, the Court’s human rights capacity continues to thrive. ¹⁸⁰

Another evidence of the success and growth of the Court is the recent adoption of information and communication technology (ICT). The use of ICT in judicial systems as a tool for enhancing the effectiveness and efficiency of courts has become a norm. Judicial systems across the globe, both national and international, have introduced the use of ICT or their case management, filing, and processing. ¹⁸¹

In the ECOWAS Court, an electronic case management system was established in 2020 in response to the physical closure of the Court as a result of the COVID19 pandemic. This development introduced a new electronic case filing platform and the conduct of virtual court sessions. ¹⁸² As the President of the Court, Justice Edward Amoako Asante, stated, this system aligns the Court’s case management system with international best practices, enables remote case filing and reduces the cost implication of travelling to the seat of the Court. ¹⁸³ The digitalisation of the Court’s operation is a notable improvement. However, the digitalisation

¹⁸⁰ Alter et al (n 177) 281
¹⁸² ECOWAS Court Practice Direction 2020 (n 102)
of the Court’s management, the establishment of a fully functioning digital library, and the maintenance of a world-class website remain undeveloped in the ECOWAS Court.

While the success of the Court deserves some commendation, the negative continues to outweigh the positives. There are many limitations to the success and growth of the Court. The ECOWAS Court continues to evolve and strive to enhance its performance through continuous reforms. However, the Court continues to encounter challenges in its day-to-day administration, the exercise of its jurisdiction, and the development of the Court’s legal regime, which continues to negatively affect the performance and impact of the Court.

3.7.1. Non-compliance and non-enforcement of the Court’s decisions

One of the major challenges faced by the ECOWAS Community Court of Justice, arguably the biggest, is the failure of member states to comply with or enforce the judgements of the Court. There seems to be a high level of nonchalance among member states about fulfilling this and other obligations owed to the Community. Since the start of business in 2004, the Court has delivered over one hundred decisions. Although the Court is actively issuing decisions, whether these decisions are complied with is a different issue.

The members of the ECOWAS organisation and the Court have acknowledged and severally addressed the issue of non-compliance and lack of enforcement.\(^{184}\) Most recently, in March 2022 at the 11\(^{th}\) external session of the Court, the President of the Court urged the member states to comply with and enforce its decisions. He stated that the delivery of the Court’s mandate is constrained by the poor rate of enforcement which stood at 13 per cent.\(^{185}\)


\(^{185}\) GNA, ‘Comply with, enforce judgements of ECOWAS Court—Akufo-Addo to member states’ (Modern Ghana, 22 March 2022) \[Comply with, enforce judgements of ECOWAS Court—Akufo-Addo to member states (modernghana.com)\] accessed 28 March 2022
The enforceability of the decisions of the ECOWAS Court is established by the provisions of Articles 15(4) and 5(3) of the ECOWAS Revised Treaty as well as Articles 19 and 23 of the ECOWAS Court Protocol 1991. The decisions of the Court may include the award of damages, injunctions, and specific actions. The process for enforcement of the Court's decisions is through the use of a writ of execution from the Court registrar to the member states. Upon the verification by the appointed authority of the recipient member state that the writ is from the Court, it should be enforced.

The failure of the member states to comply with the decisions of the ECOWAS Court has been established in many cases, and plaintiffs who have waited in vain for the enforcement of decisions have complained about member states’ defiance. For instance, the plaintiff in the case of Musa Saidykhan v The Republic of the Gambia, who had been forced to flee into exile to the United States of America for his safety, expressed his disappointment in an interview with the MFWA.

Factors such as leaving the enforcement of the Court's decision to the goodwill of member states, precedents, and the importance placed on preserving the sovereignty of states contribute to the member states' attitude. To remedy this problem, there is a need for the embedding of the ECOWAS Treaty and the Court’s Protocols and the prescription of sanctions.

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186 ECOWAS Treaty (n 6), art 15(4) provides that the decisions of the court are legally binding on member states, the institutions of the court and on individuals and corporate bodies; while art 5(3) provides that all member states are obliged to honour its obligations under this treaty and to abide by the decisions and regulations of the community.

187 See the cases of Hadijataou v. Niger (n 118), Maneh v Gambia (n 151), and Saidykhan v. Gambia Judgement (n 152)

188 See for instance, Sambo Dasuki v. Federal Republic of Nigeria ECW/CCJ/JUD/23/16 Judgement (ECCJ, 4 October 2016), where the Court issued an injunction against the continuous detention of the Claimant by the member state.

189 See for instance, the SERAP Education Case (n 156), where the Court ordered the Federal Republic of Nigeria to provide free basic education to Nigerians.

190 Supplementary Protocol A/SP.1/01/05 (n 49) art 24(2) and (3)

191 Chude Mba v The Republic of Ghana & 15 Ors ECW/CCJ/JUD/30/18 Judgement (ECCJ, 11 December 2018); SERAP Education Case (n 156); Dasuki v. Nigeria (n 190); Deyda Hydara Jnr v. The Republic of the Gambia ECW/CCI/APP/30/11 Judgement (ECCJ, 10 June 2014); Maneh v Gambia (n 151)

192 Saidykhan v. Gambia (n 152)

for the failure of member states to enforce the Court's judgement. Also, the use of media and international awareness may be a good tactic to ensure enforcement. The urgency and importance of wilful compliance by member states and prompt enforcement of the Court’s decision has thankfully begun to attract some scholarly attention\(^\text{194}\) and will hopefully be considered by member states.

3.7.2. Lack of exhaustion of local remedy rule

The lack of requirement of exhaustion of local remedies is another major problem for the Court. The issue of lack of exhaustion of local remedies is assessed in Section 2.5. above. Although the Court has continuously rebutted the concerns raised by member states on the issue, it remains a challenge as it is a contributing factor to the overburdening of the Court. While the current position of the Court provides citizens of member states with easy access to justice, it raises concerns about the risk of clogging the Court, which is already overwhelmed and underfunded, with frivolous suits.

This leads to the next challenge faced by the Court, which is the inadequacy of funds. Also, an overlap in the jurisdiction of national and international courts creates a competing atmosphere and robs the member states, through their domestic judiciaries, of the chance to right their wrongs. Thus, rather than building a network between the domestic court and the ECOWAS Court, this may ultimately sever the relationship between them.

3.7.3. Shortage of funds

Shortage of funds is a challenge faced not only by the ECOWAS Court but all institutions of the ECOWAS Community. It affects the effective discharge of the Court’s mandate and causes constraints on the human and financial resources of the Court.\(^\text{195}\)

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The ECOWAS Court, and the ECOWAS Community as a whole, is funded through a self-funding mechanism. Funds are generated through a 0.5% levy placed on goods imported into the region which should be remitted by member states to a dedicated ECOWAS account. This covers the operational costs of the Community. To cover the rest of its budget for the institutions of the Community, the ECOWAS relies substantially on the payment of levies and voluntary donations from member states. The ECOWAS has been described as one of the most financially independent intergovernmental organisations in Africa with at least 80% of its budget generated within itself. The primary problem with the levy system is the lack of commitment on the part of member states to honour their financial obligations to the Community. This is evident in the accumulation of arrears by many member states. The ECOWAS continues to be in budget deficit as the financing of the Community has continued to deteriorate since the year 2000.

According to the most recent ECOWAS annual report available the rate of debt accumulated by member states is detrimental to the growth of the Community. The financial report of the Community is difficult to access and the most recent report available is for the year 2016. At the end of the 2016 financial year, the account of the ECOWAS was in the negative and the ECOWAS credited this budgetary deficit largely to the drastic deterioration of Nigeria’s export sector due to the steep fall in oil prices.

A few member states, like Nigeria and Cote d'Ivoire, contribute the largest part of the member states' contributions. The dependence of the ECOWAS on these member states is dangerously high and gives the member states more internal powers than others. To contextualise this assertion further, the Federal Republic of Nigeria contributed $1.17bn to the ECOWAS as

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196 ECOWAS Parliament, ‘Encourages States to Improve the Collection Rate of Community Levy’ ECOWAS Parliament: Official Website of the parliament of ECOWAS accessed 08 November 2021
198 Ibid p.8
199 ECOWAS Annual Report 2016, (November 2016) para 42 ECONOMIC COMMUNITY OF (ecowas.int)
200 Ibid
201 Ibid 50-53
levies for the period of 16 years, from 2004 to 2020 totalling about 40% of the total levies paid by all member states in this period.  

The contribution by Nigeria during the 16 years is higher than the contributions of 12 other member states combined. Following Nigeria in terms of contribution are Ghana, with a total of $508.577 million, and Cote d’Ivoire, with a total of $347, 262 paid in the 16 years, representing 17.45% and 11.9% of total contributions, respectively, while the total levies contributed by the remaining 12 member states represented 30.1% of total levies contributed. These member states, especially Nigeria, have become swing states with high influence, making them engines of regional growth and stability. This essentially means these few member states can make or break the Community.

Thus, the lack of discipline by member states and the lack of transparency and a clear and prompt accountability mechanism on the part of the Community are the major causes of the shortage of funds. Despite the seemingly large contribution by Nigeria in the 16 years, the member states owe up to 36% of the levies. Also, no mechanisms are in place for ensuring compliance with Community obligations, with no penalty for non-compliance. The clear solution for overcoming the shortage of funds in the ECOWAS is the establishment of a mechanism ensuring prompt payment of levies and contributions by member states and a system of imposing penalties for non-compliance. Also, a prompt and improved budgetary and financial reporting system would go a long way in encouraging member states to uphold their end of the bargain.

3.8. Conclusion

An introduction to the history, organisation, structure, goal, success, and challenges of the ECOWAS Court sets the foundation for the assessment of the quality of the Court, which is
the main crux of this thesis. The quality of an international court is a major determinant of its effectiveness and, by extension, the attainment of a court’s goals. As Shany stated, the increased relevance of international courts in modern-day legal order necessitates the assessment of their quality and performance and leads to questions such as: are international courts effective for international governance? Do international courts fulfil their mandates? Why do some international courts seem to be more effective than others? For the purpose of this thesis, the most important question is: What are the factors that determine the quality of an international judiciary?

The traditional methods of measuring the effectiveness or quality of international judiciaries have been criticised for lacking clarity and persuasive criteria necessary for the assessment. They also pose some theoretical and methodological difficulties and have generated unsatisfying results while lumping concepts such as effectiveness, quality, and efficiency into one. Therefore, there is a need for a richer understanding of the quality of international courts, one that goes beyond compliance, usage, outcome, and impact. It has been suggested that other variables used to assess the quality of public organisations in the social sciences can be borrowed. These variables would provide new tools for measuring judicial quality that present more empirical variables and a more diverse conceptual framework. These variables include independence, legitimacy, sovereignty, accountability, and transparency. In the succeeding parts of this thesis, the quality of the ECOWAS Community Court of Justice will be assessed based on the trio indicators of independence, accountability, and transparency.

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209 Ibid 263
210 Ibid 229
211 Ibid 270
212 Ibid
PART III

THE INDEPENDENCE OF THE ECOWAS COMMUNITY COURT OF JUSTICE AND ITS JUDGES

Introduction

The independence of judicial institutions is an inherent principle of the rule of law.\(^1\) It is a major determinant of the credibility, legitimacy, and quality of a judicial system. The principle of judicial independence originates from the theory of separation of power, which postulates that there are three separate and distinct arms of government, each operating independently of the others.\(^2\) The principle states that the judiciary as an institution and its members must be free to carry out their duties without influence or interference from the executive, legislature, or other actors. In the case of international judiciaries, judicial independence implies that the international courts should be shielded from pressure from actors such as the governments of member states, non-governmental organisations, parent organisations, and private parties.

Judicial independence is a broad concept that encompasses the total institutional, adjudicatory, and administrative autonomy of the court.\(^3\) The concept relates to two aspects, how individual judges exercise their functions and how the business of a court is administered and managed.\(^4\)

In assessing the independence of the judiciary, it must be measured in relation to the level of control or influence, internal or external, exerted over a court and its judges by other actors. In comparison with international judiciaries, the general perception is that the independence of national judiciaries has developed significantly. Judicial independence in the national

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\(^4\) Ibid 158
Courts is recognised as a means of insulating the judiciary from the interference that may flow from the arbitrary use of power by other arms of government.

In national judiciaries, independence is usually guaranteed under the constitution or other equivalent legal documents of the state. Also, a plethora of international guidelines attempts to promote the independence of domestic courts and their judges. Some regions have also adopted more specific guidelines designed to suit their judicial realities. In 2010 the Committee of Ministers of the Council of Europe adopted a recommendation on the independence of judges in the domestic courts of European countries. The same year, the Consultative Council of European Judges (CCEJ) adopted the Magna Carta of Judges, which summarises and codifies the opinions on fundamental principles of judicial independence of national judiciaries previously adopted by the CCEJ.

Whether the same level of development of judicial independence can be said of the domestic courts in West African nations is highly debatable. In the Federal Republic of Nigeria, for instance, the issue of judicial independence has enjoyed growing attention among legal and political scholars over the years. The judiciary in Nigeria, like that of many other nations, performs several key functions such as complementing the political system, checking the government through judicial review, adjudicating disputes between citizens, residents, and organisations, and interpreting the law.


The independence of the judiciary is the key to the effective performance of these judicial functions. The reality, however, is that the Nigerian judiciary lacks the requisite level of independence required to perform its many functions. The only constitutional guarantee of the independence of the judiciary is found in Section 17 (2) (e) of the Constitution, which provides that “[i]n furtherance of the social order, the independence, impartiality, and integrity of the courts of law, and easy accessibility thereto shall be secured and maintained”.

This provision, which would have constituted an ample guarantee of judicial independence in Nigeria, and other similar provisions enshrined in Chapter II of the Constitution, provide for the fundamental rights that, guarantee the protection of the interest of the people, but are rendered ineffective by the non-justiciability clause in Section 6(6)(c) of the same Constitution. This section provides that the judicial powers vested in the courts shall not extend to issues or questions of whether any judicial decision conforms with the fundamental objectives and directive principles of state policy set out in Chapter II of the Constitution, thereby rendering the provisions of Section 17(2) (e) impotent.

The guarantee of judicial independence and the other fundamental objectives lie solely in their justiciability. Thus, the non-justiciability of these hallmark provisions is a retrogressive move, “a mockery of constitutionalism, and a bane of governance”. The Nigerian experience is that there is a continuous untamed desire within the executive and legislature to control the judiciary, indeed the same can be said of the judiciary in many West African member states. Therefore, as Aka concluded, there is a need for the relentless pursuit of judicial reforms on a broad range of issues in Nigeria to achieve judicial independence.

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10 The Constitution of the Federal Republic of Nigeria 1999 (CFRN), s 17(2)(e)
11 As Opadere rightly stated, the non-justiciability provision reduces the fundamental objectives and directives to mere letters with no spirit and leaves them to the prerogative of the government, having reposed them in the whims and caprices of politicians.
13 Aka (n 9) 46
provisions of Chapter II become justiciable, judicial independence and other rights it seeks to guarantee are merely a mirage.

In Ghana, on the other hand, there is more elaborate and seemingly adequate protection for the independence of the national judiciary. On its surface, the Constitution erects a structural design that effectively excludes the interference of the executive and legislature from the affairs of the judiciary. Some provisions in the Constitution guarantee judicial independence.14 However, the political climate in the country has stirred up arguments that these provisions have failed to live up to the task of insulating the judiciary from political interference15. The development of the concept of judicial independence in ECOWAS member states is relatively weak compared to countries in Europe. This is primarily due to the political and legal orientation in the region as discussed in Section 3.6. above. In terms of the independence of the judiciary, the domestic courts in West Africa are lagging and do not represent a good yardstick for measuring the independence of the ECOWAS Court.

International judiciaries are still developing in the area of judicial independence. Although the legal regime of many international courts acknowledges the importance of the independence of the court, most of them are yet to sufficiently regulate it. The first attempt at ensuring judicial independence in an international court was made in the Statute of the PCIJ, which stated that the court “shall be composed of a body of independent judges”.16 The same provision was transposed to the Statute of the ICJ.17 Since the ICJ, many other international courts have followed suit18 including the ECOWAS Court.19

14 First, Article 125 (1) of the Constitution of the Republic of Ghana 1992 provides that justice emanates from the people and shall be administered by the judiciary which shall be independent and subject only to the constitution. The Constitution further provides for the prohibition of interference of the executive, legislature, their agents, or other actors with the exercise of judicial functions by the judges or other judicial officers in Article 127(2). Similarly, Article 127(1) provides that in the exercise of its judicial and administrative powers, the judiciary shall not be subject to the control or direction of any person or authority.
16 League of Nations, Statute of the Permanent Court of International Justice, art 2
17 Statute of the International Court of Justice, art 2.
19 Protocol A/P.1/7/91 of the Ecowas Community Court of Justice, art 3
Apart from the provisions of the courts’ legal regimes, a few attempts have been made by professional organisations and other non-governmental bodies to provide guidelines for ensuring the independence of the judiciary. The first such attempt is the Bangalore Principles of Judicial Conduct adopted by the Judicial Group on Strengthening Judicial Integrity in 2002 (Bangalore Principles), which apply to domestic and international judiciaries alike. The first guideline set up specifically for international courts is the Burgh House Principles on the Independence of International Judiciary (Burgh House Principles). It contains 17 sections providing minimum standards and guidelines on factors affecting judicial independence.

A similar guideline is the Institut De Droit International Resolution (IDDIR) on the position of international judges adopted by the Institute of International Law, which provides guidelines for the selection of judges, terms of office, the status of judges, remuneration of judges, organisation of a court and the immunity of judges, among other issues. More recently, in 2015, the International Association of Judicial Independence and World Peace consolidated its Mount Scopus International Standard of Judicial Independence (hereinafter referred to as Mount Scopus Standard) which is divided into two separate sections. The first section applies to national courts and the second is dedicated to international judiciaries. Similarly, Article 23 of the Magna Carta of Judges also applies to international courts.

All these guidelines attempt to improve the independence of international judiciaries, among other things, while bearing in mind the diversity of international courts and their common mission, interest, needs, and requirements. These guidelines are not free from shortcomings, but it is important to note that they are merely sets of guidelines and minimum standards that international courts are expected to adopt and model to suit their particular needs and

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20 The Bangalore Principles (n 5)
24 CCJE (2010)3 FINAL (n 7), art 23 provides that the principles shall apply mutatis mutandis to judges of all European and International Courts.
their social, political, and historical peculiarities. In the case of the ECOWAS Court, for instance, the prevalence of domestic politics is a factor that may limit the effective participation of member states in the Court, whose powers may be perceived as limiting the sovereignty of the states. In most member states, the executive and legislature play key roles in the affairs of the judiciary. Similarly, many of the judgements delivered against member states by the ECOWAS Court relate to matters that cannot be subjected to judicial determination in the national courts, such as the right to education in Nigeria.

A major question arising from the assessment of judicial independence in international courts is whether or not the framework for assessing judicial independence in national judiciaries can be transcribed to international courts. One can argue that international courts operate in a different political and legal, climate and perform different roles from national courts. However, as Malleson stated, the “implication [of these differences] for our understanding of judicial independence can be overstated”. In establishing a practical and generally applicable framework, it must be understood that judicial independence is relational rather than behavioural. That is, judicial independence regulates the relationship between judges and other actors within and outside a court and the relationship between a court and external actors rather than regulating the behaviour or the decisions of the judges.

As stated earlier, unlike national courts, which have been extensively researched by scholars, the body of literature on international judiciaries in this aspect only began to grow recently.

25 See for instance Mount Scopus International Standard (n 23) preamble which states that “the standards give due consideration particularly to the fact that that each jurisdiction and legal tradition has own characteristics that must be recognised. It is also recognized that in the international judiciary each court or tribunal has its unique features and functions”.

26 SERAP v Federal Republic of Nigeria ECW/CCI/JUD/07/10 Preliminary ruling (ECCJ, 10 December 2010)


28 Ibid

29 Peter H Russell and David M O’Brien (eds), Judicial Independence in the age of Democracy: Critical Perspectives from Around the World (University Press of Virginia, Charlottesville, 2001) 8

However, the increasing delegation of adjudicating and law-making powers to international courts has caused scholars to begin to pay attention to the various concepts affecting the effectiveness and quality of these courts. Yet, unfortunately, the ECOWAS Court and many of its African counterparts have been left out. The independence of the ECOWAS Court is a subject area yet to be explored. The existing literature on the Court indicates that scholars are engrossed with the human rights jurisdiction of the court.31

This chapter will analyse the concept of external and organisational judicial independence as it relates to the ECOWAS Court. The analysis takes a comparative approach, drawing a comparison between the ECOWAS Court and the national judiciaries of the ECOWAS member states’ other international courts.

The first section provides a general introduction to the concept of judicial independence in international courts and the facets and levels of independence desirable in international judiciaries. It provides a summary of the different approaches to measuring the independence of international judiciaries and a justification for the approach adopted in this chapter.

The subsequent sections examine the indicators of judicial independence in relation to the rules, procedures and practice in the ECOWAS Court vis-à-vis the judiciaries of selected

ECOWAS member states, especially in Nigeria\textsuperscript{32}, and other international courts, particularly the ECtHR.

The last section concludes that the ECOWAS Court’s legal regime needs reform to reflect the current reality and international trends and norms in the selection process, security of tenure, privileges and immunity of members of the courts, budgetary and financing process, and remuneration of members of the court. While it may be considered desirable to raise the standards of the independence of the ECOWAS Court to meet that of its European counterparts, there is a need to appreciate the different legal and political engineering of the ECOWAS Court and that of its member states.

\textsuperscript{32} The focus on the Nigerian judiciary in this thesis is informed by the dominant role played by Nigeria in the ECOWAS and the availability and easy access to relevant resources. Also, Nigeria has one of the most developed judiciaries in West Africa therefore it is easy to compare the Nigerian judiciary and the ECOWAS Court.
CHAPTER 4

4. THE CONCEPT OF JUDICIAL INDEPENDENCE

4.1. Definition

The concept has no precise or generally accepted definition. It can simply be described as the freedom of a judicial entity to carry out its function free of interference or undue influence from both internal and external sources. Voeten defined judicial independence as “a set of institutional and other factors that, to a lesser or greater extent, allows judges autonomy from the preference of other political actors when these judges issue legal opinions”.¹ Power, a former judge of the ECtHR, defines judicial independence as “the independence of each individual judge in the exercise of adjudicating functions and ability to act without any restriction, improper influence, pressure, threat or fear of interference, direct or indirect, from any authority, including, authorities internal to the judiciary”.² In the Bangalore Principles, judicial independence is defined as the ability of a judge to exercise judicial functions independently based on their assessment of the facts and in accordance with a conscientious understanding of the law, free from any form of threats, influences, inducements, pressures, or interference, direct or indirect, from any quarter or for any reason.³

Despite different definitions, each reflecting the opinion of the author or the method adopted, one trait cuts across most definitions, i.e., the emphasis on the freedom of judges to carry out their duties without anticipating consequences or restraint.⁴ These definitions do not adequately capture the essence of the concept. It is essential to consider that the

³ The Bangalore Principles of Judicial Conduct, 2002
influences that need to be warded off are not only negative ones but all forms that may result in constraint, both actual and perceived.

At this juncture, it is important to unpack the essence of the concept. To do so, the arguments made in this chapter will centre around three fundamental questions: independence of whom? from whom? and from what? This chapter argues that to attain the necessary level of judicial independence, a court as an institution and its members (judges, registrars, and prosecutors, etc.) must be independent of all forms of constraint (whether direct or indirect) coming from any persons, states or entities (whether internal or external).

In the case of the ECOWAS Court, the answer to the above questions is the independence of the Court, its judges and other members of staff from all forms of constraints, influence or interference directed at them by the ECOWAS member states or their agents, citizens or groups of citizens of members states, the ECOWAS organisation and its institutions (especially the Authority, which is the governing institution of the ECOWAS and plays a vital role in the selection of judges, approval of budgets and removal of judges), and non-governmental organisations.

For this thesis, judicial independence is defined as the freedom of members of the judiciary (i.e., judges, prosecutors, registrars, and interpreters e.t.c.) to carry out their functions and duties based purely on their assessment of the facts in every case and in accordance with the law, without any form of constraint, interference, threat, inducement, pressure, or influence from other actors. However, due to the limited word count and time limit, this thesis focuses solely on the independence of the judges.

4.2. Degree of Judicial Independence Desirable

Scholars are yet to reach an agreement on the degree of independence necessary for the effective function of international judiciaries. The divide between scholars on the degree necessary is another issue that needs to be unpacked. While the definitions put forward by most scholars maintain that international courts should be insulated from threats, influence, and interference, scholars go on to argue that the term judicial independence should not be

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understood as an absolute term. Two categories of arguments already exist on the degree of independence to be accorded to international judiciaries: absolute dependence and constrained independence.

4.2.1. Absolute dependence
The underpinning argument in support of the theory of absolute dependence is that international courts operate on a different paradigm and perform a different function from domestic courts. Proponents of this theory, Posner and Yoo, argue that these differences make judicial independence undesirable for the operation of international courts. They hypothesize that judicial independence does not benefit international courts but hinders their success. The logic for their argument is that international courts lack a hierarchy, an enforcement mechanism, and a legislative instrument that allows for centralized change.

Posner and Yoo propose that states establish international courts for three reasons: to disclose information to member states in treaty disputes, to disclose information to member states in customary international law disputes, and to resolve disputes between member states. To this end, Posner and Yoo concluded that international courts cannot be independent and effective at the same time. They propose that the success and effectiveness of international courts are measured by the consistency of their affairs with the interests of the states that create them.

The theory of absolute dependence is inherently flawed. Firstly, it does not take into account the power imbalance among member states. Even if one agrees with the argument that international courts are established solely to serve the purpose of benefiting the state parties, their dependence will only be in favour of particular member states to the detriment of others. Similarly, the argument of Posner and Yoo is built upon the premise that state parties

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See also, Owen M Fiss, ‘The Right Degree of Independence’ in Irwin Stozky (ed), Transition to Democracy in Latin America (Routledge 2019), where Fiss stated that the goal is for judicial independence to be optimized rather than maximised.
7 Eric A Posner and John C Yoo, ‘Judicial Independence in International Tribunals’ [2005] 93 Calif L Rev 1; 7
8 Ibid 14-26
9 Ibid 72
seek to cooperate and provide relatively neutral information relevant to their disputes,\textsuperscript{10} which is not always the case as not all cases of non-compliance are clear-cut. One can argue that if disputing member states can agree on the facts and law in every dispute, a settlement can be reached without recourse to the court.

Secondly, while absolute dependence may be effective in courts established solely to settle disputes among member states, it will be ineffective in courts that deal with matters involving the violation of human rights or criminal liability (such as the ICC, ACtHR, E CtHR, and the ECOWAS Court). Also, absolute dependence, as proposed by Posner and Yoo, fails to take into proper consideration international courts that are accessible to private litigants (i.e., supranational courts).\textsuperscript{11}

Considering the proliferation of such international courts, it is important to consider these supranational courts in the debate on the desired degree of independence. Non-state litigants approach international courts mostly to obtain justice against state parties because they lack faith in the objectivity of the domestic courts. Thus, an international court that is dependent on the state parties does not serve the purpose of a judicial umpire to non-state litigants.

4.2.2. Constrained independence

A counter-theory to absolute dependence is what Helfer and Slaughter refer to as the theory of “constrained independence”. The central argument of constrained independence is that international courts function in a strategic space in which there is an effective operation of political constraint.\textsuperscript{12} The proponents of the theory of constrained independence argue that international courts are formally established by states to enhance their commitments, and the states then put in place a “range of structural, political, and discursive mechanisms” to ensure that the judges are independent while operating within a set of legal and political constraints.\textsuperscript{13}

\textsuperscript{10} ibid 14
\textsuperscript{13} Helfer and Slaughter (n 11) 902
Many scholars consider political constraints on international courts emanating from other actors as a mechanism for ensuring accountability\textsuperscript{14}, legitimacy\textsuperscript{15}, or proper checks and balances\textsuperscript{16}. Helfer and Slaughter in their article countering the argument by Posner and Yoo\textsuperscript{17} argued that independent international tribunals are more credible and effective.\textsuperscript{18} Helfer and Slaughter rightly observed that the purpose of the establishment of international courts goes beyond the provision of information to disputing parties.\textsuperscript{19} They were also correct to conclude that the arguments of Posner and Yoo are based on the analysis of a biased selection of courts. Indeed, Posner and Yoo blatantly ignored the rising creation of independent international courts\textsuperscript{20} and the attention paid to them by non-state litigants.\textsuperscript{21} Helfer and Slaughter, on the other hand, took into account a wider range of international courts that represents the true empirical landscape.\textsuperscript{22}

Helfer and Slaughter, recognising the flaws of the theory of absolute dependence, proposed constrained independence. They, however, went further to propose that independent tribunals should still be subject to some formal, political, and discursive constraints to ensure that the potential for overreaching by a court is narrowed.\textsuperscript{23} These constraints serve as either controlling or signalling mechanisms to make the tribunal aware when they overreach the ambit of their authority. It has also been argued that with the expansion of the powers delegated to international courts, naturally flows a need to maintain some control over them.\textsuperscript{24}

While it is fitting to argue that there is a need to put in place a mechanism to prevent judicial overreaching or other abuse of independence by the judiciary, a constraint on the said

\textsuperscript{14}Tom Ginsburg, ‘Political Constraints on International Courts’ in Cesare P R Romano, Karen Alter and Yuval Shany (eds), \textit{The Oxford Handbook of International Adjudication} (Oxford University Press 2014); Mahoney (n 30)
\textsuperscript{15}Pérez (n 6) 187
\textsuperscript{17}Posner and Yoo (n 7)
\textsuperscript{18}Helfer and Slaughter (n 11) 902
\textsuperscript{19}ibid 904
\textsuperscript{20}ibid 910
\textsuperscript{21}Which according to Helfer and Slaughter is evidenced by their swelling dockets and the large number of decisions they issue. ibid 910.
\textsuperscript{22}ibid
\textsuperscript{23}ibid 930
\textsuperscript{24}Jacob Katz Cogan, ‘Competition and Control in International Adjudication’ [2007] 48 Va J Int’l L 411, 413
independence is not a suitable mechanism. As stated in 4.2.3 below, rather than constraining the independence of the courts, establishing mechanisms for checks and balances will curtail any conceivable abuse of independence by the judiciary. Another challenge to the theory of constrained independence is the difficulty of determining where to draw the line to ensure that the constraint mechanisms do not lead to a court being totally dependent on other actors and eventually being influenced by them. Scholars like Helfer, Slaughter, Cogan, Perez, and Fiss, who argue in favour of constrained independence, agree that it is the most effective degree of independence, but they do not agree on the level of constraint necessary.

Helfer and Slaughter argue that constraint mechanisms must remain relatively weak but sufficient to influence the jurisprudential output of the tribunal, and also map out the strategic space within which international tribunals operate. Cogan, on the other hand, proposes that in order to maintain the necessary quality, the constraint must be strong. He argues that the current control asserted by member states on international courts is too weak, insufficient, and ineffective. The crux of Cogan’s argument is that “judges are naturally tempted and encouraged to depart from their limited roles” and the principle of judicial independence restricts the member states from influencing the substance of the decisions of a court or correcting interpretive errors made by international courts. Therefore, other existing control mechanisms must be stronger and more effective.

The lack of consensus as to the level of constraint proves that the theory of constrained independence does not protect international judiciaries from the influence and interference occasioned by dependence. One can, therefore, conclude that the theory of constrained independence presents a half full or half empty result depending on how it is applied by the member states and other actors. Ultimately, constrained independence does not serve the

25 Ferejohn and Kramer (n 16) 963
26 James Crawford and Joe McIntyre, ‘The Independence and Impartiality of the “International Judiciary”’ in Shimon Shetreet and Christopher Forsyth (eds), The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges (Martinus Nijhoff Publishers, 2012); Ferejohn and Kramer (n 16); Perez (n 6); Ginsburg (n 14); Fiss (n 6) Helfer and Slaughter (n 11); Cogan (n 24)
27 Helfer and Slaughter (n 11) 942
28 Cogan (n 24)
29 ibid 415
purpose of judicial independence (i.e., the elimination of influence and interference in the performance of judicial functions).

The argument in this chapter is that international courts and their members should be independent of all forms of interference, influence, or constraint. The basis of this argument is that an international court is either independent or dependent; the idea of partial or constrained independence is not desirable and does not eliminate the risk posed by judicial dependence. Therefore, this thesis proposes the concept of qualified judicial independence.

4.2.3. Qualified independence

In this chapter, the thesis proposes that the degree of independence required by international judiciaries is ‘qualified independence’. The idea that the member states should hold any degree of influence or constraint on the independence of the international judiciary does not protect the courts. International courts and their members should be insulated from all types and sources of interference and political constraints.

Constraints on the independence of international courts should not be considered a mechanism for ensuring judicial quality. Without disregarding the need for a proper system to ensure that the powers and authority of international courts and their members are not left unchecked, this thesis argues that international courts must be free to carry out their judicial and administrative duties independently, with some mechanism of checks and balance set in place. Thus, rather than constrain the independence of the court, independence should be qualified by some mechanism for ensuring checks and balances, i.e., judicial accountability and judicial transparency.

The thesis also takes cognisance of the fact that the member states and parent organisations are key actors of the courts who not only establish the courts but also play a key role in the funding of the courts. However, contrary to the notion that member states, being the principal and main actors of international courts, should control their affairs, this thesis argues that control by member states will lead to counterproductivity. The exercise of control by the member states or other external actors will negate the reason for establishing international courts.

This leads to the question, “Why do states create international courts?” There has been a number of valid answers proposed for this question, such as providing information to
disputing parties; enhancing the credibility of the commitments of member states; judicial law-making; and establishing an unbiased legal umpire separate from the states and other private parties. Control by member states simply defeats these purposes and undermines the expertise of international courts, thereby reducing the utility of the judges. In the case of international courts that are open only to member states, one may argue that control by the states does not affect the effectiveness of such courts. However, the problem with this argument is the power disparity that may exist among member states, such that some member states have more influence and power than others.

The independence of international courts is not only beneficial to the courts and their members but also benefits the litigants, who include the non-governmental organisations and private litigants that rely on the independent nature of international courts to obtain justice in cases where national judiciaries may be inclined to favour the governments or their agents. In West Africa, one of the roles of the ECOWAS Court, human rights protection, was a result of challenges of access to justice and judicial institutions and the failings of nation-states. For member states, as earlier stated, it enhances the credibility of their commitments by ensuring that violations can be detected and adequately addressed, thereby discouraging future non-compliance. For private litigants, judicial independence will guarantee that their rights are determined and protected by an independent and impartial judge and judicial system. A court is considered more legitimate and impartial when it is independent of political influence. In the case of the ECOWAS Court, citizens of member states, unable to access proper justice in their domestic courts, rely on the independence of the international court to ensure that the member states that are usually the defendants do not influence or interfere in the decisions of the Court. The justice they seek in the ECOWAS Court may not be delivered.

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30 Posner and Yoo (n 7)
32 Helfer and Slaughter (n 11) 39
34 Nwauche Enyinna, ‘Regional Economic Communities and Human Rights in West Africa and the African Arabic Countries’ in Anton Bösl and Joseph Diescho (eds), Human Rights in Africa: Legal Perspectives on Their Protection and Promotion, vol 332 (Macmillan Education Namibia, Windhoek, 2009)
or perceived to be delivered if the member states have control over the affairs of the Court and its members.

Also, the judgement of a dependent court in cases involving private litigants is less likely to be credible or enforced. As stated above, courts such as the ICJ and the ITLOS that do not entertain individual complaints may not be concerned with the administration of justice for individual litigants. However, they are still required to be independent to eliminate control by more powerful states to the disadvantage of the less influential member states.

This thesis maintains that in measuring the effectiveness, legitimacy, or quality of an international court, the independence of the court is not an end in itself. Independence must be maintained alongside measures for proper checks and balances. Checks and balances and the legitimacy of the court can be readily achieved through accountability and transparency. Part IV of this thesis will establish that independence and accountability are two different and distinct concepts and that the presence of one does not equate to the absence of the other. Independence, accountability, and transparency play equal roles in ensuring the quality of international courts. While independence ensures that members of the courts carry out their duties without constraints and interference, the rules on accountability ensure that judges of international courts, being independent, do not operate tyrannically and the transparency curbs judicial overreaching and ensures that the decisions of the court are clear and open.

4.3. Facets of Judicial Independence

To function effectively and without constraint, international courts and their members must be able to function independently in all aspects. To properly examine the independence of the Court, this chapter identifies three facets of independence that are considered desirable in international judiciaries:- organisational independence, internal independence, and external independence.

4.3.1. Internal independence

This applies to the individual judges of the court. Internal independence refers to the ability of individual judges to carry out their functions without undue influence from other members of the court emanating from the administrative hierarchies within the court, particularly without interference from senior or more influential members of the court. This facet of independence is the least examined, but it has the potential to affect the delivery of the duties
of judges and other members of the court and ultimately the quality of the court. Internal independence has been given more attention in the domestic judicial scene, especially in Europe. The Venice Commission of the Council of Europe\(^{35}\), for instance, recognises that:

“Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an “internal” aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication, he or she should, therefore, be independent also vis-à-vis other judges and also in relation to his or her court president or other (e.g., appellate or superior) courts.”\(^{36}\)

Internal independence has received no attention in the legal regime of international courts, however, an attempt to provide a standard for internal independence was made in the Bangalore Principles, which provide that “in performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently”.\(^{37}\)

There is very limited evidence available to support the argument that internal independence is a problem faced in many international courts however it should not be overlooked. An isolated incident that has put the issue of internal judicial independence in international courts on the radar is an incident in the ICTY. Fredrick Harhoff, an ICTY judge, in an email sent to 56 recipients including his colleagues and lawyers, claimed to have been brought to a deep professional and moral dilemma not previously faced by the pressure put on him and other judges by the ICTY President, Judge Theodor Meron in the Gotovina and Perisic Case.\(^{38}\)

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\(^{36}\) Ibid 8

\(^{37}\) The Bangalore Principles (n 3) principle 1.4

This has been described as “an extraordinary breach of Protocol”\textsuperscript{39} and “one of the worst scandals to engulf the ICTY in its history, regardless of whether Harhoff’s accusations have a basis in fact or not.”\textsuperscript{40} On account of this letter, the defendant in the Prosecutor v. Vojislav Šešelj\textsuperscript{41} case filed a motion requesting the disqualification of judge Harhoff from all further proceedings in his case. The ICTY decided that by writing the letter, Judge Harhoff demonstrated bias in favour of convicting the defendant.\textsuperscript{42} The motion for disqualification was therefore granted.\textsuperscript{43} However, this event would have remained unknown had the email not been leaked; therefore, the occurrence of such an incident is difficult to measure.

In this thesis, this facet of judicial independence will not be examined in detail, not because it is less important than the other aspects, but because it is a broad and separate aspect that requires an in-depth assessment as a separate research area. Internal judicial independence is a rather elusive concept that involves the administrative framework of the court. It involves issues such as influence or pressure stemming from a hierarchical relationship within the court, the discretionary assignment of cases by the president, and the non-existence of adequate complaint procedures,\textsuperscript{44} all of which are usually regulated within the court. Also, as internal independence is mainly administrative and relates to constraints within the confines of the court, it is difficult to assess or measure. To assess internal independence, a researcher

\begin{itemize}
\item \textsuperscript{40} Marko Milanovic, ‘Danish Judge Blasts ICTY President [Updated]’ [2013] EJIL: Talk https://www.ejiltalk.org/danish-judge-blasts-icty-president/
\item \textsuperscript{41} Prosecutor v. Vojislav Šešelj (Order) IT-03-67-T 28 August 2013 (28 August 2013)
\item \textsuperscript{43} In reaching its conclusion, the ICTY took into consideration the provisions Article 20(1) of the Statute of the International Criminal Tribunal for the Former Yugoslavia which guarantees an accused a “fair and expeditious trial with full respect for the rights of the accused. Also considered by the court was Article 13 of the Statute which provides an additional element of the right to fair trial as it requires judges of the Tribunal to be persons of high moral character, impartiality and integrity; and Rule 15 of the Rules of the Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, which provides that “a Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.”
\item \textsuperscript{44} Frans Van Dijk and Geoffrey Vos, ‘A Method for Assessment of the Independence and Accountability of the Judiciary’ [2017] 9 International Journal for Court Administration
\end{itemize}

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needs to rely heavily on the actual events within the court, information that can only be derived from the testimonies of the members of the court. The biggest potential challenge is the willingness of members of the court to divulge such information or to do so subjectively.

4.3.2. Organisational independence

This facet focuses on the independence of international judiciaries from their parent institutions. Almost all international and regional courts are offshoots of international organisations that set them up. In the case of the ECOWAS Court, it was set up by the ECOWAS. The interaction between international organisations and international courts goes a long way in affecting the independence of the court. These interactions are somewhat inevitable as the establishing organisations are largely involved in the financing of the courts, setting the jurisdictional boundaries, and in most cases, appointments of staff and other administrative matters. Also, because judges and other officers of the courts are members of staff of the international organisations they are considered to be under the ambits of the organisation.

However, as the independence of international courts can be greatly impaired by their interaction with parent organisations, it is important to regulate these interactions. It has since been established that the institutional independence of international judiciaries will be improved where the administration and institutional framework of the courts are left solely to the courts. The organisational independence of international courts is provided for in the Burgh House Principles and the IDDIR.

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45 For instance, the International Criminal Court for the former Yugoslavia set up by the United Nations; the Common Market for Eastern and Southern Africa (COMESA) set up the COMESA Court; the Southern African Development Community Tribunal (SADCT) was set up by the South African Development Community; the Eastern African Court of Justice (EACJ) was set up by the East African Community; and the Court of Justice of the European Union was set up by the Council of Europe.


To protect the independence of an international court as an institution, it must organise its administrative framework, including the employment of its support staff, drawing and presenting its budgets directly to the finance department of the parent organisation, and the salaries, pension and other forms of remuneration should not be left to the discretion of the organisation. All these variables will be further analysed in the second part of this chapter. However, again, to prevent establishing an unaccountable judiciary, there must be pre-established rules and procedures, such as the rules of court, rules of procedures, and practice directions that set and regulate the ambiits of all the powers vested in the presidents or vice-presidents of the court. In the ECOWAS Court, the Rules of Procedure of the Court\textsuperscript{49} and the Practice Direction\textsuperscript{50} provide pre-established rules to regulate organisational and administrative issues including the organisation of the court, the procedure of the court, the election and duties of the president and vice-president of the Court, and appointments of registrars and other supporting staff.

4.3.3. External independence

The independence of a court and its members from external actors, most especially member states, is the most considered and arguably the most important facet of judicial independence. In the international judiciary, the governments of member states are known to pose the biggest threat to the independence of the courts.\textsuperscript{51}

The lesser the control the member states have on international courts, the stronger the courts’ independence. External independence is ensured by the provisions, rules, and procedures contained in a court’s legal regime on variables such as the process of selecting the judges, the security of the judges’ tenure, and immunity accorded to the judges which will be discussed in Chapters 5 through 8.

Due to the threat posed by the member states, parent organisations and other actors, this chapter focuses on the external and organisational independence of the ECOWAS Court, using the various variables for indicating judicial independence. Member states of international

\textsuperscript{49} ECOWAS, Rules of Procedure of the Community Judicial Council (2007)

\textsuperscript{50} ECOWAS, Instructions to the Chief Registrar and Practice Directions of the Ecowas Community Court of Justice

\textsuperscript{51} Pérez (n 6)
courts are constantly seeking ways to influence the courts and will sometimes resort to arbitrary measures to constrain the court.

In the ECOWAS Court, for instance, the Gambian government, dissatisfied with judgements the Court delivered against it for the continuous arrest and torture of journalists, filed an official request for the revision of the Court’s Protocol accompanied by a draft of a new Supplementary Protocol. The main request of the Gambia was to weaken the human rights jurisdiction of the Court. Although this was a failed attempt at influencing the affairs of the Court, a similar one has successfully affected the SADC Tribunal.52

External independence is quite sensitive as it is difficult to eliminate the role of member states from the courts’ affairs.53 Firstly, international courts are creations of state parties. Secondly, the member states are, in most cases responsible for nominating candidates for the post of judge and for keeping international courts financially afloat. Similarly, the international courts in many cases depend on member states for the enforcement of their judgements. Thus, the success and impact of an international court, which is another factor for measuring its quality, is achieved through enforcement and compliance by member states.

4.4. Measuring the Independence of the ECOWAS Community Court of Justice

4.4.1. Measuring method

Scholars have developed several frameworks for measuring judicial independence. These frameworks have been categorised into three prevalent methods for evaluating the independence of international judiciaries.54 The first is the use of subjective information such as the perception of the independence of a court in the eyes of the public or the judges themselves. This method involves the collection of data by interviewing judges and other judicial officers and stakeholders.55 This approach is attractive as it provides a researcher with the chance to hear directly from the source, thereby giving the researcher the opportunity of assessing the independence of a court from the perspective of an insider with first-hand

53 Perez (n 6) 187; Ferejohn and Kramer (n 16); Helfer and Slaughter (n 11)
55 ibid 542
information. However, it can be limited by the accessibility of the data because of the
difficulty of securing interviews with judicial officers and the willingness of the interviewees,
especially judges, to be subjective in answering the questions. Also, to rely solely on this
method, a researcher must collect extensive and substantial data, which requires a lot of time
and can be costly to achieve.

The second method is the output method, which focuses on the decisions of a court and their
implementation. This method measures the independence of a court by evaluating the
compliance of the member states and other actors with the judgements of a court and the
effectiveness of the judgements.\textsuperscript{56} There are two proxies for this method, i.e., (i) the number
of cases filed with a court during a selected time frame, and (ii) the degree of compliance with
the decision of a court.\textsuperscript{57} However, the output method does not present a practical
measurement of the independence of the judiciary. Instead, it may be the best approach to
measure the effectiveness of the courts’ decisions. In other words, the independence of a
court is not dependent on the output of a court; rather it is dependent on the presence or
absence of actual or perceived interference or influence from other actors.

The third method is the institutional method, which evaluates the independence of the
judicial officers and a court as a body by assessing the rules and procedures in place to
guarantee the independence of the members and safeguard the organisational independence
of a court as an institution. It involves the use of variables of judicial independence to measure
the independence of an international court.\textsuperscript{58} This chapter will mainly adopt institutional
measuring methods.

4.4.2. Measuring indicators
There are two types of indicators of judicial independence:- de jure and de facto. De jure
judicial independence comprises variables for measuring judicial independence based on the
relevant legal foundation as set out in official documents.\textsuperscript{59} It is measured through variables

\textsuperscript{56} See for instance, Alessandro Melcarne and Giovanni B Ramello, ‘Judicial Independence, Judges’ Incentives and
Efficiency’ [2015] 11 Review of Law & Economics 149, 159
\textsuperscript{57} Voigt (n 4) 518
\textsuperscript{58} Dimitropoulos (n 54) 544-546
\textsuperscript{59} Stefan Voigt, Jerg Gutmann and Lars P Feld, ‘Economic Growth and Judicial Independence, a Dozen Years On:
Cross-Country Evidence Using an Updated Set of Indicators’ [2015] 38 European Journal of Political Economy
197, 200; Dijk and Vos (n 44) 6
such as the appointment process, tenure of office, reappointment process, and rules on the remuneration of judicial officers.\footnote{Dimitropoulos (n 54) 536; Voigt, Gutmann and Feld (n 59) 200} To measure the de jure judicial independence of the ECOWAS court, this thesis will examine the formal statutory provisions and legal basis entrenched in the Court’s legal regime.

De facto judicial independence, on the other hand, measures the actual implementation of the legal provision in place to ensure judicial independence. It involves variables such as the salary of the judges, the budget of the court, and the protection of the immunity of the officers.\footnote{Ibid; see also, Lars P Feld and Stefan Voigt, ‘Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators’ [2003] 19 European Journal of Political Economy 497; Bernd Hayo and Stefan Voigt, ‘Explaining De Facto Judicial Independence’ [2007] 27 International Review of Law and Economics 269} To assess the independence of a court, it is important to consider not only the legal provisions on its independence but also the extent to which the provisions are implemented.

For this thesis, judicial independence is assessed based on five indicators selected based on their fundamentality to the independence of the ECOWAS Court and its judges: selection process, security of tenure, condition of service and remuneration, privileges and immunity, and financing and budget. These indicators have since been considered the key to measuring the independence of courts, both domestic and international.\footnote{See for instance, Dijk and Vos (n 44); European Commission, ‘The 2019 EU Justice Scoreboard 2019 COM(2019) 198/2 \url{https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf}; European Commission for the Efficiency of Justice (CEPEJ), ‘European Judicial Systems- Efficiency and Quality of Justice (2016) CEPEJ Studies No.23 \url{https://rm.coe.int/european-judicial-systems-efficiency-and-quality-of-justice-cepej-study/1680788228} } They are also embedded in the provisions of international standards and principles.\footnote{Such as the United Nations Declaration on the Basic Principles on the Independence of the Judiciary was adopted in an attempt to establish a general guideline for national courts. See, United Nations, Basic Principles on the Independence of the Judiciary (1985) \url{https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx}; International Bar Association, Minimum Standards of Judicial Independence, (IBA Standards), 1982; The Bangalore Principles (n 5); Burgh House Principles (n 47) } The following sections will assess the rules and application of these indicators in the ECOWAS Court.

The provisions on the indicators of judicial independence in the ECOWAS Court are enshrined in the Court’s Protocol and Supplementary Protocol. The independence of the ECOWAS Court is provided for in both the Treaty of the ECOWAS and the Protocol of the Court. The Treaty provides that:

\footnote{Dimitropoulos (n 54) 536; Voigt, Gutmann and Feld (n 59) 200}


\footnote{Such as the United Nations Declaration on the Basic Principles on the Independence of the Judiciary was adopted in an attempt to establish a general guideline for national courts. See, United Nations, Basic Principles on the Independence of the Judiciary (1985) \url{https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx}; International Bar Association, Minimum Standards of Judicial Independence, (IBA Standards), 1982; The Bangalore Principles (n 5); Burgh House Principles (n 47) }
“There is hereby established a Court of Justice of the Community...... [t]he Court of Justice shall carry out the functions assigned to it independently of the member states and the institutions of the Community”\textsuperscript{64}

Similarly, Article 3 (1) of the ECOWAS Court Protocol provides that “[t]he court shall be composed of independent judges”.\textsuperscript{65} In many other international courts, there are more elaborate provisions for the independence of the court and its judges.\textsuperscript{66} Chapters 5 through 8 will examine the rules and procedures regulating the five selected indicators of judicial independence as they relate to the ECOWAS Court in comparison with the ECtHR and the national judiciaries of member states.

\textsuperscript{64} Protocol A/P.I/7/91 of the Ecowas Community Court of Justice, art 15
\textsuperscript{65} Ibid art 3(1)
\textsuperscript{66} In the African Court on Human and Peoples' Rights, for instance, the establishing protocol provides that the independence of the judges of the court shall be ensured in accordance with provisions of international law. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art 17(1); see also the Rome Statute of the International Criminal Court, art 40
CHAPTER 5

5. SELECTION OF ECOWAS COURT JUDGES

International judiciaries, like national courts, are shaped by the calibre of judges and other members of the court. Thus, the process of their appointment is the most direct pathway to securing or breaching the independence of a court.¹ Unsurprisingly, there has been an increase in the interest of scholars and the general public in the competence of the judges of various international courts, their background, experience, impartiality, and independence. The confidence of the public is one of the sources of an international court’s credibility and quality. It is, therefore, essential that the process of selecting the members of a court meets the international standards of judicial independence.

The process for the selection of judges in international courts varies, because of the difference in the composition of the bench of these courts. In this regard, international courts can be categorised into two. The first is courts with full representation which have the same number of judges as member states. In such courts, the member states are all equally represented on the bench. The other category is selective representation courts, which have more member states than seats available on the bench. In this case, the selection of judges becomes more competitive.

The appointment process in the ECOWAS Court is quite peculiar compared to the process adopted in other regional or international courts. In the ECtHR, for instance, the conventional two-tier selection system applies. As provided in European Convention on Human Rights (hereinafter referred to as the European Convention), the judges are elected by the PACE with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.²

The selection process in the ECtHR involves both the member states (who are responsible for nominating their best-qualified candidates) and the PACE (who determine by vote which

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¹ Ruth Mackenzie, ‘The Selection of International Judges’ in Cesare Romano, Karen Alter and Yuval Shany (eds), The Oxford Handbook of International Adjudication (Oxford University Press 2014)
² European Convention on Human Right, art 22
candidates are eventually elected).³ This leaves a lot of discretion to the member states to put forward any candidate without accounting for the process of nomination and for the PACE to appoint judges without having to follow any stipulated rule. However, as discussed in Section 5.2. and 5.3. below, the selection process in the ECtHR has evolved into a more expansive process.

At inception, the selection of the ECOWAS Court judges involved the conventional two-tier process involving both the member states and the ECOWAS as an institution. As in the ECtHR, the member states were responsible for the nomination of candidates to fill a vacant seat on the bench⁴ while the Authority of the ECOWAS was responsible for the election of the judge from the list of nominees. The involvement of the member state through the nomination of candidates is a typical process in most international courts, usually tied to the legitimacy of the court.⁵

However, this process of selection was repealed and replaced by the provisions of Supplementary Protocol A/SP.2/06/06, which leave the selection of the Court’s judges solely in the hands of the Authority, which is composed of the Presidents and Heads of States and Governments of member states. It provides that the Court shall be composed of seven judges selected and appointed by the Authority.⁶ The process of selection is provided in the Supplementary Protocol thus:

“The Authority shall allocate vacant posts to member states. A Judicial Council of the Community comprised of the Chief Justices of the Supreme Courts of member states to which the posts have not been allocated, or their representatives shall select three (3) candidates per country from among the nationals of the countries to which the posts have been allocated. The Judicial Council shall also interview the candidates and

³ ibid
⁴ Protocol A/P.I/7/91 of the Ecowas Community Court of Justice, art 3(4)
⁵ See for instance, Article 36(4) of the Rome Statute of the International Criminal Court; Art 4 of the Statute of the International Court of Justice; ECHR (n 2) art 22; Art 7 of the Statute of the IACTHR; Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights
⁶ ECOWAS Court Supplementary Protocol A/SP.2/06/06 Art 2(1) amending Article 3(1) of the Protocol (on file with Author)
propose their appointments by the Authority of Heads of State and Government through the Council of Ministers.”

The selection process involves three stages: allocation, selection, and appointment.

5.1. Allocation
The first process for selection is the allocation of vacant seats on the bench to member states. The allocation process that replaced nomination by member states is one of the major differences between the ECOWAS Court and the ECtHR. Unlike the ECOWAS Court, the role of member states in the selection process is preserved in the ECtHR. The ECtHR nomination process gives the member state a chance to participate in the selection of judges and also enhances the legitimacy of the courts. However, the independence of the candidates nominated is of utmost importance and can only be guaranteed by a strict and stable set of rules and procedures. The importance of the nomination process in ensuring the legitimacy of a court cannot be overemphasised. However, unlike the ECtHR, the ECOWAS Court is a selective representation court; thus, the allocation of available posts for rotation or representation does not apply to the ECtHR.

The aim of the allocation process in the ECOWAS Court, according to the Supplementary Protocol, is to ensure that statutory positions are rotated among member states. The allocation process may also be a useful medium to ensure due representation of the different legal systems and geographical areas of the region. However, the allocation of vacant positions in the Court so far does not indicate the rotation of the posts. This process is left to the discretion of the Authority, with no established procedure for deciding which country gets allocated vacant posts. Therefore, the chance of a member state having a national on the bench is potentially based on their lobbying and political power.

For instance, even though the Federal Republic of Nigeria always had a judge on the bench before this new selection process was established, it continues to get a post allocated to it.

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7 Ibid, Art2(3) [emphasis added]
8 ECHR (n 2) art 22
10 Decision A/DEC.5/07/13 Allocating Three Positions of Judge and Re-allocating One Position of Judge of the Community Court of Justice to member states, art 1 (on file with Author)
Also, the Authority has terminated the allocation made to one member state and reallocated the position to another.\(^{11}\) Thus the Authority not only has the power to allocate vacant seats but may also terminate a previous allocation and reallocate to another member state. The Authority is not bound by the provision for rotation; the only limitation to their allocation of power is that no two judges can be nationals of the same member state.

5.2. Selection

The selection process is carried out by the Judicial Council of the ECOWAS (hereinafter referred to as “the Council”). In 2006, the Authority, keen on establishing a “credible organ capable of effectively managing the process of recruiting judges on a competitive basis” and in accordance with the provisions of the Supplementary Protocol, established the Council, comprised of the Chief Justices of all member states or their representatives.\(^{12}\) The Council was established to ensure, among other things, the appointment of highly qualified and competent judges who can contribute, through the quality of their decisions, to the development of Community law, capable of consolidating and speeding up the regional integration process.\(^{13}\) The Council is also obligated to ensure that the judges of the Court are persons of high moral standing upon assumption of duty and to guarantee that this quality is maintained by the judges throughout their term of office.\(^{14}\)

Upon allocation, the duty of the Council is to select and interview three candidates from each member state to which the position has been allocated and make a recommendation for appointment to the Authority through the COM.\(^{15}\) The Judicial Council became operational in 2007 upon the adoption of its Rules of Procedure by the Authority.\(^{16}\) In selecting the candidates, the Council must consider a set of criteria stipulated by a combination of the Rules of Procedure, Protocol, and Supplementary Protocol. The Rules of Procedure also set out the process and procedure for selection.

\(^{11}\) Ibid Art 1(2)

\(^{12}\) Decision A/Dec.2/06/06 Establishing the Judicial Council of the Community, Preamble para 10 (on file with Author)

\(^{13}\) Ibid para 6

\(^{14}\) Ibid para 7

\(^{15}\) Ibid art 4(1)

\(^{16}\) Rules of Procedure of the Community Judicial Council of the ECOWAS Court (on file with Author)
5.2.1. Criteria for selection

Article 2(1) of the Supplementary Protocol sets out the criteria to be considered when selecting candidates to be appointed to the bench of the Court. It provides that:

“The Court shall be composed of seven (7) independent judges selected and appointed by the Authority from nationals of the member states who are persons of high moral character and possess the qualification required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law, particularly in areas of Community Law or Regional Integration Law. Furthermore, candidates to the posts of Judge of the Community Court of Justice shall have a total of no less than twenty (20) years of professional experience.”¹⁷

Additionally, Article 3(7) of the Protocol provides that:

“No person below the age of 40 years and above the age of 60 years shall be eligible for appointment as a member of the court. A member of the Court shall not be eligible for reappointment after the age of 65 years.”¹⁸

By the combined effect of these provisions, the criteria to be considered by the Council and the Authority when selecting candidates for the bench are nationality, moral character, qualifications, experience, competence, and age. While these criteria are similar to those set out in other international and regional courts, in recent times many have provided additional sets of criteria, as discussed later in this chapter. Although these criteria potentially enhance the legitimacy of the court, it will be argued later that they do not affect the independence of the court.

i. Nationality

The first criterion for appointment to the ECOWAS Court bench is that a candidate must be a national of an ECOWAS member state. In a case where a candidate is a national of more than one state, they would be considered a national of the one in which they ordinarily exercise civil and political rights.¹⁹ The Protocol, however, is quiet on cases where a candidate holds

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¹⁷ Supplementary Protocol A/SP.2/06/06 (n 12) [emphasis added]
¹⁸ ECOWAS Court Protocol (n 6) art 3(7)
¹⁹ Supplementary Protocol A/SP.2/06/06 (n 12) art 3(3)
dual citizenship, and the second country is not an ECOWAS member state. This is a more plausible occurrence as many West African nationals are also citizens of countries in Europe and the United States of America. The presumption, based on the provision of the Protocol, will be that such a candidate must show that they exercise civil or political rights in the member state. Also, important to note is the provision that no two judges of the ECOWAS Court can be nationals of the same country. The requirement of nationality is similar to what obtains in other regional and international courts as well as national courts.

ii. Moral character

The requirement of a high moral character is an important criterion for the appointment of judges to both national and international courts as judges are expected to adhere to strict standards of judicial ethics. Also, the moral standing or history of the judges has an effect on the outlook of a court as a judicial institution and the trust of the litigants and the general public in the court. The legal regime of the ECOWAS Court, like many other international courts, provides a vague and general provision on moral character. It does not address the fundamental questions, i.e., What will suffice as a high moral standard? What are the benchmarks for measuring the same? and Who determines whether a candidate passes this criterion or not? The lack of specificity of the required moral standard is a common issue in international courts.

In the ECtHR, an attempt has been made, albeit insufficient, to qualify high moral standards. It simply provides that nominees are considered to be of high moral character where their behaviour and personal status are compatible with holding judicial office and gives member states examples of good practice for ensuring that nominees pass this criterion, which is to

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20 Ibid art 2(2) amending Article 3(2)(a) of the protocol “no two (2) members of the Court shall be nationals of the same member state.”

21 See for instance, in the African Court of Human and People’s Rights (ACtHPR), judges are required to be nationals of member states of the African Union. Protocol of the ACtHPR (n 5), art 11;

Also, the Southern African Development Community Tribunal, member states are also required to be nationals of member states. Protocol on the Tribunal of the Southern African Development Community, art 3(1) https://ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf
ask candidates if anything they have said, done or written can bring disrepute to the ECtHR if made public.\textsuperscript{22}

In the ECOWAS Court, no attempt has been made to answer any of these questions thus the acceptable definition of high moral character for each candidate depends on the subjective determination of the Council and there is no uniform understanding of what level of morality is considered good enough. This is a huge loophole, especially as there is no mechanism set in place to oversee the selection process.

iii. Qualification

There are two alternative qualifications provided for in the Supplementary Protocol:\textsuperscript{23} the qualification required for the appointment to the highest judicial office in the respective member states, and recognised jurisconsult with competence in international law. This provision is not far from what is obtained in other international courts.

Although it is not uncommon for a candidate’s professional qualification to be tied to the requirement for appointment to the highest judicial office in their nominating state, in most West African states, being qualified for appointment to the highest judicial office does not necessarily equate to having any experience in the judiciary. While in Nigeria and Ghana, for instance, the highest judicial office is the office of the Chief Justice and the required qualification is at least 15 years of legal practice as a legal practitioner, in Liberia such appointees need only have practised as a counsello of the Supreme Court bar for five years.

The constitutions of these member states do not require appointees to have held previous positions in the judiciary. Some other member states have no requirement for minimum qualification in their constitution but simply provide that the President of the Supreme Court shall be appointed by the President of the country upon recommendation of the High Council of the judiciary.\textsuperscript{24} The only member state with a requirement for experience is the Gambia where an appointee to the office of the Chief Justice is required to have held the office of a

\textsuperscript{22} Council of Europe Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights CM(2012)40, Section C (ii) (20-21) https://search.coe.int/cm/Pages/result_details.aspx?Objectid=09000016805c8080

\textsuperscript{23} Supplementary Protocol A/SP.2/06/06 (n 12), art 2(1)

\textsuperscript{24} See Art 83 of the Constitution of the Republic Mali; Sec 120 and 121 of the Constitution of Sierra Leone, and Art 120 of the Constitution of Guinea Bissau
Supreme Court judge in the Gambia or a judge of a superior court of a common law country for not less than ten years.\textsuperscript{25}

Considering the calibre of cases expected to come before the ECOWAS Court, the candidates need to have a considerable amount of experience in either their national judiciary or other international judiciaries, which the Protocol initially failed to provide for. Many international judiciaries have incorporated similar requirements in their legal regime. In the ICC, alongside possessing qualifications required for the highest judicial office of nominating states, candidates must have relevant experience as a judge, prosecutor, advocate, or extensive experience in a professional legal capacity that is relevant to the judicial work of the court.\textsuperscript{26} The additional requirement of 20 years of experience was subsequently infused by the Supplementary Protocol although this does not apply to jurisconsult.\textsuperscript{27}

iv. Experience in specific areas of law

The ECOWAS Court is a court with a dual mandate. Although it was established to interpret the ECOWAS Treaty and promote regional integration, it doubles as an international human rights court. In fact, most of the matters adjudicated by the Court, both pending\textsuperscript{28} and decided\textsuperscript{29}, are human rights matters. Thus, the Court needs to be equipped with judges who cover a broader range of expertise than currently provided. The only area of experience required is competence in international law, specifically community law, and regional integration law.

There are two lacunas in this provision. For one, it does not require any of the judges of the Court to have knowledge of or be experts in human rights law. The necessity for the judges to have knowledge and experience is justified by the expectation that they should “provide the first layer of protection in the event of an alleged human rights violation”.\textsuperscript{30} Secondly, the

\textsuperscript{25} The Constitution of the Republic of the Gambia, sec 139 (1) and (2)

\textsuperscript{26} Rome Statutes of the ICC (n 5) art 36(3)

\textsuperscript{27} Supplementary Protocol A/SP.2/06/06 (n 12)


\textsuperscript{29} A look through the list of reported judgements on available on the ECOWAS Court website reveals that all the 16 judgements reported by the court in 2019 were on cases of violation of human rights.

requirement for expertise in community or regional integration law applies only to candidates selected under the qualification of jurisconsults. Thus, those selected under the qualification of eligibility for the highest judicial office in a member state do not need to have experience in either community law, regional law or human rights law. Seeing as only a few of the former and current judges are jurisconsult, it can be concluded that the Court’s judges have little or no expertise in interpreting and applying the ECOWAS Treaty or the various human rights charters and conventions applied by the Court.

In this regard, the ECtHR is also lagging. The provisions of the European Convention\(^{31}\) on the selection of judges are silent on their qualifications. The only provision for expertise is provided in the 2012 Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the ECtHR,\(^{32}\) which list as part of the criteria for selecting judges that candidates need to have knowledge of the national legal system(s) and public international law and add that practical legal experience is desirable. The ECtHR is an international human rights court, thus there should be specific requirements for it to be composed of judges with human rights expertise.

In this regard, the ECOWAS Court can emulate other international courts such as the ICC\(^{33}\), the ITLOS\(^{34}\) and the Inter-American Court of Human Rights (IACtHR)\(^{35}\), which specifically require judges to have qualifications and experience in the court’s area of specialisation.

v. Age

Age as a criterion for appointment to the bench of international judiciaries is mostly overlooked, but it has a significant impact on the composition of the court. The Protocol of the ECOWAS Court stipulates a minimum age of 40 years and a maximum age of 60 years.\(^{36}\)

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31 ECHR (n 2) art 21
32 CM (2012) 40 (n 22)
33 The Rome Statute of the ICC (n 5) art 36(3)(b) provides that candidates for election to the ICC have established competence and experience in either criminal law and procedure; or in relevant areas of international law such as international humanitarian law and the law of human rights.
34 United Nations Convention on the Law of the Sea, Annex 6, Statute of the International Tribunal for the Law of the Sea, Art 2(1) provides that “the Tribunal shall be composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea.
35 Statute of the Inter-American Court of Human Rights, Art 4 provides that judges have “recognized competence in the field of human rights”
36 ECOWAS Court Protocol (n 6) art 3(7)
This implies that candidates who fall outside of this age bracket cannot be selected even if they meet all other requirements.

Considering the fact that candidates are required to be eligible for appointment to the highest judicial office in their member state and have at least 20 years of professional experience\(^{37}\), the minimum age limit does not raise an issue as it will be relatively difficult for persons below the age of 40 to qualify. The maximum age limit, however, has the effect of disqualifying otherwise eligible candidates on the ground of age. Also, considering that the term of ECOWAS Court judges is four years, the age limit of 60 years is too low. A longer term of up to nine years should be considered for the ECOWAS Court. That way, judges may serve until the age of 69 and then retire.

In the ECtHR, there is no minimum or maximum age limit; however, there is a compulsory retirement age of 70 years,\(^{38}\) which by implication translates to a maximum age limit of 61 years at the time of appointment; otherwise, candidates will not be eligible to serve for the full nine-year term. The explanatory report to the Protocol stipulating the retirement age recommends that member states avoid nominating candidates who given their age would not be able to serve their full term. However, member states have failed on a few occasions to follow the recommendation.\(^{39}\)

Similar to the ECOWAS Court, the retirement age of ECtHR judges has been criticised for being too low and has become a deterrence of “otherwise well-equipped judges from applying for Strasbourg office”.\(^{40}\) A higher maximum age limit has been suggested by Protocol No 15 which increases the age limit by 3 years.\(^{41}\) The Protocol provides that candidates must be less than 65 years of age at the date the list of candidates is submitted to the PACE.\(^{42}\)

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\(^{37}\) ECHR (n 2)

\(^{38}\) ECHR (n 2) Art 23(2) as amended by Protocol no 14

\(^{39}\) In 2012, Paul Mahoney, a candidate of the United Kingdom was appointed a judge at the age of 66. He only serves for four out of the nine-year tenure and was replaced by Tim Eicke in 2016


\(^{41}\) Council of Europe Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms

\(^{42}\) Ibid art 2(1)
Protocol enters into force, the maximum age limit will increase the age of retirement to 74 years.

All the criteria discussed above are similar to those provided for in other international courts. However, the criteria of many international courts have been expanded to accommodate current realities and achieve diversity and equal representation. These criteria include geographical representation[^43], representation of different legal systems[^44], gender parity[^45], range of expertise, and language proficiency[^46]. While these criteria are essential to ensure that a court is composed of the most qualified members which contribute to the outlook, legitimacy, and arguably value of decisions of a court, they do not have an impact on its independence.

The independence of a court is more about the freedom of its members from constraint than it is about their qualifications. This is not to suggest that the effect of the qualifications and experiences of judges on the quality of judicial procedure and decisions is of no importance, but to point out that the independence of judges and their qualifications are different issues. While diversity in age, gender, experience, qualification, race, legal systems, language, and geographical representation will play a vital role in the reasoning and decisions of an international court, these criteria do not necessarily affect the independence of the judges.

In the ECtHR, the European Convention merely provides for two criteria: high moral character and possessing the qualifications required for appointment to high judicial office or being a recognised competent jurisconsult- with no guidelines for the process[^47]. To avert the partiality that may be involved and ensure meritocracy in the nomination process, over the

[^43]: Rome Statute of the ICC (n 5) art 36(8)(a) (i-ii)
[^44]: Southern African Development Court (SADC) Tribunal Protocol art 4(2); ACtHPR Protocol (n 5) art 14(2)  
[^45]: Gender parity is one of the criteria considered to be an emerging trend and it has gained significant degree of access to the legal regimes of many courts. See for instance, Rome Statute of the ICC (n 5), Article 36(8)(a)(iii) ; Parliamentary Assembly of the Council of Europe, ‘Resolution 1366 on Candidates for the European Court of Human Rights (2004)’[https://assembly.coe.int/nw/xml/XRef/Xref.XML2HTML-en.asp?fileid=17194&lang=en](https://assembly.coe.int/nw/xml/XRef/Xref.XML2HTML-en.asp?fileid=17194&lang=en)  
[^47]: The requirement for gender parity has found its way to some International Courts in the African Continent. See for instance, ACTHPR Protocol (n 5) art 12(2) and art 14(3) and SADC Tribunal Protocol (n 44), Art 4(2)  
[^47]: Resolution 1366 on Candidates for the European Court of Human Rights (n 45) art II (3)
years, the PACE and the COM have continuously attempted to improve the criteria and process of selection to enhance the independence and quality of the court.

In 2004, the PACE in Recommendation 1649 set out the criteria to be considered and the process to be followed by member states in nominating candidates. It recommends, in addition to the moral qualities and experience stated in the ECHR, that member states meet six other criteria before submitting lists of candidates, including ensuring that a call for candidatures has been issued through the specialised press, every list contains candidates of both sexes, the candidates have sufficient knowledge of at least one of the two official languages, the names of the candidates are placed in alphabetical order, and as far as possible no candidate should be submitted whose election might result in the necessity to appoint an ad-hoc judge.48

Similarly, in 2012, the Committee of Ministers adopted further guidelines for the member states and the Advisory Panel to follow in the selection process. It provides, among other things, that the process for eliciting applications at the national level must be established in advance and codified or settled by administrative practice, the final list of candidates drawn up by the member states must be made public, and all information about the process of nomination must be transmitted alongside the names and curriculum vitae of the nominees to the Advisory Panel and the PACE.49 The selection criteria in the ECtHR and the ECOWAS Court are similar, but the ECtHR is more advanced and takes into consideration the emerging trends in the composition of international courts. However, while they foster legitimacy and racial equality, some of these criteria have little or no impact on the independence of the court.

5.2.2. Procedure for selection
The process for the selection of judges is spelt out in the Rules of Procedure of the Judicial Council (Rules of Procedure). The first step is the advertisement of the vacancy in the allocated member states. The member states are charged with the responsibility of ensuring

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48 Parliamentary Assembly of the Council of Europe Resolution 1646 on Nomination of Candidates and Election of Judges to the European Court of Human Rights (2009), Paragraph 19
49 CM(2012)40 (n 11) para III
wide publicity of the position and ensuring transparency and competitiveness in the advertisement.\textsuperscript{50} The member states, however, do not select or nominate the candidates; they only forward a list of all applicants alongside a copy of the vacancy advertisement to the Council. The second stage is shortlisting. The Council sets up a committee of three of its members chaired by the President of the Council, who assess the lists forwarded by member states and shortlists three candidates per country.\textsuperscript{51}

The committee prepares a report together with a document containing information about the candidates shortlisted, including their nationality, age, qualification, and experience, and a copy of the vacancy advertisement. It must also contain an analysis of the assessment and the criteria considered in the shortlisting process. The Council considers the report of the committee and shortlists the candidates to be interviewed. In the process of shortlisting the Council may request additional information about candidates from the member states, who are obligated to assist.\textsuperscript{52} The process of shortlisting candidates for the interview process is thorough, making sure that only the most qualified applicants get shortlisted.\textsuperscript{53}

Even more thorough is the interview process. The rules provide, in detail, the procedure for the interview, the procedure for inviting the interviewees,\textsuperscript{54} and the order of appearance of the interviewees.\textsuperscript{55} In the course of the interview, the interviewees are asked two categories of questions, chosen by lot: five technical questions and two general questions, designed to appraise their knowledge and experience, virtue, capacity, and comportment.\textsuperscript{56} The performance of interviewees is appraised and scored by each member of the Council.\textsuperscript{57} A system for scoring the candidates by points\textsuperscript{58} is provided in the rules and the criteria to be rated\textsuperscript{59} during the interview.

\begin{footnotesize}
\textsuperscript{50} Rules of Procedure of the Community Judicial Council (n 16) rule 16
\textsuperscript{51} Ibid rule 17(1)
\textsuperscript{52} Ibid rule 17(2-4)
\textsuperscript{53} Ibid rule 17
\textsuperscript{54} Ibid rule 18
\textsuperscript{55} Ibid rule 19
\textsuperscript{56} Ibid rule 20
\textsuperscript{57} Ibid rule 21
\textsuperscript{58} Ibid rule 22
\textsuperscript{59} Ibid
\end{footnotesize}
The President of the Council sums up the points awarded by each member and works out the average points obtained by each candidate. He then announces the results and recommendations to the other members of the Council and transmits the same to the Authority. To be eligible for a recommendation, a candidate must have scored an average of at least 70 points. This point-based system of selection provides a transparent merit-based process.

While the point-based selection process may be considered effective for independently selecting the most qualified candidates, the composition of the Council may raise questions about the independence of its members. For the purpose of selecting judges, the Council is composed of the Chief Justices of the Supreme Court of the member states to whom the vacant judicial position has not been allocated or their representatives. These Chief Justices are in a good position to lobby and negotiate during the nomination process. As they are representatives of member states, they are likely to drive the interest of their states. Also, those representing economically dominant member states may have more influence on the decision of the Judicial Council. It is therefore important to diversify the composition of the Council.

5.3. Appointment
The third phase in the selection of judges is the appointment, which is synonymous with the election process in other international courts. The appointment, like most international courts, is carried out by a multilateral body that represents the member states. Upon transmission of the recommendation to the Authority through the President of the ECOWAS Commission, the Authority in its next ordinary session or an extraordinary session considers the recommendation of the Council and reports attached thereto and appoints the judge(s) to fill the vacant seat(s).

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60 Ibid rule 21
61 Ibid rule 35(1)
62 Ibid rule 23
63 Supplementary Protocol A/SP.2/06/06 (n 12) art 3(5)
64 Rules of Procedure of the Community Judicial Council (n 16) rule 36
At first glance this may seem like a fool-proof election process; a closer look reveals some fundamental gaps. Firstly, both bodies involved in the election process are composed of representatives of the member states. The Authority is defined in the Protocol as the Authority of Heads of States and Governments of member states of the Community. Thus, it is safe to conclude that the heads of state and presidents of member states are ultimately in charge of the entire selection process. Therefore, the election process is equally filled with politics and lobbying as the allocation process, albeit, the politics involved are on an international level.

Also, the legal regime provides absolutely no procedure or guidance for the process of election. The election of a candidate is highly dependent on the political influence his or her member state possesses for lobbying and negotiating, thereby giving member states with dominant political and economic influence an upper hand.

Nigeria, for instance, is at an advantage when it comes to bagging a seat on the bench. It is considered the ECOWAS superpower. It is at the cutting edge of the Community and possesses the highest political and economic influence of all West African Countries, ranking third on the list of the most powerful countries in Africa. Many African countries, especially West African nations, look to Nigeria for support in times of political and economic need. In fact, some member states refer to Nigeria as “big brother”. Nigeria also played and still plays a major role in peacekeeping and conflict resolution and management in West Africa and beyond. Its population, natural resources, economic and military capacities, and global recognition give it an advantage in influencing regional politics, especially in the ECOWAS.

The dominance of the executive in the selection process of judges in the ECOWAS is similar to what applies in the judiciary of member states. The appointment process in the Nigerian

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65 Aderemi Ojekunle, ‘These are the 7 Most Powerful African countries on Earth Right Now’ Business Insider by Pulse 03 June 2019. [https://www.pulse.ng/bi/politics/the-7-most-powerful-african-countries/fjz3kg8](https://www.pulse.ng/bi/politics/the-7-most-powerful-african-countries/fjz3kg8)


judiciary, for instance, involves one of two procedures. The first is the appointment by the
President (in the case of federal courts) or the Governor (in the case of state courts) on the
recommendation of the Judicial Council and subject to the approval of the Senate or the
House of Assembly of the state, as the case may be. 69 The second is the appointment by the
President or Governor on the recommendation of the Judicial Council. For this category, there
is no requirement for the approval of the legislature. 70

This process of appointment is by its very nature dominated by the executive and legislative
arms of government. In practice, the executive is not bound to appoint the candidates
recommended by the Judicial Council. The President or Governor may reject candidates
recommended and request that another candidate be recommended. This is where politics
(or as popularly referred to, “politricks”) comes into play. Also, the approval by the legislature
does not provide any form of check on the power of the executive as the ruling party holds
more than 50 per cent of the seats in the Senate and state Houses of Assembly.

Similarly, in Ghana, despite the provisions in the Constitution on the independence of the
judiciary, the executive and legislative arms of government still play dominant roles in the
appointment of judges. 71 While the Constitution establishes a Judicial Council 72 and a Council
of States 73 to advise the President during the process, both bodies are exempted from the
appointments of senior judicial officers. Also, both bodies are comprised of members who are
mostly handpicked by the President and their advice is not binding. Therefore, judges are
likely to be appointed based purely on political considerations. 74

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69 This selection process applies to the offices of the Chief Justice of Nigeria, Justices of the Supreme Court,
President of the Court of Appeal, Chief Judges of the High Courts of the various States and the Chief Judge of
the Federal High Court.

70 This selection process applies to the offices of the Justices of the Court of Appeal, Judges of the High Courts
of the various states and the Judges of the Federal High Court.


72 Ibid, art 153

73 Ibid, art 89

Again, the involvement of political negotiations and lobbying in the appointment of judges of international courts is not a practice peculiar to the ECOWAS Court. The appointment process in the CJEU, for instance, is carried out by the member states in Council, and is said to take place in the “muffled atmosphere of ministerial cabinets and diplomatic meetings, sheltered from the public gaze”.76

In recent years, international courts have taken steps to rise above the challenge and adopted a more transparent merit-based selection process. Using the ECtHR as a reference point, the election process has been broadened to entail more scrutiny of the suitability of the candidates nominated. The transparency and merit of the selection process are, however, still questionable.

Similar to the ECOWAS Court, the last tier of the process of electing judges in the ECtHR is the election by the PACE. The ECtHR has moved from the simple two-tier selection process to a more detailed one, modified to involve three stages.77 This improvement is designed to ensure that the candidates put forward by member states are fit for the bench and ultimately to better insulate the ECtHR from interference. In 2010, the Committee of Ministers established an Advisory Panel of Experts that carries out functions similar to the Judicial Council of the ECOWAS.

The difference between these two bodies is their composition. While the Judicial Council lacks the diversity needed to carry out its functions, the Advisory Panel has a good composition. The Advisory Panel is a geographically and gender-balanced body composed of seven members, including members of the highest national courts, former judges of international courts (including the ECtHR), and other lawyers of recognised competence.79 The member states submit a list of the nominated candidates to the Advisory Panel to examine their

75 In the ICC, the body responsible for election is the Assembly of State representatives (Rome Statute of the ICC, art 36(6)); similarly, in the IACtHR, the General Assembly is responsible for the election of judges (Statute of the IACtHR (n 35) art 6(1), 7(1) and 9(1).
76 Renaud Dehousse, The European Court of Justice: The Politics of Judicial Integration (Macmillian 1998) 14
77 ibid
79 ibid para 2
suitability. The Advisory Panel communicates its opinion, confidentially to the member states and the PACE. The role of the Advisory Panel is to ensure that the requirements for nomination are followed and that the nominees are suitable.

Guidelines have been set by the COM and the PACE for the Advisory Panel to follow. Most recently, in 2022 the PACE adopted Documents SG-AS on the Procedure for the Election of Judges, which reiterates the requirements to be fulfilled in the nomination process as earlier adopted by the Committee of Ministers and provides for more requirements for the nomination and election procedures. It provides, among other things, that:

- a reasonable period should be allowed for the submission of applications;
- the body responsible for recommending candidates should have a balanced composition, its members should have the sufficient technical knowledge and command respect and confidence, and it should be free from undue influence;
- the applicants’ linguistic abilities should be assessed;
- the list should be submitted to the PACE only after the Panel’s opinion on the candidates’ suitability has been obtained.

However, the functions of the panel are not being optimised. The member states have occasionally attempted to circumvent the process for nomination, which has resulted in the rejection of their nomination list. In 2016, two lists of nominees were rejected on procedural grounds. In one case, the guidelines were not followed as the list was transmitted simultaneously to the Advisory Panel and the PACE. This meant that the government was not able to take the views of the panel into account before the transmission of the list to the Assembly. In another case, no real nomination procedure was carried out. Following discussions in yet another case, in January 2019, the committee concluded that a nomination list will not be considered where the member states do not carry out interviews during the
nomination process. Yet another member state exhibited disregard for the guidelines: In April 2019, Ukraine gave only a week’s notice for applications to be submitted for the nomination process.

Similarly, in the past, the Advisory Panel has encountered difficulties due to the attitude of the other actors. In 2013, the then chairman of the panel, Luzius Wildhaber, at a Steering Committee for Human Rights meeting, highlighted some of the challenges faced by the panel, which include the failure of member states and the PACE to follow the opinion of the Advisory Panel, the simultaneous transmission of nomination list to the panel and the PACE leading to the latter conducting the election before the panel adopted its opinion, insufficient exchange of information between the actors, and the lack of recognition of the role of the panel.

Upon transmission of the list of candidates and the opinion of the Advisory Panel, the next stage of the selection process is the assessment of the list for fairness and transparency by a special sub-committee of the PACE. The sub-committee conducts interviews with the candidates and scrutinises their curriculum vitae. The sub-committee provides another tier of protection to ensure that candidates are selected based purely on merit. The sub-committee recommends the most suitable candidates. Where none of the candidates is considered suitable, the sub-committee may recommend the nomination of new candidates. The role played by the sub-committee provides an extra filter, a feature that is not included in the selection process in the ECOWAS Court.

The last stage is the election by the PACE. The election is carried out by secret ballot and the results are publicly announced by the President of the PACE. The process of election in the

85 ibid
88 Committee on the Election of Judges to the European Court of Human Rights composed of 22 members (including the chairpersons of the Committee on Legal Affairs and Human Rights and the Committee on Equality and Non-Discrimination, who are ex officio members) all of whom have sufficient legal expertise and experience. Its ordinary members and their substitutes are nominated by the political groups in proportion to their strength in the Assembly. See also, Parliamentary Assembly, Information Documents SG-AS (2022) 01 rev (n 80) para 14
89 Ibid, para 28
ECtHR is similar to the appointment process in the ECOWAS Court. Like the case of the Authority in the ECOWAS Court, the PACE decides autonomously, who will be elected to fill a vacant seat. The assessment and recommendation of the sub-committee and the Advisory Panel have no binding effect.

Thus, although the selection process in the ECtHR has undergone immense growth and is gradually becoming more open, transparent, and fair, it would be a misconception to believe that the process has been depoliticized.\(^{90}\) Lemmens argued that in principle, unfit candidates are filtered out by the Advisory Panel and the sub-committee, therefore even though politics play a dominant process in the election by PACE, it has no impact on the quality of judges eventually elected.\(^{91}\) However, Lemmens failed to consider the role played by independence in the quality of international courts and judges. A judge may be qualified and dependent at the same time. The test for quality when it comes to the selection of international courts should not be limited to the ability of candidates to meet set criteria but should be extended to the independence of the candidate from other actors (especially the member states and the appointing body) and the transparency and merit of the selection process. This is not to suggest that the suitability of candidates for the post of a judge is not important, but to submit that the suitability is of less value where the ability of the judge to perform his or her functions is constrained.

5.4. Conclusion

In conclusion, the process for the appointment of judges in the ECOWAS member states should be transcribed to the ECOWAS Court as it lacks merit and is heavily influenced by the executive and legislative arms of government. Similarly, although the selection process in the ECtHR has developed over time into a more merit-based process, it is not without flaws. The role of the Advisory Panel and the sub-committee of the PACE provides a check on the quality of the court by filtering out unqualified candidates. However, politics continues to play a dominant role in the election by the PACE.


\(^{91}\) Ibid 117
It is important in securing the independence of a court that the judges be selected through independent and transparent processes. Also important is the role of the member states in the selection process. The failure to ensure that member states perform their part in the selection process impartially and based on merit can be a strain on a court’s independence. To maintain the independence of the judges and the court from the constraint that may flow from this process, the role of the member states must be limited to the nomination of candidates.

The nomination process must be properly regulated by strict pre-established procedures that will ensure merit-based nominations. In the ECOWAS Court, the nomination process has been replaced by an allocation process that leaves even more power in the hands of the Authority without any form of check. This deprives member states of the chance to put forward their best candidates and may also affect the legitimacy of the Court. The Authority stated that the allocation process is to ensure the rotation of the post of judge among member states. However, while the idea of rotation creates a chance for equal opportunity for member states, it does not enhance the independence of the Court. Also, there is no evidence to suggest that the allocation of posts has achieved the purpose of rotation of the seats between member states. A few powerful member states continue to secure a seat on the bench while others have never been allocated a post.

The selection process in the ECOWAS Court must be commended for its point-based nature which clearly states the score of each candidate. The transparency of this process makes it clear how the Judicial Council reaches its decisions. However, the composition of the Council and the non-binding nature of its recommendation continues to pose a challenge. The establishment of judicial councils or committees is not an unusual practice in the appointment process of international and national courts; however, it does not necessarily ensure an independent appointment process in all cases.

The effectiveness of a judicial council or committee in ensuring independent selection depends on its composition. It is important that the process of election or appointment be conducted by an independent body which is properly composed of judges of the court, former judges, international and regional law experts, and lawyers, with a balanced representation of both genders, the legal systems, and the different geographical areas. In the case of the ECOWAS Court, the Judicial Council represents such a body of experts. However, as discussed
in 6.1.3. below, the composition of the Judicial Council does not guarantee independent selection.

Lastly, the ultimate veto power vested in the Authority to appoint without necessarily following the recommendation of the Council and without justification is the biggest constraint on the merit of the selection process. To achieve a more merit-based appointment process, the recommendation of the Council must have a binding effect on the Authority. Alternatively, merit-based appointments can be achieved by extending the authority of the Council to final appointment powers.\(^9^2\)

CHAPTER 6

6. SECURITY OF TENURE AND RENEWAL

Outside the process of selection of judges, other fundamental indicators pose a source of constraint on the independence of the judge and other members of the court. The security of tenure is one such indicator. It is one of the three minimum standards for judicial independence. Secure tenure is defined in the Bangalore Commentary as a tenure for life, until the age of retirement or for a fixed term, protected from interference by the executive, appointing authorities or other stakeholders in a discretionary or arbitrary manner. While this provision correctly suggests that the goal of secure tenure is to ensure that it is designed to adequately protect the judges from the influence of the appointing bodies, the definition of a secure tenure bears fundamental faults as it does not adequately consider the length of the tenure.

To access the security of tenure in international courts, three elements must be considered: the length of the term of office, the renewability of the tenure, and the condition and process for removal from office. Generally, in national courts, to ensure the security of tenure, judges hold life tenures, thereby eliminating renewal of tenure, but subject to preestablish conditions and procedures from removal free from the interference of other actors. On the other hand, generally, the tenure of judges in international courts is either short renewable terms, short non-renewable terms, or longer non-renewable terms.

6.1. Security of Tenure in the ECOWAS Court

6.1.1. Length of tenure and prospect of renewability

The length of term and non-renewability of the tenure of international judges work hand in hand to ensure that they enjoy a secure tenure. In the ECOWAS Court, at inception, the judges were appointed to serve for five years and were eligible for reappointment for another term.

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2 Ibid art 26(a)
3 See for instance, judges in the ICTY, CJEU, ICJ, and IACtHR are appointed for a renewable term of four, six, nine, and six years respectively.
4 See for instance, the Judges in the ICC are elected for a non-renewable nine-year tenure.
of five years only\(^5\). This provision left room for the interference of member states who were responsible for the nomination of sitting judges for reappointment as the judges may be tempted to succumb to government pressure to secure reappointment. Also, this provision was not adhered to by the Authority as the appointment pattern of the Court failed to reflect compliance with this provision.\(^6\)

The tenure of office for ECOWAS Court judges was amended by a Supplementary Protocol signed by the Authority in 2006, changing the tenure of judges to a non-renewable four-year term.\(^7\) The amendment of the length of tenure was not designed to ensure the independence of judges; rather, it was an attempt to ensure the rotation of statutory positions among the member states and to harmonise the tenure of the judges with other statutory positions in the other institutions of the ECOWAS.\(^8\)

The development of the tenure of judges in the ECOWAS Court is similar to that of the ECtHR. Previously, the term of office in the ECtHR was a six-year tenure renewable for another six years. However, in 2004 the provision on the term of office was reviewed, making the term a non-renewable nine-year tenure.\(^9\) However, unlike the ECOWAS Court, the change in the tenure of judges in the ECtHR was aimed at reinforcing the independence and impartiality of the judges and preventing the prospect of a renewal of tenure being an incentive for judges to decide cases in a particular way.\(^10\)

Just like short renewable terms, which can easily be a motivation for judges to decide in favour of member states responsible for their reappointments, short non-renewable terms may put judges in a position where they consider maintaining their relationship with their member states to ensure that they secure their places and career after their tenure as judges come to an end.

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5 Protocol A/P.I/7/91 of the Ecowas Community Court of Justice, art 4(1)
6 The first set of judges appointed in 2001 held office for nine years and three of the seven were re-appointed for another five-year term.
7 ECOWAS Court Supplementary Protocol A/SP.2/06/06, art 4(1)
8 Ibid Preamble para 6
an end. While there are no recorded or known cases of ECOWAS Court judges showing bias to secure their post-tenure career, it is evident that ECOWAS judges usually secure appointments in federal government agencies or institutions or seek political appointments.\textsuperscript{11} Thus, the risk posed by the tenure of judges is not warded off by merely eliminating the prospect of renewability of tenure. To ensure that the tenure of judges does not create an avenue for member states and other actors to influence the decisions of the court, the most suitable tenure would be a longer non-renewable tenure or until a member is unable to carry out his or her function due to incapacity or removal.

6.1.2. Process for removal or dismissal

Another element of security of tenure is that the conditions and procedure for removal from office must be regulated to avoid interference with judges’ tenures by the member states. To avoid arbitrary removal of members of a court from office, the grounds and procedure for removal from office must be clear and specified in advance and must be regulated by the court.\textsuperscript{12}

Previously, the conditions and procedure for the removal of judges in the ECOWAS Court involved two processes. The first process was regulated by Protocol A/P.I/7/91, which provides that where a member of the Court commits gross misconduct or is unable to exercise his or her functions due to physical or mental disabilities, the Court shall meet in plenary session to take cognisance of the fact. It shall then draw up a report and transmit the same to the Authority.\textsuperscript{13} The second process was the decision of the Authority on whether to relieve the member of his duties\textsuperscript{14}, a process that was left unregulated.

The process for removal was, however, amended by Supplementary Protocol A/SP.2/06/06 in 2006. The new provision eliminates the role of the Court in the removal process. It provides that cases of the disciplining of judges or the inability of judges to perform their functions

\textsuperscript{11} See for Instance, Hon. Justice Friday Chijoke Nwoke who was a judge in the ECOWAS Court from 2014-2018, became a law lecturer at one of the federal government university in Nigeria.


\textsuperscript{13} Protocol A/P.I/7/91 of the Ecowas Community Court of Justice, art 4(7)

\textsuperscript{14} ibid
because of physical or mental disability shall be decided by the Authority. In the same year, the Authority, with the aim of setting up an “independent disciplinary mechanism which guarantees transparency of deliberations and objectivity of decisions in disciplinary matters”, established the Judicial Council of the Community (the Council). The Council, for disciplinary matters, is composed of the Chief Justices of the Supreme Courts of the member states or their representatives that do not have judges on the Court, and one representative of the Court from among its judges, elected by the Court judges for one year. In cases involving the commission of criminal acts, the Council is to make recommendations to the Authority through the COM. The Council, in its Rules of Procedure, provides a non-exhaustive list of misconduct, their requisite sanctions, and the disciplinary procedures. The provisions of the Rules of Procedure on misconduct and sanctions are assessed in Chapter 9 below.

The list of misconduct includes breach of professional honour, insulting utterances or insulting behaviour; deliberate overreaching of jurisdiction; inciting other members of the Court to disobedience; absence from duty without permission; divulging secrets and confidential information of court cases; accepting favours or payments from parties to cases. The rules provide for two degrees of sanction varying from reprimanding, written warning, and suspension to summary dismissal. The applicable sanctions depend on the severity of the misconduct.

The Rules of Procedure provide pre-established rules and guidelines for the Council; however, it contains many ambiguities. First, the procedure for cases that do not involve criminal acts is not provided for and it is unclear if the Council disciplines the judge directly or makes a recommendation to the Authority. Also, as stated earlier, this list is not exhaustive, and it can be inferred that other acts, not previously specified, may be considered as misconduct by the Council. The rules also fail to stipulate what amounts to physical or mental incapacity or the

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15 Supplementary Protocol A/SP.2/06/06 (n 7), art 4(7)(2) amending Art 4(7) of Protocol
16 Decision A/Dec. 2/06/06 Establishing the Judicial Council of the Community, Preamble para 10
17 Ibid art 1
18 Ibid art 2(2)
19 Ibid art 4(2)
20 See, Rules of Procedure of the Community Judicial Council of the ECOWAS Court, rule 25 for a full list of disciplinary misconduct.
21 Ibid rule 33 for the full scale of sanctions.
process of removal based on incapacity. These ambiguities appear to be mere oversights or omissions on the part of the drafters; nonetheless, they leave room for various interpretations of what will be considered incapacity and also may lead to arbitrary removal in such cases.

6.1.3. Procedure for discipline and removal

A proceeding for the discipline or dismissal of a judge of the ECOWAS Court may be initiated by any person; corporate entity; institutions of the ECOWAS; member states or the Council itself, through the President of the ECOWAS Commission to the Council.22 To determine matters of discipline or removal of judges, the Council is composed of the Chief Justice of the Supreme Courts of member states whose nationals are not members of the Court or their representatives. Also part of the composition is one representative of the Court elected by the Court’s judges.23

When a disciplinary proceeding has been initiated, the President of the Council appoints a rapporteur from within its members, to investigate the allegations brought against the judge.24 In the course of the investigation, the rapporteur is empowered to hear complaints, examine witnesses under oath, and call for parties to produce evidence. At the end of the investigation, the rapporteur submits a report to the President of the Council, analysing the grounds upon which the proceeding is initiated and setting out the issues to be settled. The President shall then forward the report to the other members of the Council and the defendant (accused judge).25

The Council then deliberates on the report of the rapporteur in camera and reaches a decision.26 The defendant is bound to appear in person upon being summoned by either the President of the Council or the rapporteur. They are also entitled to a fair hearing and a legal counsel appointed by them. The defendant is entitled to receive a copy of the case file and other documents and reports relating to their case and to cross-examine witnesses.

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22 Ibid rule 24
23 Ibid rule 6 (2)
24 Ibid rule 28
25 Ibid
26 Ibid rule 31(7)
For the deliberation of the Council to be valid, a quorum, of half its members plus one must be formed. In the process of deliberation, any member of the Council may raise a point of order on any issue and the President of the Council shall give a ruling on each point of order raised. The member may appeal the ruling of the President, in which case it shall be put to a vote and the decision on the ruling shall be taken by a simple majority. After deciding by a simple majority vote, the recommendation and reports of the Council are transmitted to the President of the ECOWAS Commission, who forwards them to the Authority for consideration.27

The Council stands as an independent body of experts and the role of the Council in the disciplinary and dismissal process is sufficiently regulated; however, there are some fundamental flaws in the process that may affect the independence of the Court. The delegation of powers to expert bodies such as the Judicial Council of the ECOWAS to achieve independent and impartial appointment, discipline, or removal of judges is not unusual. However, in the case of the ECOWAS Court, the functions of the Council are rendered almost inconsequential.

First, the Council is composed of the Chief Justices of member states, all of whom are appointed judges by the members of the Authority. Additionally, the constitutions of these West African nations do not secure the independence of the Chief Justices themselves from the executive. The influence of the members of the Authority on the deliberation and recommendation of the Council is therefore inherent.

Also, the Council lacks the diversity essential for the effectiveness of such an expert body. A body of experts composed of diverse members including international law experts and scholars, judges, and former judges with a balanced representation of gender, the different geographical areas, and the legal system will better constitute an impartial, efficient, and independent body that serves the delegated functions.

Thirdly, and most importantly, the decision and report of the Council are mere recommendations to be considered and the Authority is not bound to decide in line with

27 Ibid rule 36
them. Ultimately it is all left to the decision of the Authority, and they do not have to justify their decisions.

The security of tenure of judges in the ECOWAS member states does not provide a good practice to be emulated by the ECOWAS Court. Like the process for their selection, the removal of judges is dominated by the executive and legislature. Constitutionally, judicial officers in Nigeria hold office until the age of retirement, which is 65 years. The imposition of a mandatory age of 65 years may be a breeding ground for insecurity and interference, as judges may be forced to consider their financial security and stability after retirement. Another constraint on the independence of the judiciary in Nigeria is the process of removal.

Dismissal or removal of a senior judicial officer is carried out by the President or Governor acting on an address supported by a two-thirds majority of the Senate or state House of Assembly. For junior officers, the removal is carried out by the President or Governor on the recommendation of the Judicial Council. There are no rules guiding the process of removal nor ensuring that judicial officers are given the right to a fair hearing.

Similarly, judicial officers in Ghana hold office until a mandatory age of retirement. The process of removal is also dominated by the executive. The removal of the Chief Justice involves an inquiry by a committee set up by the Council of States, which then makes a recommendation to the President.\(^{28}\) Just as in the case of appointment, the role of the committee is irrelevant. Firstly, the findings and recommendations of the committee are not binding on the President who can choose without justification not to follow them. Secondly, the Supreme Court justices who form the committee are selected by the President. The threat of arbitrary removal posed by this process has been recognised as a potential source of influence on the way the Chief Justice runs the affairs of the judiciary.\(^{29}\)

In the ECtHR, the procedure for the removal of judges is more effective at protecting its judges from external interference. A judge of the ECtHR may be removed on the account of his or her inability to fulfil the required conditions as stated in Art 21(3) of the European Convention. The motion for dismissal may be filed by any of the judges of the court. Where such a motion

\(^{28}\) Constitution of the Republic of Ghana, art 145 and 146

is brought against a judge, they are granted a fair hearing before the Plenary Committee\textsuperscript{30}, after which the other judges, meeting in plenary session, decide by a majority of two-thirds of the elected judges in office that he or she has ceased to fulfil the required conditions\textsuperscript{31}.

The provisions for the dismissal and removal of judges in the ECtHR are quite different from those of the ECOWAS Court. Unlike the ECOWAS Court, the executive does not interfere with the removal process. However, it is not without loopholes. First, there is no clear definition of what will amount to the “inability to fulfil the required conditions”, thereby leaving it open to various interpretations. The condition for office as stated in the convention is that “during their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office”.\textsuperscript{32} It does not specify or define what activities would be incompatible. Secondly, the provisions failed to provide for cases of misconduct or incapacity of judges. However, the procedure for the removal of judges insulates the judges from arbitrary dismissal by the member states or other actors.

The procedure for the removal and discipline of judges in the ECtHR, although enhances its independence, may raise concerns about the merit of the process. One can argue that leaving the process within the confines of the court without any form of counterbalance from an external body may not serve the purpose of protecting individual judges from more powerful or influential colleagues. For instance, in cases where a complaint is filed by a minority judge (for instance, a black judge or a female judge) claiming that they have been racially discriminated against or sexually harassed, it may be difficult to get two-thirds of the judges, who are mostly white men, to vote in their favour. Were this internal process of dismissal and discipline of judicial officers to be emulated by the ECOWAS Court, it might raise the issue of gender-based discrimination as most of the judges of the courts are men. Since its inception, the ratio of female to male judges has been one to four. The potential problem emanating from this is the risk of leaving the fate of a minority of judicial officers in the hands of the majority or the high-ranking judicial officers.]

This is where the principle of judicial accountability comes in. The concepts of accountability and how it relates and connects with the independence of the Court will be analysed in the

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\textsuperscript{30} Rules of Court of the European Court of Human Rights, rule 7
\textsuperscript{31} European Convention on Human Right, art 23(4)
\textsuperscript{32} Ibid art 21(3)
\end{flushright}
next chapter. As earlier stated, the independence of a court does not effectively enhance its quality unless it is counterbalanced by accountability and transparency.

6.2. Conclusion
In conclusion, the security of tenure and removal of judges is one of the most sensitive variables of judicial independence. One can argue that although life tenure will best secure the independence of the Court, its disadvantages outweigh its merits. Life tenures provide judges with career security and limit the chances of judges acting or deciding in favour of member states to secure future careers or benefits. However, for renewability, diversity, and representation, life tenure is not advisable for international courts. Thus, the best tenure is a longer non-renewable tenure coupled with a suitable and adequate pension plan and severance package to ensure financial independence upon expiration or termination of tenure.

The security of tenure is also an important factor in safeguarding independence. The tenure of the judges must be fixed and should not be subject to arbitrary changes, interference, or removal. This is not to say that judges should become irremovable or untouchable. The removal of a judge may be based on the inability of the judge to carry out his or her functions due to physical or mental incapacities. In this case, there must be pre-established rules and procedures to determine the incapacity of the said judge.

A judge may also be dismissed or made to face disciplinary actions in cases of misconduct. However, the rules and procedures for the removal or discipline must not undermine the independence of the court. Leaving the process totally in the hands of an external body constrains the independence of the court. On the other hand, making it a purely internal process may raise questions about accountability. To this end, this thesis concludes that the removal or discipline of judges must be carried out by the members of the Court internally but regulated by strict pre-established rules, ratified by the state parties, alongside a robust mechanism for accountability. The concept of judicial accountability and its connection with judicial independence will be examined in Part IV below.
CHAPTER 7

7. PRIVILEGES AND IMMUNITY

Privileges and immunities, simply put, are rights, benefits, and protections enjoyed by a person, state, or entity by virtue of their position. In most cases, it is associated with states, heads of state, diplomatic missions, and diplomatic agents. The terms ‘privileges’ and ‘immunities’ are two separate but similar concepts. In many cases, the terms are used interchangeably as it is difficult to separate one from the other. The distinction between the two terms, however, lies in the benefits that flow from them. While privileges confer on the holder the right to be exempted from duties or obligations such as payment of taxes and other levies such as stamp duties or even speeding tickets, immunity confers on the holder exemption from the administrative, criminal or civil jurisdiction of the courts in the receiving states.

An offshoot of the concept of immunity is judicial immunity. Judicial immunity is a common law doctrine¹ that has been refined over time and adopted into the legal system of many nations. The immunity of judicial officers is generally aimed at ensuring that they can carry out their duties without apprehension or threats of consequences.² The protection of judges from lawsuits and prosecution which may arise as consequences of their decisions is another fundamental element of judicial independence.

Although it is one of the most important variables of judicial independence, it is yet to be considered in relation to international courts. The immunity of international judicial officers raises some crucial questions: Do international courts and their judges enjoy judicial immunity? If so, what are theambits and limits of their immunity? How does the conferment of immunities and privileges affect the accountability of the judges?

The immunity of national judiciaries and their judges, heads of state, diplomatic missions, and agents has gained more attention than the immunity of international courts and judges. In most national judiciaries, the immunity of judges flows from the state and is usually an integral part of the independence of the judiciary provided for in their constitutions. Similarly, the immunity of diplomatic missions and agents is usually provided for in the constitution of states or other acts or statutes enacted specifically for this purpose.

To assess the immunity and privileges of international courts and their members, this thesis will analyse it in comparison to the immunity of diplomatic agents or missions and the immunity of judges in national judiciaries and the privileges they enjoy.

7.1. Privileges and Immunity in National Judiciaries of the ECOWAS Region

While it is generally accepted that the judges in national judiciaries should enjoy privileges and immunity, there is no consensus on the degree of immunity they should be accorded. Historically, judicial immunity is associated with the old English maxim “the King can do no wrong”, which by extension applies to the delegates of the King, including the judges. The concept has evolved to apply only to liabilities arising from acts and omissions which occurred during the performance of the duties or functions of judicial officers, i.e., functional or restrictive immunity.

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The main argument for absolute immunity is that judges should be immune from litigation not only in the interest of their independence but also in the interest of the public, who rely on them to perform their duty independently. On the other hand, some scholars have argued that absolute immunity can be abused and used as a shield by judges for malicious and corrupt acts or omissions committed outside their judicial duties. Functional immunity recognises the importance of protecting judicial officers from the avalanche of lawsuits that may arise as a result of their functions and help ensure their independence but argue that there should be a limit to which the immunity of judges can stretch.

The scholars who support functional immunity argue that it is a more suitable alternative that can protect the independence of judges and litigants who are victims of judicial corruption.

While it may be argued that the protection that flows from functional immunity is sufficient for the effective functioning of a court and its members, as this thesis will discuss further below, it still leaves room for disgruntled litigants to fabricate frivolous claims against judges.

In the ECOWAS member states, the immunity of judicial officers and the privileges enjoyed by them are provided for in varying degrees. In Ghana, for instance, Article 127 (3) of the Constitution provides for the immunity of judicial officers. This provision simply protects judges from suits or actions instituted based on acts or omissions carried out as a result of the performance of their duties, i.e., functional immunity. This ambit of immunity does not serve the purpose of protecting judges as they are still liable for acts and omissions carried out outside of judicial functions.

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9 Similarly, section 123 of the Constitution of the Republic of the Gambia, 1997 which provides that
Even worse is the total silence of the Nigerian Constitution on the issue of judicial immunity. Judicial officers in Nigeria have to rely on the provisions of other legislation such as the Criminal Code Act (CCA) and the laws of the specific courts. The most blanket protection is in Section 31 of the CCA\textsuperscript{10} which provides that judicial officers shall not be held criminally responsible for acts or omissions occurring as a result of their judicial duties. This provision of the CCA merely protects judicial officers from criminal liabilities arising from the performance of their duties.

Thus, the judges are liable in criminal cases originating from acts or omissions outside their judicial functions, in all cases involving civil liability arising from acts or omissions committed whether or not it is as a result of carrying out their judicial functions, and in all cases involving tortious liability arising from acts or omissions committed whether or not it is as a result of carrying out their judicial functions.

Apart from the provision of the CCA, there are a few other provisions in the acts and laws of a few specific courts\textsuperscript{11}, all of which provide the judicial officer within the courts with functional immunity. Apart from the fact that these provisions do not offer complete protection, only a few courts have such provisions in their establishing legislation. The Chief Justice Justices of the Supreme Court, and the Court of Appeal as well as the judges of the High Courts of 33 out of the 36 states can only rely on the provision of the CCA. It is accurate to conclude that the Nigerian judiciary and its judges are not protected from frivolous suits instituted by parties in retaliation for the judgement or decision of the court.

\textsuperscript{10} Nigeria Criminal Code Act, Section 31
\textsuperscript{11} Nigeria Federal High Court Act, provides in section 63(1) that “no judge or other person acting judicially shall be sued in any courts for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits off its jurisdiction”. The exact same protection as provided to the judges of the Federal High Court applies in the National Industrial Court by virtue of section 52(1) of the National Industrial Court Act, 2006.
Similar provisions apply to the judges in Lagos State, Ogun State and Cross rivers state.
The lack of judicial immunity has been explored by the executive and their agents. On 8 and 9 October 2016, officers of the Department of Security Services (DSS) carried out a sting operation in the homes of judges across the country leading to the arrest and detention of seven judges. The DSS allegedly recovered an incredibly large amount of cash from the homes of the judges and all seven judges affected by this raid were arrested and detained for various offences. In all these cases, the charges brought against the judges could not be established and all judges were exonerated. It appears, therefore, that the raid, arrest, and detention of these judges were a result of previous judgements delivered by them against the executives and their agents. The current situation in the Nigerian judiciary is that no laws or measures have been put in place to prevent this from occurring again.

The raid by the DSS is not an isolated case of an attack on the judiciary. More recently, a fatal blow struck the Nigerian judiciary. In January 2019, the Code of Conduct Bureau charged the Chief Justice of the Supreme Court, the highest judicial officer of the country, Walter Onnoghen (CJN) to the Code of Conduct Tribunal (CCT). The Chief Justice was arraigned for a six-count charge, all within Section 15 of the Code of Conduct Bureau and Tribunal Act (CCBTA), including failure to submit a written declaration of his assets and his various domiciliary and local bank accounts.

The allegations levelled against the CJN were based on a petition filed at the CCT by the Executive Director of the Anti-Corruption and Research-Based Data Initiative, Dennis Aghanya, accusing the CJN of false asset declaration and money laundering following the trace of millions of United States Dollars allegedly found in three of his domiciliary accounts with

12 Mrabure (n 7)
14 The judges affected by the raid are: Justice Sylvester Ngwuta of the Supreme Court (charged with money laundering and bribery); Justice John Inyang Okoro of the Supreme Court (accused of corruption); Justice Adeniyi Ademola of the Federal High Court (and his wife Mrs. Olabowale Ademola, charged for alleged bribery and corruption); Justice Nnamdi Dimgba of the Federal High Court (accused of bribery); Late Innocent Azubike Umezulike, former Chief Judge of Enugu State (charged with bribery and corruption); and Justice Muazu Pindiga of the Gombe State High Court (charged with bribery and corruption).
15 Code of Conduct Bureau and Tribunal Act, Nigeria
the Standard Chartered Bank Plc. While the case is still pending, the President of the Federal Republic of Nigeria dismissed and replaced the CJN.\textsuperscript{16} This incident, which has been described as a grave attack on the independence of the judiciary\textsuperscript{17}, can be perceived as a political orchestration.

The process of complaint, arrest, and dismissal raises some red flags. First, the complaint against the CJN was filed by a former spokesman of the President a few days before the general election. The CJN, who would have played the leading role in the election petition matters which usually follow general elections, was dismissed and replaced by the President without following the provision of the Constitution requiring approval of the Senate.

Evidently, the immunity accorded to judges in Nigeria and other ECOWAS states is not sufficient for the protection of the judges and certainly is not desirable for the ECOWAS Court judges. The purpose of absolute judicial immunity is not to render a corrupt judicial officer untouchable or unquestionable, but to ensure that the national judicial councils examine and investigate the merit of the allegations brought against judicial officers and issue a waiver of immunity where appropriate. The provisions in the national judiciaries are altogether different from that of the ECOWAS Court and are therefore not comparable.

7.2. Privileges and Immunities of International Courts and Their Members

To analyse the immunity of international court judges, certain questions need to be answered. First, what is the source of the immunity of international courts and their members? What is the extent and limit of the immunity to be enjoyed by a court and its members? The immunity of states can and has transposed to international organisations. Just as the leaders and diplomats draw their immunities from the state, international courts, other institutions of international organisations, and their members draw their immunity from the organisations.

The immunity of international organisations and their members is usually provided for in their establishing statutes, charter or convention and is analogous to the immunity and privileges


enjoyed by diplomatic missions and agents. In addition to the provisions of the treaties or conventions of international organisations, international courts and their judges draw their immunity from the Protocols of the courts which, in most cases, confer on its members, immunities, and privileges similar to those available to diplomatic missions and agents.

The first provision for the immunity and privileges of an international organisation is enshrined in the Charter of the United Nations (UN Charter), which provides that “[t]he Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes”. The Charter also provides that the “representatives of the members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.” The provisions of the UN Charter were further expanded by the Convention on the Privileges and Immunities (UN Convention), which provides additional protection for the UN and its representatives, officials, and experts on missions for the UN.

7.3. Privileges and Immunity in the ECOWAS Court

The UN Convention has become a design for many similar conventions of other international organisations, including the General Convention on Privileges and Immunities of the ECOWAS (ECOWAS Convention), which came into force in 1980. The ECOWAS Convention provides for the privileges and immunities of the organisation, its institutions, and its members. The ECOWAS Convention confers on the Community, its premises, buildings, assets, and other property absolute immunity from all legal proceedings and also exempts it from taxes. The ECOWAS Convention also provides for the privileges and immunity of three categories of persons.

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18 The Charter of the United Nations
19 Ibid art 104
20 Ibid art 105(2)
21 Convention on the Privileges and Immunities of the United Nations Article II, Section 2 provides amongst other things that: [t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It also provides for the inviolability of the UN and its premises, archives, and documents and those of its representatives and agents.
22 General Convention on Privileges and Immunities of the Economic Community of West African States
The first category comprises representatives of member states to the ECOWAS Community and they are accorded functional immunity only.\(^{23}\) The second category comprises experts on missions for the Community, who are also accorded privileges and immunity necessary for the exercise of their functions during the mission and all journeys connected thereto.\(^{24}\) The third category comprises the officials of the Community, who enjoy the broadest spectrum of privileges and immunity.\(^{25}\) The Community officials and, in some cases, their spouses and relatives residing with and dependent on them\(^{26}\) are protected from member states, individuals, and organisations in the territory of all member states of the Community. The scope of immunities and privileges enjoyed by the officials are the same as those enjoyed by the diplomatic persons at the headquarters of the ECOWAS and the headquarters of the ECOWAS Fund and diplomatic persons in all member states.\(^{27}\)

To ensure that the member states respect this provision, the ECOWAS Convention further enumerates specific privileges and immunities to be enjoyed by the officials and the scope of their immunity. It provides among other things for the inviolability of the persons\(^{28}\), documents, correspondences and residence of the Community officials\(^{29}\); protection of freedom and dignity of the officials\(^{30}\); immunity from criminal, civil and administrative jurisdictions in all member states\(^{31}\), except in actions relating to private immovable property\(^{32}\) or actions relating to succession where they are executor, administrator, heir or a legatee as a private person\(^{33}\); immunity from the obligation to give evidence as a witness in legal

\(^{23}\) ibid art 6
\(^{24}\) ibid art 8
\(^{25}\) ibid art 7
\(^{26}\) ibid art 7 (3) (h)
\(^{27}\) ibid art 7(2)
\(^{28}\) ibid art 7 (3) (a)
\(^{29}\) ibid art 7(3) (b)
\(^{30}\) ibid art 7 (3) (a)
\(^{31}\) ibid art 7(3) (c)
\(^{32}\) ibid art (7) (3) (c) (i)
\(^{33}\) ibid art (7) (3) (c) (ii)
proceedings\textsuperscript{34}; exemption from taxes on salaries and emoluments\textsuperscript{35}; and immunity from national service obligations\textsuperscript{36}, immigration restrictions, and alien registration.\textsuperscript{37}

The privileges and immunity accorded the officials, although absolute, can be waived in cases where failure to do so is not in the interest of justice; the power of waiver of these protections rests with the Executive Secretary on behalf of the Community.\textsuperscript{38}

As regards the application of the provisions of the ECOWAS Convention to the members of the ECOWAS Court and the members of other institutions of the ECOWAS who hold statutory positions, it is not clear under what category they are classed or if the provisions of the ECOWAS Convention apply to them at all. As the judges of the Court are not experts on a mission and do not represent their member states, it is safe to conclude that they should fall under the category of Community officials.

However, the power to determine and specify who can be categorised as a Community official falls on the Executive Secretary of the Community. The Executive Secretary transmits the list of the specified officials to the Council for approval and then communicates it to the member states. Unfortunately, there are no records of whether or not these officials who fall under this category have been specified by the Executive Secretary; thus, one can only guess or suggest who the Community officials are.

A more specific provision for the privileges and immunities of the members of the Court, which is similar to that of the provisions of the ECOWAS Convention, is contained in the Protocol of the Court which provides that:

“[t]he Court and its members shall during the period of their tenure, enjoy privileges and immunities identical to those enjoyed by diplomatic missions and agents in the territory of member states, as well as those normally accorded to International Courts and the members of such courts.”\textsuperscript{39}

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\textsuperscript{34} Ibid art (7) (3) (e) \\
\textsuperscript{35} Ibid art (7) (3) (f) \\
\textsuperscript{36} Ibid art (7) (3) (g) \\
\textsuperscript{37} Ibid art 7 (3) (h) \\
\textsuperscript{38} Ibid art 7 (3) (i) \\
\textsuperscript{39} Protocol A/P.I/7/91 of the Ecowas Community Court of Justice, art 6
\end{flushleft}
All the ECOWAS member states have ratified the provisions of the VCDR and have legislations that confers functional and personal immunity on diplomatic missions and agents. In Nigeria, for instance, diplomatic and consular officers, their staff and family, certified international organisations and representatives of Commonwealth countries are conferred absolute immunity. Similarly, in Ghana, the Diplomatic Immunities Act enacts into law, the provisions of Articles 22, 23, 24, and 27 to 40 of the VCDR. By the joint provisions of the ECOWAS Convention and the provisions of the Protocol, the ECOWAS Court and its judges enjoy personal immunity in every member state during the subsistence of their tenure. Upon the expiration of their tenure, personal immunity ceases to apply, and a former judge becomes exposed to arrest, detention, or lawsuits for liabilities incurred in their private capacity.

Additionally, to ensure that the ECOWAS judges do not perform their function and duties in fear of repercussions that may arise from the performance, the Protocol further provides that “members of the Court shall not be liable to prosecution or arrest for the acts carried out or statements made in the exercise of their function”. By the combined effect of these two provisions, judges of the ECOWAS Court are accorded both personal and functional immunity. Therefore, they enjoy absolute immunity.

In comparison to most of its counterparts, the ECOWAS Court has more robust protection for its judges. The provisions in most international courts provide judges with only functional immunity. The ECtHR, provides that judges shall, during the exercise of their functions, enjoy the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe which provides that:

“[t]he Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions.”

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40 Diplomatic Immunities Act of the Federal Republic of Ghana, sec 1
41 ECOWAS Court Protocol (n 39) art 6(2)
42 See for instance, Statute of the International Court of Justice, art 19, provides that the members of the court when engaged on the business of the Court, shall enjoy diplomatic privileges and immunity. See similar provisions in the Rome Statute of the International Criminal Court, art 48; and the Statute of the Inter-American Court of Human Rights, art 15
43 European Convention on Human Right, art 51
44 Statute of the Council of Europe, art 40
The immunity and privileges flowing from Article 40 of the Statute are set out in the Sixth Protocol to the 1949 General Agreement on Privileges and Immunities of the Council of Europe (1996). It provides that judges enjoy immunity with respect to words spoken or acts performed during the performance of their judicial duties, protection which extends to retired judges. It also provides privileges for the judges, their spouses, and their minor children. However, all of the immunity and privileges are functional. Therefore, where a disgruntled member state or an aggrieved party institutes an action against a judge of the ECtHR, that judge is liable as long as the alleged act or omission is carried out outside his or her judicial functions.

Functional immunity does not provide judges with the protection necessary for the performance of their function. The judges are still open to the threat of criminal and civil liability. It is safe to argue, therefore, that the best level of protection required to eliminate the threat is absolute immunity for the tenure of office and upon expiration of the tenure, functional immunity only. The extension of functional immunity ensures that the judges continue to enjoy protection from liability arising from the performance of their duties, even after their tenure is over.

While one may be persuaded to conclude at this point that the privileges and immunities of the ECOWAS Court and its members as provided for in the legal regime are adequate for the protection of the judges from frivolous lawsuits or suits brought in bad faith, the provisions of the ECOWAS Court legal regime is not without its loopholes. Firstly, the power to waive the immunity of the members of the Court is left in the hands of the Executive Secretary of the Community, which enables organisational interference. This is contrary to the standards in the Burgh House Principles, which provide the most detailed standard for the privileges and immunity of international judges, prescribed as a minimum standard, that only the Court “shall be competent to waive the immunity of judges; it should waive immunity in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the exercise of the judicial function”.

To ensure total protection, the power to waive the privileges and immunity of members of the Court should be left in the hands of the Court. In the ECtHR, for instance, only the Plenary Court is competent to waive the immunity and privileges of the judicial officers. The Plenary Court is under a duty to do so in cases where the immunity will impede the course of justice and where it can be waived without prejudice to its purpose.
Secondly, on at least one occasion, a member state has failed to comply with these provisions. In 2017, the Supreme Court of Liberia delivered a judgement revoking the law licence of a sitting judge of the ECOWAS Court, Justice Micah Wilkins Wright, on the grounds of an alleged conflict of interest committed by the judge while serving as the Solicitor General of Liberia and alleged involvement in a USD 15.9 million fraud against the Liberian government.\textsuperscript{45} He was suspended from practising law, directly or indirectly, for the period of the revocation. Based on the judgement of the Liberian Court, the President of Liberia, Ellen Johnson Sirleaf sent a request to the ECOWAS Court that the judge be recalled. The request was granted, and the judge was replaced by another Liberian national, Justice Micah Kaba.\textsuperscript{46}

Although the ECOWAS and the Court do not have control over the affairs of the member states and were by no means involved in the proceedings leading to the revocation of the judge’s licence, they enabled the member state’s disregard of the provisions of the legal regime by removing the sitting judge. This singular incident has set a precedent for the lack of protection of the judges of the Court.

There is no evidence that the Court or the ECOWAS attempted to deter the Liberian government from instituting an action against a sitting judge and no documented procedure applied by the Court or the ECOWAS for the conclusion that this judge be removed. There is a high tendency for this incident to repeat itself considering the level of disregard for the immunity of judges in the national judiciaries of the ECOWAS member states.

7.4. Conclusion

This chapter argues that the immunity accorded to the judges in the national judiciaries of ECOWAS member states is not suitable for the protection of judges in the ECOWAS Court. International court judges should enjoy privileges and immunities analogous to those enjoyed by diplomatic agents as enshrined in the VCDR. This may raise issues of abuse of power by the judges and concerns about the judges becoming unaccountable. Does it mean judges should be free to commit crimes and their victims silenced until the end of the judge’s tenure? Should

\textsuperscript{45} Bettie K Johnson-Mbayo, ‘Liberia: Supreme Court Restores Suspended Justice Micah Wilkins Wright’s License’ (\textit{All Africa}, 16 May 2018) \url{https://allafrica.com/stories/201805160589.html} accessed 8th December 2019

judges be free to incur debt and other civil liability without implications? The answer to these questions and other similar ones is ‘no’. The immunity of judges, whether absolute or functional, must have its limitations.

The immunity of judges is another indicator of judicial independence that must be counterbalanced by accountability. First, to ensure that the immunity of judges does not result in abuse or misuse of their position, there must be a mechanism for accountability prohibiting acts or omissions that will amount to abuse or misuse of their privileges or immunity. Also, the legal regime must establish what acts or omissions will lead to a waiver of the protection of judges. Similarly, the convention and other legal regimes providing for the immunity of diplomatic agents and judges must contain a provision for the waiver of their immunity. The waiver is put in place as a mechanism to ensure that the diplomats and judicial officers do not abuse their office and become malicious or corrupt. Therefore, if the failure to waive judicial immunity will lead to a miscarriage of justice, then the veil of protection must be lifted.

In the VCDR, Article 32 provides to this effect that the immunity from the jurisdiction of diplomatic agents and their families may be waived by the sending state. The same applies to the ECOWAS Court. Article 7 of the ECOWAS Convention provides that the immunity of an official be waived by the Executive Secretary on behalf of the Community. These provisions provide the required balance of independence and accountability as far as judicial immunity is concerned, albeit the power of waiver resides in a representative of the Community. Where a judge who enjoys both personal and functional immunities becomes liable for acts or omissions carried out in his or her private capacity, the immunity enjoyed can be waived by the court and the judge held accountable for his or her acts or omissions.

As argued in 7.3.1 above, the legal regime in the ECOWAS Court provides for more extensive protection when compared to other international courts. However, the waiver of the privileges and immunity of the ECOWAS Court judges needs to be vested in the Court itself or a duly composed judicial council. Also, there is a need for the enhancement of the actual implementation of the immunity provided by the legal regime. There has been only one incident in the ECOWAS Court as mentioned above and the ECOWAS, and the Court failed to protect the judge. This raises concern about the probability of such an incident being repeated. This lacuna makes it evident that the mere provision of privileges and immunity does not suffice; it must be met with actual implementation.
The viability and effectiveness of the protections provided depend largely on the implementation by the member states and the ECOWAS Community. In the case of the Liberian judge, both the member state and the ECOWAS operated in contravention of the provisions, and there seems to be no record of the process involved in the removal of the judge from the ECOWAS bench. Going by the provisions of the ECOWAS Convention and the ECOWAS Protocol, the waiver of the immunity of Justice Micah Wright should have preceded the trial by the Liberian Court. Thus, the process of waiver must be established with stiff penalties for the failure of member states to comply with the provisions of the legal regime.
CHAPTER 8

8. FINANCIAL SECURITY

Financial security in the judiciary is a pivotal aspect of judicial independence. The judiciary, both national and international, is an indispensable institution for socio-economic development with the power to interpret laws, treaties, and regulations as well as determine matters between conflicting parties. To ensure that these functions are performed duly and independently, both the court and its members must be financially secure. Financial dependence may subject the judiciary to abuse and influence from the executive, legislature, and other actors. In the case of international judiciaries, abuse, and influence from member states and the parent organisations.

The financial dependence of international judiciaries which are supposed to operate independently presents a paradoxical situation. In the international judiciary, the biggest threat to the financial security and independence of a court and its judges is the member states. This poses a very serious challenge as the member states are primarily responsible for keeping a court afloat financially. The role of the member states and other actors in the funding of a court cannot be eliminated, therefore, the process of funding needs to be regulated to eliminate the threat of arbitrary interference. Financial security is an important factor for the protection of the integrity and autonomy of the court. It enhances the institutional efficacy, efficiency, and effective functioning of the judiciary. To safeguard the independence of the judiciary, financial security, which encompasses the remuneration of the judicial officers and the budgetary autonomy of a court as an institution, must be comprehensive.

This chapter assesses the financial aspect of the independence of the ECOWAS Court. The first section will examine the remuneration of the judges and other conditions attached to their services such as pension and allowances. The second will examine the budgetary autonomy of the Court as an institution.
8.1. Remuneration and Conditions of Service

The provision of adequate salaries and other conditions of service for judges is an indicator of their independence. To maintain the socio-economic status of judicial officers and ensure that judges are not easily tempted to decide cases in favour of parties for financial gain, they must be adequately remunerated and must be financially protected even after the expiration of their judicial tenure. As Olowofoyeku succinctly puts it, in order to ensure the independence of judicial officers, it is pertinent that they are free from all forms of financial anxieties.¹ The adequate payment of remuneration as a reward for service as well as payment of allowances pension and other benefits puts the judges in a secure position and prevents monetary inducement.

The benefits of financial security for judges cannot be over-emphasized. It protects the power and integrity of a court by eliminating bias or inconsistent decisions and plays a huge part in maintaining the independence of the judges who are less likely to succumb to pressure or influence for economic gains. Also, a decent condition of service, including allowances, retirement and pension benefits, bonuses, and other incentives will drive judicial officers to observe high standards in the performance of their duties and improve the standard of service.² It also provides the judicial officers with social insurance during and after their tenure and improves the socio-economic status of judges thereby curtailing corruption in the judiciary.³

Financial security and the enhancement of the condition of service of judges in domestic court is an issue that has gained a fair amount of scholarly attention, even in the ECOWAS member states, especially in Nigeria. The salaries, allowances and other remunerations of judicial officers in Nigeria are prescribed by the legislature (National Assembly), and the amount prescribed must not exceed what has been determined by the Revenue Mobilisation Allocation and Fiscal Commission, an agent of the executive.⁴ The adverse effect of the

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⁴ The Constitution of the Federal Republic of Nigeria 1999 (CFRN), sec 84
influence of the executive and legislative arms of government on the remuneration of judges in Nigeria is evident in the lack of adequate pay and the failure to review and adjust their salaries. While the total annual remuneration of the judges at the federal and states judges stand at 8.7 billion Naira, the National Assembly allocated about 24 billion Naira for the severance package for its outgoing members only. Judicial officers in Nigeria have been said to have a reason to have financial anxiety.

Not only is the judiciary far less paid of the three arms of government, but the salaries and allowances of the judges are also not reviewed periodically to reflect the economic situation in the country. The salaries and allowances of the judges were last reviewed in 2008 by the Certain Political, Public and Judicial Office Holders (Salaries and Allowances ETC (Amendment) Act which repealed an earlier law. This Act sets the basic salary of the Chief Justice of the Federation (the highest judicial officer) at NGN3,363,972.50 per annum which is approximately USD9,204 while other Justices of the Supreme Court and the President of the Court of Appeal earn NGN2,477,110.00 per annum (approximately USD6,778).

There has been no review of the salaries of the judges for the past thirteen years. As Olisa Agbakoba SAN, the former President of the Nigerian Bar Association stated, “it is absolutely not healthy for the country for judges’ salaries to remain static for over ten years”. It is, therefore, accurate to conclude that the members of the Nigerian judiciary are subjected to inadequate conditions of service which may lead to servitude and result in judges caving in to

6 Olowofeyoku (n 1) 64
8 Certain Political, Public and Judicial Office Holders (Salaries and Allowances ETC (Amendment) Act 2008
9 Ibid part II. Other judicial officers earn between 1,995,430.18 (USD 5,500) and 1,804,704.00 (USD 4,938) per annum
10 Isah (n 7)
pressure for financial gains. The current situation in the ECOWAS Court is very similar to that of the Nigerian Judiciary.

To ensure that judicial officers are adequately remunerated and free from financial anxieties, the legal regime of an international court must provide for the following:

a. Judges' essential conditions of service should be enumerated in legally binding instruments.\(^{11}\)

b. Judges should receive adequate remuneration which should be periodically adjusted in line with any increases in the cost of living at the seat of the court.\(^ {12}\)

c. Conditions of service should include other adequate allowances and pension arrangements.\(^ {13}\)

d. No adverse changes shall be introduced to judges' remuneration and other essential conditions of service during their terms of office.\(^ {14}\)

e. The remuneration of judges and other conditions of service must not be controlled by the discretion of other actors.\(^ {15}\)

These five standards must exist simultaneously and work hand in hand to safeguard the financial security of international court judges. The adequacy of the conditions of service of judicial officers can be measured by the level of financial security it provides the judges at a given time. For this purpose, factors such as the location of the court, the cost of living, and other economic factors must be put into consideration when assessing the above standard in relation to any court.

In the ECOWAS Court, the provisions for the remuneration of judges are far from adequate. As will be examined in 8.1.1. below, the available legal provisions on the remuneration of


\(^{12}\) The Burgh House Principles (n 11), Art 4; Montreal Declaration, Universal Declaration on the Independence of Justice, International Association of Judicial Independence and World Peace (Montreal Declaration), 1983, art 2.21(c); IBA Standards (n 11) art 14

\(^{13}\) The Burgh House Principles (n 11), Art 4; Montreal Declaration (n 12) 2.21 (b); IBA Standards (n 11) art 14

\(^{14}\) The Burgh House Principles (n 11), Art 4; Montreal Declaration (n 12) 2.21 (a); IBA Standards (n 11) art 15(b)

\(^{15}\) The Burgh House Principles (n 11), Art 4; IBA Standards (n 11) art 14
judges date back to the year 2001 when the Court was established. There has been no adjustment to the provisions since then. Working with these available provisions, the following section will assess the conditions of service of the Court in relation to the five standards enumerated above.

8.1.1. Remuneration and conditions of service in the ECOWAS Court

The condition of service in the ECOWAS Court is regulated by the combined provisions of the Court’s protocol\textsuperscript{16}, a decision of the Authority\textsuperscript{17}, and regulation of the Council of Ministers\textsuperscript{18}. On the remuneration of the judges of the Court, the Protocol simply provides that the remuneration, allowances, and all other benefits of the President and the other members of the Court shall be determined by the Authority.\textsuperscript{19}

In exercising the power vested on it by the above provision, the Authority decided in 2001 that pending the findings of the study on the grading and salary scale of the staff of the ECOWAS Court, the annual salaries and allowances of the President of the Court will be the same as that of the President of ECOWAS Bank for Investment and Development (EBID)\textsuperscript{20}. i.e., an annual salary of 41,651.85 Units of Account which is equivalent to USD57,183.8.\textsuperscript{21} Other Judges of the Court receive an annual salary equivalent to those of the Managing Directors of EBID\textsuperscript{22}, i.e., 39,459.36 Units of Account which is equivalent to USD54,173.7.\textsuperscript{23} Additionally, the Vice President is to receive a duty allowance alongside his/her salary.\textsuperscript{24}

From the above provisions, it can be concluded that the remuneration of the ECOWAS Court judges passes the test in the first standard, i.e., it is contained in a legally binding and enforceable instrument. The next step is to determine the adequacy of the salaries and other conditions of service provided in the legal regime and the adjustment to reflect the cost of

\textsuperscript{16} Protocol A/P.I/7/91 of the Ecowas Community Court of Justice, (n 19) 
\textsuperscript{17} Decision A/DEC. 20/12/01 Relating to the Annual Salaries of the Judges of the Community Court of Justice (on file with Author). 
\textsuperscript{18} Regulation C/REG.4/4/01 Relating to the Annual Salaries of the Statutory Appointees of the EBID and its subsidiaries (on file with Author) 
\textsuperscript{19} ECOWAS Court Protocol (n 16) art 28 
\textsuperscript{20} DECISION A/DEC. 20/12/01 (n 17) art 1. 
\textsuperscript{21} Regulation C/REG.4/4/01 (n 18) art 1 
\textsuperscript{22} DECISION A/DEC. 20/12/01 (n 17) art 1 
\textsuperscript{23} Regulation C/REG.4/4/01, (n 18) art 1 
\textsuperscript{24} Decision A/DEC. 20/12/01 (n 17) art 2
living. The crux of the second standard is that the remuneration provided for judicial officers must be adequate and frequently reviewed in line with the increase in the cost of living. The legal regime of most of the other international courts across the world provides for more adequate salaries and remuneration and other conditions of service of judges than that of the ECOWAS Court Judges.\(^{25}\)

However, the adequacy of the remuneration of judicial officers is a variable of judicial independence which cannot be assessed by a comparison between two courts seating in different parts of the world, such as the ECOWAS Court and the ECtHR. In the ECtHR for instance, the conditions of service of judges are provided for in the Committee of Ministers’ Resolution on the status and condition of service of judges.\(^{26}\) The Resolution provides for the basic salary of the judges\(^{27}\) which is equal to 12,706.43 Euros per month\(^{28}\). Instead, the financial security of the Court and the judges will be better assessed in comparison with other regional courts in Africa.

Just like the ECOWAS Court, the unavailability of relevant data in other African regional courts poses a big limitation for this assessment. Nonetheless, one can infer from the remuneration of the registrar of the East African Court of Justice (EACJ) that provisions for the salaries of judicial officers in the ECOWAS are adequate. The EACJ registrar receives a basic salary of USD 52,298 per annum plus other allowances such as USD 16,800 and USD 3,000 for transportation.\(^{29}\) Additionally, in comparison with the average salary in Nigeria, which is the seat of the Court, the salary of the ECOWAS Court judges is adequate. Averagely, the highest salary in Nigeria is about 1,500,000 NGN per month which is equivalent to USD 3,597 per month and USD 43,164 per annum.\(^{30}\) The salary of the Court’s judges falls within the same

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25 In the ICC for instance, the salaries, benefits, allowances, pension, health insurance, travel and relocation costs are duly provided for in the ICC Condition of Service and Compensation and Staff Regulation (ICC-ASP/2/10) [https://legal.un.org/icc/asp/2ndsession/report/english/part_iii_e.pdf](https://legal.un.org/icc/asp/2ndsession/report/english/part_iii_e.pdf).

26 Resolution CM/RES (2009)5 on the Status and Conditions of Service of Judges of the European Court of Human Rights and the Commissioner for Human Rights [https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c0ce3#_ftn4](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c0ce3#_ftn4).

27 Ibid. Art 3


range as that of the EACJ judges and is about 35 per cent higher than the highest average salary at the seat of the Court.

The other part of this standard is the periodic adjustment of the salaries of judges to reflect the change in the cost of living and economic climate in the seat of the Court. The decision of the Authority setting the salaries of the judges dates back to the year 2001 and has since been left unrevised. Thus, for twenty years, the salaries and other conditions of service of the judges of the ECOWAS Court have not been reviewed. The minimum and maximum inflation rates in Nigeria per year between 2001 and 2018 is 5.38 per cent (in 2007) and 16.52 per cent (in 2017) respectively.\(^\text{31}\) Also, on average, the annual salary increment rate in Nigeria for the year 2021 was 8 per cent.\(^\text{32}\) It is therefore surprising that the salaries of the judges of the Court have remained static. While it seems that the salaries of the Court’s judges are adequate for the seat of the court, the failure to review and adjust the salary of the judges in line with the increase in the cost of living and inflation will affect the financial condition of the judges.

The third standard is the provision and adequacy of other conditions of service. Apart from the basic salaries of judicial officers, there are other conditions of service which are important for ensuring the financial security of judges. The legal regime must provide for adequate allowances and pension plans. In the ECOWAS Court, there is no provision for these conditions of service in the legal regime.

In the ECtHR, in addition to their basic salaries, the judges are entitled to other allowances where appropriate. These allowances include 10 per cent as expatriation allowance; 335.72 Euros as a supplement for each dependent child per month; 94.22 Euros as expatriation allowance for each child per month; and 335.72 Euros as basic family allowance per month. Also, all judges receive a displacement allowance of 12.5 per cent of their basic salary, and the President and the Vice President of the ECtHR receive an additional 13,885 Euros and 6,942 Euros respectively per annum.\(^\text{33}\)

\(^\text{32}\) Salary Explorer (n 30)
\(^\text{33}\) Resolution CM/RES (2009)5 (n 26) art 3(3)
The Resolution also provides for other additional conditions of service such as payment of travel and subsistence expenses incurred on official duties as well as removal expenses, pension, social and medical insurance, annual leave, sick leave, and maternity/paternity/adoption leave. In the EACJ, the registrar of the court is entitled to housing and transportation allowances.

The provision of other allowances is vital to the advancement of the living condition of judges while the provision of an adequate pension plan ensures the financial security of the judges after retirement. Therefore, the lack of these conditions of service, especially pension plans poses an adverse risk to the financial security of the ECOWAS Court.

The fourth standard for the financial security of judicial officers is to ensure that the salaries and conditions of service, are not subject to any adverse change. The probability of this occurring is slim. However, this protection needs to be enshrined in a legal instrument. In the ECtHR, to ensure that the salaries, allowances and other conditions of service are not subject to adverse changes, the Resolution provides that the ECtHR must be consulted before any form of amendments can be made to the status and conditions of service. The provisions of the ECOWAS Court legal regime are totally silent on this standard. The implication of this is that the Authority has the power to change or cut down the salaries and other conditions of service of the judges of the ECOWAS Court.

The last standard for ensuring the financial security of judicial officers is to exclude the influence or interference of other actors, in this case, the member states and the parent organisation. Leaving the remuneration and conditions of service of judicial officers to the discretion of the member states may be a tool for constraining the independence of the judges. It can be rightly expected that the judges may be inclined to deliver judgements in favour of member states in order to secure adequate remuneration and avoid adverse changes to the conditions of their service.

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34 Ibid. Art 4
35 Ibid. Art 10
36 Ibid. Art 11
37 Ibid. Art 7
38 Ibid. Art 8
39 Ibid. Art 11
40 Ibid. Art 14(1)
In the ECOWAS Court, the salaries and conditions of service of judges are determined by the Authority, thereby leaving the financial fate of judges solely in the hands of the heads of states of member states. This power vested in the Authority is a potent avenue for constraining the independence of the judges. The involvement of member states in determining the remuneration of judges is not peculiar to the ECOWAS Court. In the ECtHR, the conditions of service of the judges are determined by the Committee of Ministers. Similarly in the EACJ, the salaries and other terms and conditions of service of a Judge are determined by the Summit (i.e., heads of states and government) on the recommendation of the Council (i.e., ministers representing each member state).

An improper or insecure pay package for judges and the supporting staff creates a breeding ground for interference. As earlier stated, the five identified standards are only effective when they exist simultaneously. Therefore, although the remuneration of the judges of the ECOWAS Court is established in a legally binding instrument and the salary of the judges when compared to the salaries of judges of the domestic court at the seat of the Court and judicial officers in a similar regional court, may not be deemed inadequate, the legal regime fails to ensure the financial security of the judges. Firstly, the legal regime of the Court does not provide for any other condition of service or pension. In many other international and regional courts, judges are entitled to other allowances for accommodation, travel, transportation, relocation, and family. In the ECOWAS Court, the provision of these allowances is left to the discretion of the Authority.

The absence of a provision for periodic reviews of the remuneration and conditions of service is another flaw in the legal system. The increment of the salary of judges is totally left to the discretion of the authority. In the ECOWAS Court, there has been no review of the judges’ salaries and allowances for over two decades. Also, there are no provisions for pension plans or retirement benefits for the judges which creates a risk of financial anxiety upon retirement thereby leaving room for judges to get tempted to be open to seeking financial or career favours in order to secure their financial future.

Lastly and most importantly, the remuneration of judges needs to be independent of the constraint and influence of the member states. The power vested in the Authority of the

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41 Statute of the Council of European, art 16
ECOWAS to determine the remuneration of the judges is the biggest flaw in the legal regime. The Authority represents the member states of the ECOWAS who are the major defendant in the cases brought before the Court. This leaves room for member states to use financial dependence as a tool for punishing judges for deciding against them. There is a need for reform in the legal regime to safeguard the financial security of the judges of the ECOWAS Court. Although the ECOWAS Court cannot be compared with the ECtHR in terms of adequacy of the remuneration, other provisions such as payment of allowances, the provision of pension plans, and ensuring that there are no adverse changes made, can be transposed into the regime of the ECOWAS Court.

8.2. Financial and Budgetary Autonomy

The last indicator of the independence of international courts is the financial/budgetary autonomy of the court. Every court requires the provision of sufficient resources for its day-to-day running and the effective discharge of its mandate. The budget of a court is a potential avenue to impair the independence of international courts. Unlike national courts which are financed by taxpayers' money, most international courts are dependent entirely on the contributions of the member states to the parent international organisation, thus it is important to ensure that it does not become an avenue for controlling or sanctioning the courts or its members.

Financial adequacy and autonomy provide the judiciary with the necessary resources and allow for a smooth and effective running of the courts without constraints. Thereby enhancing its independence and credibility. On the other hand, financial dependence poses the danger of budgetary starvation which may become a tool for constraining the independence of the court.

In the national judiciary, financial adequacy and autonomy are some of the biggest problems faced by the courts. The Nigerian Judiciary, for instance, the judiciary is funded by the executive. The revenue to be allocated to the judiciary and other arms of the government for each financial year is determined by the President and set out in form of an Appropriation Bill which is then passed to the legislature for approval. The judiciary is not involved in the

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42 CFRN (n 4) sec 81(1)
process of determining the revenue to be allocated to it, it is solely based on the discretion of the presidency.

Coupled with the control of the budgetary allocation by the executive, the availability of the allocated and approved revenue is left to the discretion of the legislature. The allocation due to the judiciary is drawn from the Consolidated Revenue Fund of the Federation. The Constitution of the Federal Republic of Nigeria provides that “no moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation, except in the manner prescribed by the National Assembly”.43

As Justice Mustapha Akanbi, a former president of the Court of Appeal stated, “it is certainly no use speaking of the judiciary as the third arm of government if that arm has wittingly been consigned to the role of a beggar, living at the mercy of the other powerful arms”.44 The reality in the Nigerian judiciary is that the Chief Judge and Justices of the Courts constantly appeal to the executive and legislature to make available the funds allocated to their courts. Financial dependence is one factor that continues to daunt the independence of the Nigerian Judiciary. The national judiciary of the ECOWAS member states still has a long way to go in securing the financial independence of the court. Therefore, transposing or comparing the current practice in this region does not represent the financial independence necessary for the effectiveness and credibility of the ECOWAS Court.

8.2.1. Financial autonomy in international judiciaries

Financial autonomy in international judiciaries is difficult to achieve. Because international courts depend solely on the contribution of member states and their parent organisations for funding. In the ECOWAS Court, the budget is funded by the Community levies paid by member states. Similarly, the ICJ is financed by the UN from its budget which is borne by all UN state parties according to a scale of assessment which is based on the principle of “capacity to pay”.45 Member states, therefore, can limit the funds made available to the Court

43 CFRN (n 10) sec 80 (4)
A similar scale of assessment applies in the IACtHR and the United States of America alone contributes over 50 percent of the budget. The ITLOS, ECtHR and ICC also use the same scale of assessment.
as a means of retribution, for instance, in the ECOWAS many member states owe arrears of allocated levies and contributions. In the case of the ICJ, Romano suggested that the insufficiency of the budget of the court may be a “poorly concealed attempt to influence it rather than justified parsimony”.

There are a few minimum standards prescribed for the budgetary procedure of international courts. The Burgh House Principles provide that “states parties and international organisations shall provide adequate resources, including facilities and levels of staffing, to enable courts and the judges to perform their functions effectively”. While the standards prescribed above can facilitate the financial independence of the courts, it does not provide for financial autonomy. The role of the member states and the parent organisations cannot be eliminated as international courts do not have the resources to fund themselves.

Since the role of these parties is indispensable, the importance of establishing a regulatory provision for funding the courts which eliminate the adverse influence or constraint posed by their role. To this end, the regulatory provision must ensure that the international court or tribunal must have exclusive responsibility to submit proposals to the relevant budgetary authorities and shall be in a position to defend those proposals directly before such authorities. This provision must ensure that a court receives adequate funding rather than having to make do with whatever is determined by the other actors. Also, the regulatory provision must provide that the approval of the budget should not be left to the discretion of the member states or their agents. This provision will ensure the elimination of the possibility of the member state or the parent organisation cutting down the proposed budget.

8.2.2. Budgetary autonomy in the ECOWAS Court

The provision in the ECOWAS Court Protocol simply states that all operational expenses of the Court shall be charged to the budget of the Executive Secretariat of the Community. This provision suggests that the Court does not have its own budget, however, the ECOWAS Treaty provides that there shall be a budget for the Community and, where appropriate, a budget

46 Ibid 286
47 Burgh House Principles (n 11) Principle 6
49 ECOWAS Court Protocol (n 16) art 30.
for the Institutions of the Community. It further provides that the income and expenditure of the Community and its institutions shall be approved by the Council or other appropriate bodies for each financial year and shall be charged to the budget of the Community or the institution concerned.

Lastly, the Treaty provides that the Executive Secretary or the Head of the Institution shall prepare a budget for each financial year and propose the budget to the Council or other appropriate bodies for approval, on the recommendation of the Administration and Finance Commission. The role of the Administration and Finance Commission is to consider the draft budget and all financial issues concerning the institutions of the Community and to examine issues pertaining to administration and personnel management in the institutions.

In most of the institutions of the ECOWAS the budget is prepared by the head of the institution, a Committee set up within the institution for that purpose or a department of the institution. While it is not clearly stated what the actual process for drafting the budget is, it would seem that the Court through its Director of Administration and Finance submits a budget to the Community, the budget is adopted by the Administration and Finance Committee of the ECOWAS and then approved by the Council of Ministers. For instance, in June 2019, at the Administration and Budget Retreat of the Court, the Director of Administration and Finance of the Court, William Deiyan Towah, and the Vice-President stated that one of the aims of the retreat is to initiate the process for the 2020 draft budget for submission to the authorities of the Community. Later in the year, the Administration

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51 Ibid art 69 (2)
52 Ibid art 69 (3)
53 Ibid art 69 (4)
54 Council of Ministers Regulation C/REG.10/12/12 Approving the Budget for Community Institutions, Other Interventions and Obligations for the 2013 Financial Year. (on file with Author)
55 Ibid; ECOWAS Court, ‘Court President Urges Staff to Contribute Towards Resolving its Challenges’ (ECOWAS Court Blog) [http://prod.courtECOWAS.org/2019/07/18/court-president-urges-staff-to-contribute-towards-resolving-its-challenges/]

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and Finance Committee deliberated on the budget of the Court as well as those of other ECOWAS institutions and adopted them.\(^\text{56}\)

While this process gives the Court the chance to set its own budget, it does not exclude the member states from the process. In fact, the approval of the budget is left to the discretion of the Council, which comprise representatives of member states, as they are not bound to follow the recommendation of the Administration and Finance Committee.

The process in the European Convention is different from that of the ECOWAS Court Protocol. In the ECtHR, there is no separate budget for the court. All the expenditure of the ECtHR is borne by the Council of Europe.\(^\text{57}\) Thus, the process in the ECtHR excludes the court. Its budget is part of the general budget of the Council of Europe, subject to the approval of the Committee of Ministers which is comprised of the member states’ Ministers of Foreign Affairs.\(^\text{58}\) Leaving the budget of international courts to the sole discretion of the member states or their agents is not an uncommon issue, and this is one of the major reasons for the insufficiency of funds in many international courts. For instance, the Statute of the ICJ provides that “the expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly”.\(^\text{59}\)

The budget of the ICJ represents less than one per cent of the United Nations’ budget.\(^\text{60}\) The President of the ICJ, Abdulqawi Ahmed Yusuf, stated, at the United Nations General Assembly in October 2019, during the presentation of the Court’s Annual Report for 2018/2019 that the budget allocated to the ICJ is extremely low compared to its responsibilities under its mandate and its increasingly high caseload. He stressed that it is important to “strike the right balance between budgetary austerity and the [court’s] statutory mission”.

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\(^{57}\) European Convention on Human Right, art 50

\(^{58}\) European Court of Human Rights Budget 2019 [https://www.echr.coe.int/Documents/Budget_ENG.pdf](https://www.echr.coe.int/Documents/Budget_ENG.pdf)

\(^{59}\) Statute of the International Court of Justice, art 33

See also, in the COMESA Court, similar to what obtains in the ECOWAS Court, the President presents the budget of the Court to the Council for approval, through the Intergovernmental Committee. Treaty Establishing the Common Market for Eastern and Southern Africa, art 42.

In the ECOWAS Court, the total budget for the 2018/2019 legal year was 16,270,791 Units of Account\textsuperscript{61} which is equivalent to about USD22,484,443. Compared to other regional courts in Africa, the budget of the Court is adequate. In the EACJ for instance, the court’s budget for the 2013/2014 legal year was only USD4,279,489.

With respect to budgetary and finance systems, the IACtHR has a more adequately independent process. The Statute provides that the budget of the IACtHR shall be prepared by the Court and submitted to the General Assembly of the Organization of American States through the General Secretariat. The budget has to be approved without any changes. Upon approval, the Court administers the budget by itself.\textsuperscript{62}

8.3. Conclusion

The reliance of international courts on the contributions of the member states and the parent organisation poses a potential constraint to the independence of the Court and its members. The challenge with the remuneration of the judges is the dominant role played by the member states. The issues emanating from this can be remedied by reviewing the provisions of the legal regimes to reflect standards set out in 8.1. above, thereby eliminating the dominance of the Authority.

Unfortunately, the ECOWAS Court lacks the resources to adequately fund itself, therefore the role of the member states cannot be totally eliminated. The only viable measure to ensure the financial independence of an international court is to vest in that court the power to draw up its budget and present it to the appropriate authority for approval without the influence of the member states of the ECOWAS. Although the ECOWAS Court is vested with the power to put together its budget, the approval of the budget is still left to the discretion of the representatives of the member states.

Another constraint on the financial independence of the Court is the provision of the allocated revenue. In the 2018/2019 legal year, for instance, the Court reported in its interim report for 2019 that only 14.42 per cent of its budget was committed at the end legal year. This is


\textsuperscript{62} Statute of the Inter-American Court of Human Rights, art 26
perhaps due to the failure of member states to honour their obligations to pay their levies when due. The delay or outright failure in the payment of levies remains a major challenge in the ECOWAS Community. In recent years, there have been pleas by the president of the community, Marcel de Souza, to member states to honour their obligations as all the cost-containment measures put in place within the ECOWAS Commission and the institutions of the ECOWAS continued to fail.\(^{63}\)

In reality, ultimately the availability of funds in the ECOWAS Community is tied to the readiness of the member states to make those funds available. Therefore, vesting the budgetary power in the Court provides it with some protection, but the financial security of the Court, as well as other institution of the Court, is still tied to the discretion of the member states to make the funds available.

**PRELIMINARY CONCLUSION**

Within Africa, particularly the western region, the judiciary enjoys far less independence when compared to the judiciaries in other parts of the world. Judicial systems across the ECOWAS member states are subdued by the control of the executive and legislative arms of government. The courts in this region are subject to a great deal of undue interference—both formal\(^ {64}\) and informal\(^ {65}\) which weakens their independence. Also, most of these interferences take place behind closed doors, however, some are apparent and inherently embedded in the Constitutions of the member states.

It is, therefore, safe to conclude that the rules and practices of judicial independence in the national judiciaries across West Africa do not correspond with what is desirable or necessary in the ECOWAS Court. Although scholars have suggested that in measuring the independence of international courts, it should be compared to the national judiciaries which are usually more independent, this logic does not fit in the context of the Court. The ECOWAS Court


\(^{64}\) Formal interferences include constitutional provisions vesting the power to appoint judges in the executive and legislature; loopholes or silence in the constitution on vital matters such as immunity of members of the court and the financing of the court

\(^{65}\) Informal interferences include threats; violent attacks; bribery; the arbitrary removal of sitting judges, and godfatherism.
operates in a region where the rule of law is given minimal or no regard. The level of corruption and political influence in the region cuts across all spheres of the government, including the judiciary.

There have undoubtedly been some developments in the legal regime of the ECOWAS Court. However, these developments have been directed towards the rotation of official positions among member states and the appointment process as well as the delegation power of the Authority in the removal process. The independence of the Court has not gained any attention from the member states or the institutions of the ECOWAS.

Conclusively, the assessment of all five indicators of judicial independence identified in relation to the provisions of the legal regime of the ECOWAS Court and the implementation of these provisions reveals that there is a gap in the independence of the Court and its judges. The major challenge to the independence of the ECOWAS Court is the dominant role played by the member states either through the Authority or the Council of Ministers. The ECOWAS Court judges are appointed by the Authority, and the discipline and removal of erring judges are also left to the Authority. Similarly, the immunity of the judges may be waived by the Executive Secretary while the salaries and other conditions of service of the judges are determined by the Authority and the funding of the Court is subject to the approval of its budget by the Council of Ministers.

Thus, the Court has very little power over its own affairs and the member states have various avenues and mechanisms in place to constrain the independence of the ECOWAS Court. While the Court has continued to show its willingness to decide against the member states, especially in cases bothering on the protection of human rights, the lack of compliance and enforcement of these decisions suggests that the member states are not steered to brandish the power and control they have over the Court. As earlier discussed, the argument in this thesis, which correlates with the various international standards and principles of judicial independence, is that to achieve the efficiency and quality necessary for the performance of the functions of international courts, they must be totally independent of the influence or constraint of the member states and other actors.

Finally, this thesis also argues that the independence of the judiciary may become a tool for judicial tyranny, therefore it must operate alongside an effective mechanism for
accountability as well as transparency. The relationship between these three concepts and the need to balance them will be discussed in Part V of this thesis.
PART IV

THE ACCOUNTABILITY AND TRANSPARENCY OF THE ECOWAS COMMUNITY COURT OF JUSTICE

Introduction

The indispensable role played by the judges of international courts in sustaining the rule of law has since been recognised by several international law experts and scholars.\(^1\) International court judges bring with them diverse experiences in different legal systems and different areas of law which contributes to the wealth of the over one hundred international and regional courts in existence.\(^2\) The quality and effective performance of the roles of judges, in both national and international courts, is tied to the interplay of three major concepts (i.e. independence, accountability, and transparency), all of which must be adequately provided for and safeguarded.

Judicial independence provides a shield for judges to carry out their duties without undue influence or interference, whether external or internal which may emanate from other members of the court, state parties, parent organisations or other international organisations, individuals, groups of individuals, or other actors.\(^3\) The concept of judicial independence, its measuring methods and variables, and the operation of the concept in the ECOWAS Community Court of Justice (the ECOWAS Court or the Court) have been examined in Part III of the thesis.

The main purpose of judicial independence is political insularity i.e., ensuring that a judicial institution does not become a tool for enhancing political interests and aims. However, the insularity should not be considered to operate in an absolute sense. Otherwise, it may interfere with the operation of the rule of law and result in arbitrariness and abuse of power.\(^4\)

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\(^3\) See Chapter 4 of this thesis for more on the concept of judicial independence.

While assessing the independence of the ECOWAS Court, the argument put forward in this thesis is that the overall quality of the judiciary can only be achieved where independence is maintained alongside an effective system or mechanism for checks and balances in place. The accountability and transparency of judges are fundamental issues, but they receive less attention than they deserve especially in the international judiciaries. This may be due to the perceived conflict between judicial independence and these two concepts. The independence of judges simply empowers judges to deliver impartial judgements based on the provisions of the law. It should not be equated to the freedom of judges to decide cases whimsically or arbitrarily or based on personal interests, preferences, or antipathies.

The saying that “power corrupts, and absolute power corrupts absolutely” is the bedrock upon which the concept of judicial accountability and judicial transparency is built. When compared to judicial independence, judicial accountability and transparency are relatively modern developments that emerged as institutional responses to the expansion of the adjudicative powers of the judiciary. The attention to accountability and transparency has continued to gain attention in different fields. In the field of international investment arbitration, for instance, it has been observed that actors sequentially or simultaneously play the roles of the arbitrator, counsel, tribunal secretary, and expert witness, which raises ethical issues over conflict of interest and transparency.

As Mahoney rightly observed, discretionary powers, however well-meaning the holder may be, should not be perceived as absolute. The power of judges to act and perform independently is not an exception to this general rule. Thus, while judges and other members of a court (prosecutors, registrars, clerks, interpreters, etc.) must be free to carry out their

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5 See sections 4.2.3., 6.1.2., 6.1.3., and 7.3.1. above.
7 The relationship between judicial independence and judicial accountability is assessed in section 9.3. below
8 Alan G Tarr, Without Fear or Favor: Judicial Independence and Judicial Accountability in the States (Redwood City: Stanford University Press 2012) 91
9 This quote is an extract from words of John Emerich Edward Dalberg Acton, otherwise known simply as Lord Acton. The historian and moralist expressed this opinion in a letter to Bishop Mandell Creighton in 1887. https://www.phrases.org.uk/meanings/absolute-power-corrupts-absolutely.html
11 Mahoney (n 6) 320
duties and functions independently and in accordance with their understanding of the law, this discretionary power must not be left unchecked. Grant and Keohane believe that checks and balances “are mechanisms designed to prevent action that oversteps legitimate boundaries by requiring the cooperation of actors with different institutional interests to produce an authoritative decision”

As discussed in chapter 4 of this thesis, the consensus which can be drawn from the argument of scholars and other international law experts is that judges and other members of the court, whether in national or international courts, must be subject to some form of checks in order to ensure that they are answerable for their acts, speech, decisions and conducts during the performance of their duties. However, there is a divide amongst scholars on the form of mechanisms to be adopted to achieve this purpose.

Scholars like Helfer, Slaughter, Cogan, and Ferejohn maintain that judicial independence should not be considered absolute but as limited or constrained. The aim of judicial independence as proposed by these scholars is to ensure that it is just enough to empower the judges and other members of a court to carry out their duties in a lawful manner without any form of undue influence and interference. They maintain that to achieve the necessary checks on the power and affairs of the judges of the court, other actors, especially member states, should maintain or hold some influence, control, or constraint on the affairs of the judiciary and its members. These limitations to the independence of the judiciary, to them, must be put in place to ensure that a court does not go beyond the scope of its mandate. This argument has been crystallised into the theory of constrained judicial independence. The challenge with the theory of constrained independence is where to draw the line to ensure that the constraints do not undermine the essence of judicial independence.

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14 Cogan (n 13) 413; Ferejohn and Kramer (n 13) 975; Helfer and Slaughter (n 13) 942
The argument in this thesis is that the effectiveness of a court and its judges, as well as the quality of the court, can only be achieved where all forms of constraints and interference are eliminated, thereby making the judges adequately independent. However, this thesis aligns with the argument that the independence of judges of international courts as of national judges, if unrestrained, can metamorphose into judicial arrogance and lead to a miscarriage of justice or judicial overreaching.\textsuperscript{16} Thus, the independence of a court must not be considered in isolation. To understand the operation of the independence of the judiciary, it is important to recognise that restrictions and exceptions to the concept are permissible only as long as they do not impair a court’s autonomy.\textsuperscript{17} To achieve the necessary checks and balances, the independence of a court and its judges must be qualified by standards and mechanisms of judicial accountability and judicial transparency.\textsuperscript{18}

This part of the thesis will assess the accountability and transparency of the ECOWAS Court in comparison to that of the other international courts (particularly the European Court of Human Rights (ECtHR)) and the national judiciary in ECOWAS member states. The part comprises two chapters, 9 and 10. Chapter 9 introduces and examines the concept of judicial accountability. It unpacks the elements of the concept and the development of the concept in national and international judiciaries. Chapter 9 also examines the normative standards and measures for judicial accountability in the ECOWAS Court, in comparison to the standards in place in Nigeria (an ECOWAS member state) as well as the ECtHR, in a bid to assess its consistency to available international minimum standards (particularly the Bangalore Principles). The chapter also evaluates the mechanisms put in place to enforce the normative standards also in comparison to the mechanisms in operation in member states and the ECtHR.

Chapter 10 focuses on the concept of judicial transparency, its importance as well as the development of the concept in national and international judiciaries. The chapter also unpacks and analyses the elements of judicial transparency and the operation of these elements in the ECOWAS Court in comparison to the national courts in ECOWAS member states and the ECtHR in order to assess the consistency with established international standards. Finally, the chapter assesses the gaps which exist in the operation of judicial accountability and transparency.

\textsuperscript{16} Mahoney (n 6) 320
\textsuperscript{17} Kate Malleson, The New Judiciary, The Effects of Expansion and Activism (Dartmouth: Ashgate, 1999) 73
\textsuperscript{18} See section 4.2.3. for more discussion on qualified independence.
transparency in the legal regime of the ECOWAS Court and proffers recommendations for the enhancement of judicial transparency in the Court.
CHAPTER 9


9.1. Introduction

Accountability is one of the main principles of the operation of checks and balances and a major condition for the maintenance of the rule of law. It has, in recent times, become one of the key concepts emphasised in relation to the quality of various organisations and institutions, especially in the area of public administration and management. An important component of public trust in any institution is the ability of actors and stakeholders to hold its members accountable. Accountability is a term used to describe the right to hold a person answerable for the performance of their duties or functions, and to be accountable is to be obliged to answer for one’s action and accept the consequences that may flow therefrom. It represents a mechanism for the advancement and promotion of good governance and public confidence in any democratic state or public institution and also a fundamental principle for averting abuse and misuse of power as well as the corruption of power holders. Hernes, in his work in the field of public management, stated that “efficiency is sought through methods such as decentralization of authority to the technical levels while ensuring accountability to society at large.”

The absence of a mechanism for accountability or the inadequacy thereof in administrative or decision-making processes will potentially have a negative impact on the legitimacy of an organisation or institution. Judicial accountability derives from the more general progenitor, public accountability, which relates to the accountability of any institution that exercises public power. Public accountability gained prominence in the second half of the 20th Century

4 Tor Hernes, ‘Four Ideal-Type Organizational Responses to New Public Management Reforms and Some Consequences’ (2005) 71 International Review of Administrative Sciences 5
5 Bovens (n 1) 454
and has since influenced accountability in institutions across different sectors.\textsuperscript{6} The understanding of the concept of accountability as we have it now is highly influenced by the attempt by scholars like Bovens,\textsuperscript{7} Mulgan,\textsuperscript{8} and Follesdal\textsuperscript{9} to establish a coherent framework for its assessment.

Bovens defined accountability as a relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, while the forum can pose questions and pass judgement, and the actor may face consequences.\textsuperscript{10} Similarly, Follesdal defined accountability as “the obligation to explain and justify conducts”.\textsuperscript{11} These general definitions and descriptions of accountability create a bedrock for the understanding of the concept as it relates to different institutions and organisations.

The importance of the concept as well as the relationship between accountability and other concepts relating to the quality of institutions including the judiciary continue to be a subject for discussion. A major debate is whether or not the concept of judicial accountability and judicial independence can operate simultaneously.\textsuperscript{12} Another important debate is whether judicial accountability and judicial transparency should be merged and examined as closely linked and interchangeable\textsuperscript{13} or as two separate and distinct concepts.\textsuperscript{14} Some scholars simply consider judicial transparency as a subset of accountability i.e. decisional accountability.\textsuperscript{15}

\textsuperscript{6} ibid
\textsuperscript{7} Ibid
\textsuperscript{8} Mulgan (n 1); Richard Mulgan, ‘Accountability: An Ever-Expanding Concept’ (2000) 78(3) Public Administration 555
\textsuperscript{10} Bovens (n 1) 450
\textsuperscript{11} Follesdal (n 9) 502
\textsuperscript{12} ibid 505; Bovens (n 1) 449; Ronli Sifris, ‘Weighing Judicial Independence against Judicial Accountability: Do the Scales of the International Criminal Court Balance’ (2008) 8 Chi-Kent J Int’l & Comp.L p 88, 92
\textsuperscript{13} Frans Van Dijk and Geoffrey Vos, ‘A Method for Assessment of the Independence and Accountability of the Judiciary’ [2017] 9 International Journal for Court Administration 1, 7
\textsuperscript{14} David Kosař and Samuel Spáč, ‘Conceptualization(s) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back’ (2018) 9 International Journal for Court Administration 37, 42
\textsuperscript{15} Daniela Piana, Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice (Farnham, 2010); Hakeem Yusuf, Transitional Justice, Judicial Accountability and the Rule of Law (Routledge, 2010).
These two concepts although interrelated and aimed at the same end, i.e. the quality of the judiciary, are distinct and therefore should not be conflated.\textsuperscript{16}

In the judiciary, accountability moderates the behaviour and conduct of judges to ensure consistency with the functions of the court, and this is achieved mainly by putting regulations in place to curb the risk of abuse of power and also guide judges’ discretion and behaviour. The behaviour and conduct of judicial officers, especially in international courts have now become more scrutinised by other stakeholders as well as the media. This attention is not only limited to conducts tied to their judicial functions. Judges are generally expected to maintain high moral standards and integrity even in their day-to-day life as personal or professional misconduct by a judge can potentially tarnish not only the reputation of the judge but may also affect the integrity of the court.\textsuperscript{17}

9.2. Judicial Behaviour

Judges are required to be independent and unbiased umpires in the settlement of disputes among litigants. They are also expected to be exemplary individuals of high moral character\textsuperscript{18} and should, therefore, be held to a certain level of standards. However, like any other holder of power, they are prone to abuse or misuse their position if left without any form of checks. Judges, just like other human beings, can be swayed by their personal interests, affiliations, relationships, beliefs, biases, and background experiences. All of these factors play major roles in our day-to-day life and can potentially inform our decisions and the performance of our duties, judges included. Court decisions are made by individuals who, in their attitudes, proclivities, and intellectual tendencies, are to a significant degree, products of their environments, national systems, and social values.\textsuperscript{19}

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\textsuperscript{16} The concept of judicial transparency as well as the similarities and differences between transparency and accountability will be assessed in next chapter.

\textsuperscript{17} See, for instance, the Irish Justice Seamus Woulfe’s Golfgate dinner party incident and the decision of the court on the significant and irreparable damage to the institution of the Irish Supreme Court. Shane Harrison, ‘Golfgate: Seamus Woulfe ‘should resign’, says Irish Chief Justice’ \textit{BBC News} (Dublin, 10 November 2020); Michelle Devane and James Ward, ’No Further Steps Will be taken against Seamus Woulfe, Taoiseach says’ \textit{Belfast Telegraph} (Belfast, 17 November 2020); The Irish Times, ‘Letters in Full: What Chief Justice Said to Mr Justice Seamus Woulfe Over Golfgate Dinner and His Reply’ (Dublin, 9 November 2020)


\textsuperscript{19} Gleider I Hernandez, ‘Impartiality and Bias at the International Court of Justice’ (2012) 1 Cambridge J Int’l & Comp L 183, 185
When faced with the question of how judges reach their decision in the cases before them, or what factors influence their decision, the obvious answer will be that “the law determines judicial decision-making”. This answer, although correct, is incomplete. Studies related to the psychology of judicial behaviours have identified that extra-legal factors, such as race, gender, culture, public opinion, educational background and, career motivation, play a huge role in the use of the discretionary powers of international court judges and how they interpret the law. These extra-legal factors have been classified into two broad spectrums – political factors and sociological factors.

Although it has been established that in the ideal sense, judges of international courts enjoy independence from the influence of the member states, it has been suggested that a more realistic argument is that member states are still actively attempting to fashion some control mechanisms on the affairs of courts, most especially the judges from their state. Most of these control mechanisms usually operate indirectly and have been said to lead to political factors that influence the behaviour of judges and the exercise of their discretionary power. Such factors include home state bias, geopolitical bias, and policy and institutional preference.

There have been claims that home-state bias, emanating from culturally instilled values, patriotism, or national interest, sometimes plays a role in judicial decision-making. Home state bias is perhaps the most crucial factor influencing judicial discretion. As far back as 1968, a study carried out on the International Court of Justice (ICJ) revealed that members of the court are largely influenced by national biases. This study, which involved a quantitative analysis of data obtained through coding the ICJ contentious cases and advisory opinions, led to the conclusion that the justices of the ICJ, at the time, showed a “disposition to favour

21 Ibid 555
22 Ibid 551
23 Ibid
25 Hensley (n 24) 589
26 Ibid 570
their own countries”. More recently, a study carried out by Posner and Figueiredo examining data on the voting pattern of the ICJ judges concluded that home-state bias heavily influences the decision-making of the ICJ. The Scholars found that ICJ judges vote in favour of their home states ninety per cent of the time.

They also found that in cases where a judge’s home state is not involved, geopolitical bias can come to play. Although geopolitical bias is far-reaching, judges may be inclined to represent the geopolitical interest of their home state by deciding in favour of states with similar economic, cultural, or political regimes as their states. Posner and Figueiredo also concluded that ICJ judges are also likely to vote in favour of states who are strategic partners of their home states.

A similar conclusion has been reached in a study on the European Court of Human Rights. Voeten found that although the judges of the ECtHR sit in their individual capacities, they do have incentives to behave like representatives of their home state. While his major argument, which is hinged upon the renewability of tenure, has become invalid due to a review of the provisions of the European Convention on Human Rights concerning the tenure of office, other arguments made in his study, including home bias stemming from career incentives, and systematic internalised reasonings remain valid. As Voeten stated, not all legal systems are the same, thus the factors vary from one court to another. They may also include factors such as gender, race, income, and legal origin.

27 Ibid 568
29 Ibid 600
30 Ibid 624
31 Voeten (n 20) 555
32 Ibid
33 Posner and Figueiredo (n 28) 625
34 European Convention on Human Rights (ECHR), Art 21 (2)
35 Voeten (n 20) 418
36 Ibid 419
37 ECHR (n 34) Art 23(1). This provision reviewed the tenure of judges to nine non-renewable years, thereby eliminating the motivation to be bias for the gain of reappointment.
38 Voeten (n 20) 418-426
39 Ibid 426
Another political factor that may influence judicial decisions is the desire to influence policies and drive compliance with the judgement of the court. Voeten believes that compliance is important to judges, not only because of the policy implication of their judgement but also for the purpose of maintaining the legitimacy and effectiveness of their courts.⁴⁰ For the sake of getting compliance, judges may have to strategically anticipate the response of the parties, especially member states, and adjust their judgements in line with the anticipated response.

Apart from the factors emanating from the control mechanisms of member states, international court judges carry with them individual collections of sociological values, which are likely to influence or modify the discretionary exercise of judicial duties. These factors include cultural orientation, educational background, and professional background. Although every international court develops its own values and norms which guide the behaviour of its judges, the cultural and personal values of individual judges before appointment to the bench also shape their decisions.⁴¹

Culturally inculcated values have been attributed to perceived national bias in the ICJ.⁴² Also, international courts are designed to be composed of a diverse body of judges with different educational and professional backgrounds.⁴³ The legal education or training of each judge may be a determining factor in their interpretation and application of the law. In a similar vein, the past professional experiences of the judges also play a role in their reasoning. Thus, one can argue that a person who has previously held a judicial position may reason differently from an academic or former diplomat with no judicial experience.⁴⁴ Other sociological factors that may influence judicial decisions include career motivations, personal relationships and associations, and personal opinions.

The presence and effect of these factors are yet to be examined in relation to the ECOWAS court. This is most likely due to inadequate records and data required to carry out such a study or mainly because the Court has adjudicated very few interstate disputes. However,

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⁴⁰ ibid 417
⁴¹ Voeten (n 20) 565
⁴² Hensley (n 24) 580
⁴³ See for instance, Article 9 of the Statute of the International Court of Justice
⁴⁴ Voeten (n 20) 566
factors such as the length of tenure and the qualification of judges of the Court indicate the possibility of bias for career motivations.\(^{45}\)

To ensure that the presence of these factors does not taint the decisions of the court, judges must be held accountable for their acts, speech, and omission and there must be openness and clarity of the reasoning of the judges in its decision-making process. There have been incidents in several judicial institutions pointing to such excesses, such as incidents of corruption\(^{46}\), embezzlement\(^{47}\), addiction, incompetence, and bias by judges.\(^{48}\)

9.3. The Concept of Judicial Accountability

The concept of accountability is in itself a complex one, the definition of the concept varies, depending on the field of study (or field of reference). In an attempt to define accountability, Ferejohn stated that “to say that one agent (A), is accountable to another agent (B) is to say that A has a kind of duty (moral or legal) to B and that B has means to enforce it.”\(^{49}\) This scenario outlined by Ferejohn gives a concise and sufficient description of the concept of accountability generally. Ferejohn considered accountability purely from the principal-agent angle.

The nature of the relationship between international courts and the states who create them continues to be an issue for debate amongst scholars, and their arguments have been crystallised into two theories – the Principal-Agent (P-A) theory and the Trusteeship theory. This debate has been assessed in section 2.2. above. The major difference between these theories is the nature and degree of the influence the states have over the functioning of a court and its judges. The P-A theory draws largely from the rational choice theory which is

\(^{45}\) The accountability of the court will be further examined in this chapter.


used by political scientists to explain the delegation of authorities to executive and judicial powers.

The trusteeship theory, on the other hand, argues that international court judges are delegates of the member states appointed based on their personal and professional qualifications to decide on behalf of the member states. The trusteeship theory places a lot of emphasis on the reason behind the delegation of power to international judiciaries, which is to appoint judges who are neutral third parties in the resolution of disputes between parties.\textsuperscript{50} To achieve this aim, international judges must be free from all forms of influence and control and carry out their duties based on their mandate, rules, and expertise.\textsuperscript{51}

Whether one is inclined to the principal-agent theory or the alternative principal-trustee theory, Ferejohn’s analysis provides a great starting point for understanding the concept of judicial accountability. Similarly, Schedler defines accountability as subjected power to the threat of sanction; obliging it to be exercised in transparent ways; and forcing it to justify its acts.\textsuperscript{52} Ferejohn’s description and Schedler’s definition of the concept imply that power has been delegated to the delegate (A) by the delegator (B), and as a result of the delegation, the delegator has the right and power to hold the delegate to account for their acts and/or omissions. The delegator also has the right and power to penalise the delegate.\textsuperscript{53}

Similarly, Grant and Keohane stated, accountability “implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met”.\textsuperscript{54} In a similar vein, Perez stated that the notion of accountability, broadly speaking, “involves a relationship in which the power-wielders are evaluated by those who are affected by their actions or those who entrusted them with power”.\textsuperscript{55}

\textsuperscript{51} Ibid 55
\textsuperscript{53} Ibid 3
Just like accountability as a general concept, judicial accountability is devoid of an encompassing or general definition. It is an embodiment of the responsibilities flowing from the enjoyment of judicial independence such as ethical obligations and conduct within and outside the court. Judicial accountability serves the purpose of eliminating possible abuse or overreaching of judicial power by judges and ensuring that personal preferences, affiliation, empathy, and sympathy do not affect their judicial decisions. It operates to curb judicial conduct and behaviour that are hostile or contrary to the performance of their functions, or conducts that are prejudicial to the overall quality and efficiency of the court. It is also essential for the enhancement of the legitimacy of a court in the eyes of the other actors and the general public. A decline in trust in a court has the potential to result in a lack of legitimacy. Judicial accountability lays down and enforces formal rules on judges by holding them legally or politically responsible for their actions and conduct.

The concept of judicial accountability is a rather complex one that has caused a divide amongst international law scholars. Scholars debate whether the concept should include both ex-ante (proactive measures) and ex-post (retrospective measures) accountability which is a broader definition of judicial accountability or whether it should be reserved solely to ex-post mechanisms which is a narrow definition of judicial accountability. Also, a subject of debate is whether or not accountability mechanisms should include sanctions or consequences for non-compliance to standards set for accountability, as well as rewards for compliance.

In addressing the first issue, both the ex-ante and ex-post standards and mechanisms of judicial accountability are vital to the quality and legitimacy of the court. The line between the proactive measures for accountability and retrospective mechanisms for ensuring accountability is a very blurry one, as both are interconnected. Put simply, ex-ante measures embody the internalised normative standards and rules which are produced and adopted to

58 Alan G Tarr, Without Fear or Favor: Judicial Independence and Judicial Accountability in the States (Redwood City: Stanford University Press 2012) 91, 93
60 Ibid 35
61 Bovens (n 1) 447
guide the judges, while ex-post measures are the mechanisms for enforcing these rules and standards. Limiting the definition of accountability to retrospective measures will amount to a distortion of the essence of judicial accountability. Accountability does not only cover the ex-post mechanism but must also include measures for anticipating and preventing possible future acts or omissions. Judicial accountability, thus, operates to anticipate retrospective misconducts or wrongdoing and deter them, as well as to correct and sanction misbehaviour. On whether the mechanisms for accountability should entail the imposition of sanctions and award of rewards, there are also two points of view. There are scholars like Schedler\textsuperscript{62} who believe that accountability can be achieved without the imposition of sanctions. On the other hand, some scholars maintain that the imposition of sanctions for actions is a constitutive element of accountability. The establishment of standards without consequences for noncompliance is simply counterproductive. The imposition of sanctions as well as the promise of rewards are essential elements for judicial accountability, the absence of punishment and reward will render the standards of judicial accountability unenforceable. To attempt a definition of the term, one must first understand the facets of judicial accountability. Accountability of a court and its members can first be considered as a set of normative standards that binds the conduct and affairs of the members of the court, or put differently, a set of legally binding rules of conduct, ethical obligations, and other regulations put in place to check judicial conducts.\textsuperscript{63} On the other hand, judicial accountability can also be considered as a mechanism for ensuring that these normative standards are complied with and to determine when a judge is in breach of any of the standards. In this chapter, both facets of judicial accountability will be assessed side by side. Therefore, this chapter adopts a definition of judicial accountability which sums up these two facets. For the purpose of this thesis, judicial accountability is defined as the obligation of judges to be answerable to other actors for their actions and conducts, with these actors having the right to hold them to a set of standards, determine whether they have fulfilled their responsibilities

\textsuperscript{62} Schedler (n 52) 16-17
\textsuperscript{63} Kosař (n 59) 57
in light of those standards, and to impose sanctions if they determine that these standards have not been met.\footnote{Adapted from the definition by Dunoff and Pollack. Jeffrey L Dunoff and Mark A Pollack, ‘The Judicial Trilemma’ (2017) 111 AM. J. of Int’l L 225, 233}

It is important at this juncture to point out that the concept of judicial accountability should not be equated to control of the affairs of the judiciary. The adoption of a control-inclined definition of accountability is a common misconception amongst political scientists as well as legal scholars. Lupia, for instance, stated that “an agent is accountable to a principal if the principal can exercise control over the agent and delegation is not accountable if the principal is unable to exercise control. If a principal in situation A exerts more control than a principal in situation B, then accountability is greater in situation A than it is in situation B”\footnote{Arthur Lupia ‘Delegation and its Perils’, in Kaare Strom et al. (eds), Delegation and Accountability in Parliamentary Democracies (Oxford University Press, 2003) p 35}.

Similarly, international law scholars like Helfer and Slaughter, Cogan, and Ferejohn have suggested that political and legal constraints and influence (which essentially amount to control) should be deployed as mechanisms for balancing independence.\footnote{Jacob Katz Cogan, ‘Competition and Control in International Adjudication’ [2007] 48 Va J Int’l L 411, 413; John A Ferejohn and Larry D Kramer, ‘Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint’ [2002] 77 NYuL Rev 962, 975. See section 4.2.2. for the full assessment of the arguments of these scholars.} As Bovens rightly suggests, to have control over a person is to have power over them for example through handing out direct orders or having control over their behaviour.\footnote{Bovens (n 1) 454} Thus, to equate accountability to control puts the concept at war against independence thereby creating a trade-off that cannot be balanced between the two concepts.

\section*{9.4. Development of Judicial Accountability}

The concept of judicial accountability in the international judiciary is relatively novel when compared to the accountability of judges in national courts. It is a long-established principle in many national judiciaries, even in the ECOWAS member states, which is largely provided for in the Constitution and/or the courts’ Rules of Practice.\footnote{In the West African region for instance, the Constitution of the Republic of Ghana 1992, Art 151 and 152 provides for the accountability of judges and stipulates the mechanism for accountability. A similar provision is contained in the Constitution of Sierra Leone 1991, Art 137 (4-10)} International judiciaries have begun to pay more attention to the accountability of the judge by establishing various rules...
of conduct designed specifically for each court and other mechanisms to regulate judicial conduct.69

Again, drawing examples from the national judicial system of the Federal Republic of Nigeria, judicial accountability is a major element for the protection of the rule of law and separation of power which is entrenched by the Nigerian Constitution.70 The Constitution divides power amongst the executive, legislature, and judiciary, vesting each with specific independent powers. The principles of separation of power have also been reiterated by the judiciary. Notably, in the case of Attorney-General of Abia State & Ors v. Attorney-General of the Federation71, the Supreme Court stated that the principle of separation of power as provided for in the Constitution requires that all three arms of the government must operate individually with none encroaching on the powers of another or eroding the functions of another.72

The Constitution of the Federal Republic of Nigeria provides measures to ensure that the powers of each arm of government are put in check. The judiciary, for instance, is the caretaker of the constitution and is responsible for curbing the potential of the legislature and the executive to exceed their constitutional power and also nullifying the misuse of power. The judiciary exerts a lot of power and therefore must be subject to some form of checks to ensure the proper delivery of justice because such powers if left unregulated are susceptible to abuse.

To ensure that the judiciary is accountable, there are set standards established to guide the conduct of the judges as well as a mechanism for enforcement. The standards of accountability in the Nigerian judiciary are enshrined in the Code of Conduct for Judicial

70 The Constitution of the Federal Republic of Nigeria 1999 (CFRN), sec 4, 5, and 6
72 CFRN (n 70) sec 6
officers\textsuperscript{73} which reiterated that while an independent judiciary is indispensable for the administration of justice, it is important that judges be held to specific prescribed and published standards to guide the judges’ conducts. The Code of Conduct enumerated the duties of the judges and the conduct expected of them. It stipulates the acts and conducts that are prohibited as well as the penalties for these conducts.\textsuperscript{74}

To ensure that the standards are enforced, the Constitution established a number of institutions to oversee the functions, conducts, and exercise of power by judges in both federal and state courts such as the National Judicial Council\textsuperscript{75}; the Federal Judicial Service Commission\textsuperscript{76}; the Judicial Service Commission in the various states\textsuperscript{77}; and the Judicial Service Committee of the Federal Capital Territory\textsuperscript{78}. These institutions are responsible for investigating claims of judicial misconduct and disciplining errant judges. They are also involved in the process of the removal of judges.

In Europe, on the other hand, the accountability of the national judiciary is mostly overshadowed by the discourse of judicial independence.\textsuperscript{79} Thus, while judicial independence is a well-established judicial concept across Europe, the same cannot be said of judicial accountability.\textsuperscript{80} However, in recent years, there has been an increasing attempt to bridge this gap in many European states. The Consultative Council of European Judges (CCEJ), for instance, in Opinion No.18\textsuperscript{81} acknowledges the importance of the concept of judicial accountability and sets guidelines for ensuring accountability in the national courts of member states.

One of the main questions examined by the CCEJ in Opinion No.18 is to what extent and in what ways should judiciaries be accountable to the societies they serve as well as other

\textsuperscript{74} Ibid Preamble
\textsuperscript{75} CFRN (n 70) sec 153 (1) (i)
\textsuperscript{76} Ibid sec 153 (1) (e)
\textsuperscript{77} Ibid sec 197 (1) (c)
\textsuperscript{78} Ibid sec 304 (1)
\textsuperscript{80} Kosař, (n 59) 14
\textsuperscript{81} Consultative Council of European Judges (CCEJ) Opinion No.18 (2015) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy. https://rm.coe.int/16807481a1
powers of the state? They stated that the judiciary, just like other powers of the state, provides public service and therefore must account for their actions and conducts to the society. CCEJ Opinion No.18 enumerates what the judiciary should be accountable for, to whom the judges should be accountable, and the different elements of accountability i.e. explanatory accountability, judicial accountability, and punitive accountability.

Also, more focus has been placed on the issue of judicial accountability in individual states across the continent and this is evident from the reforms in the legal regimes of their national judiciaries. In the United Kingdom, for instance, the power to enforce judicial accountability through disciplinary mechanisms is vested in the Lord Chancellor and the Lord Chief Justice by the Constitutional Reform Act. The Guide to Judicial Conduct which provides the standards and guidelines for the conduct of judicial officers in the United Kingdom was first established in 2003 by a working group of judges set up by the Judicial Council and was recently revised by the Judicial HR Committee. The same has been authorised by the Lord Chief Justice of England and Wales, and the Senior President of Tribunals in Scotland and Northern Ireland. It provides basic guiding principles for judges on standards such as judicial independence, impartiality, and integrity. It also provides standards and guidance to regulate specific conducts, including their activities outside the court, personal and social relationships, and behaviour towards other members of the court and parties amongst others. Similar reforms targeted at ensuring that the judges of the domestic courts maintain the necessary level of accountability have been implemented in the Italian national judiciary.

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82 Ibid para 4 (iii)
83 Ibid para 21
84 Ibid para 23-24
85 Ibid para 25
86 Ibid para 26-33
88 Constitutional Reform Act, 2005
90 Ibid preamble
91 Ibid part 2
92 Ibid part 3
93 Benvenuti (n 87) 373
In recent times, various international standards, such as the Limassol Conclusion 2002\textsuperscript{94}, the Ibero-American Code of Judicial Ethics\textsuperscript{95}, the Latimer House Principles\textsuperscript{96}, and the Bangalore Principles\textsuperscript{97} have been established, all of which acknowledge and seek to provide minimum standards for accountability of judges. Many of these international standards, although promulgated for the advancement of judicial independence, also address issues surrounding or relating to judicial accountability, such as judicial ethics, integrity, and impartiality. Many international courts have adopted some of the provisions of these international instruments into their legal regime.

In international judiciaries, the standards and mechanisms of judicial accountability are provided for in their Protocols, Code of Ethics, Code of Conducts, or other similar instruments. In the ECtHR for instance, judicial accountability is duly regulated by the combined provisions of the Resolution on Judicial Ethics\textsuperscript{98} and the Rules of Court\textsuperscript{99}. Similar instruments apply in other international courts across the world.\textsuperscript{100} In the ECOWAS Court, the accountability of judges is provided for in the Rules of Procedure of the Community Judicial Council (Rules of Procedure) which will be further analysed in the next section.\textsuperscript{101} The Rule of Procedure was adopted in 2007. Until then, there was no provision for the accountability of the judges of the ECOWAS Court, thus leaving the judges to conduct themselves and their affairs without any rules or standards. The Rules of Procedure was not particularly established to set the standards or mechanism for the judges to follow, instead, it was designed as a guideline for members of the Judicial Council of the ECOWAS Community (Judicial Council) in the performance of their duties. However, some of the provisions of the Rules of Procedure are

\textsuperscript{94} Commonwealth Judicial Colloquium on Combatting Corruption Within the Judiciary, Limassol Conclusions 2002 \url{https://www.cmja.org/downloads/limassolconclusionwithannexe.pdf}

\textsuperscript{95} Ibero-American Code of Judicial Ethics, adopted by the Ibero-American Judicial Summit in Santo Domingo (Dominican Republic) 2006 (as amended in Santiago (Chile) 2014) \url{http://www.poderjudicial.es/stdfs/CIEJ/FICHEROS/EN%20Iberoamerican%20Code%20of%20Judicial%20Ethics%202006.%20as%20amended%20in%202014.pdf}


\textsuperscript{97} The Bangalore Principles were developed by the Judicial Group on Strengthening Judicial Integrity 2002

\textsuperscript{98} ECtHR Resolution on Judicial Ethics (n 69) Resolution I-X

\textsuperscript{99} ECtHR Rules of Court (n 69) Rules 3-7 and Rule 9

\textsuperscript{100} See for instance, Code of Professional Conduct for the judges of the International Criminal Tribunal for Former Yugoslavia; Code of Ethics of the ICC (n 69) Art 5; CJEU Code of Conduct (n 69)

\textsuperscript{101} The Rules of Procedure of the Community Judicial Council of the ECOWAS
pointers to the standards for the accountability of judges and the mechanisms for enforcing them.

The accountability of judges in every judicial system, national or international must be analysed from two perspectives. The first is accountability as a normative concept and the other is accountability as a mechanism.\(^{102}\) As a normative concept, accountability involves a set of standards that regulate and guide the behaviour of judges. As a mechanism, on the other hand, accountability as a mechanism involves the process through which the standards are enforced. The imposition of sanctions is a constitutive element of accountability as a mechanism.\(^{103}\) Other elements include the obligation of judges to report to the forum on their conduct; the ability of the forum to question the said conduct i.e., the answerability of judges; and the ability of the forum to pass judgement on the conduct and enforce the judgement. In the next section, the provisions of the legal regime of the ECOWAS Court will be analysed in terms of the normative standards as well as the enforcement mechanism.\(^{104}\)

9.5. Elements of Judicial Accountability.

Given the complexity of defining judicial accountability, it is prone to vague descriptions, which poses the danger of leaving it open to different definitions and misconceptions by various actors.\(^{105}\) Therefore, it is important to define the ambit within which the concept operates in any given judiciary. To properly examine and understand the concept of judicial accountability, the same must be further unpacked. To do this, this thesis draws from the work of Bovens who stated that to understand the various elements of accountability, some important questions must be answered. The four questions highlighted by the author are: a). to whom is accountability to be rendered? b). who should render the account? c). what account is to be rendered? and d). why should the actor feel compelled to render an account?\(^{106}\)

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102 Mark Bovens, ‘Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism’ (2010) 33 West European Politics 946, 949
103 Ibid 952
104 Ibid
106 Bovens (n 1) 454-455
To break down the complexity of the concept of judicial accountability, this section is divided into three subsections designed to answer three germane questions, i.e., who is to be held accountable? to whom is judicial accountability owed? and what are they accountable for?

9.5.1. Accountability for whom?
The question of who should be held accountable can be considered from two perspectives. The first is the broad perspective which includes the accountability of individual judges, a group of judges, and a court as an institution. The second perspective covers only the accountability of individual judges for their actions. This chapter will examine accountability from a broad perspective. As Kosar\textsuperscript{107} rightly stated, the functions of a court are not carried out by the judiciary. The cases are decided by judges in their individual capacities\textsuperscript{108}, but the functions of courts are not limited to decision-making. Courts also perform, within themselves, certain administrative functions that must also be accounted for. Although most of the standards and mechanisms of judicial accountability are more effective when designed to target individual actions, it is important to also examine the accountability of the institution of the court.

9.5.2. Accountability to who?
The next question is ‘to whom are judges accountable?’ Generally, delegates (whether agents or trustees) are accountable to their principal. In the case of the judiciary, national court judges are accountable to the other arms of government, citizens of the state, and in some cases judicial unions. In the international scene, the judges are accountable to a number of actors, including the member states, parent organisations, citizens of the member states, intergovernmental organisations, and in some cases, the institution of the court.\textsuperscript{109} In most cases, the power to hold the judges accountable in both national and international courts is delegated to a body of experts such as disciplinary panels, judicial councils, and advisory bodies.

\textsuperscript{107} Kosar (n 59) 34
\textsuperscript{108} Ibid 41-42
\textsuperscript{109} Ibid 45
9.5.3. Accountability for what?

The accountability of judges has been categorised by scholars into various forms. The question “what are judges accountable for?” is one that may seem to have a straightforward answer. However, there is a split opinion on whether judges should be held accountable for their actions (i.e., behavioural accountability) as well as their decisions (i.e. decisional accountability); or be limited to behavioural accountability only. Some scholars argue that both components of accountability operate hand in hand, therefore focus should be placed on both. Judicial accountability also extends to institutional accountability.

The first form of judicial accountability is decisional accountability which involves holding judges accountable for the decision reached in the matters brought before them. The accountability of judges for their judicial decision can be considered broadly to encompass the substantive content of the decision, its form, clarity, comprehensibility, and the reasoning behind it. Other considerations include whether the decision in question is contrary to established precedent and whether a judge purposely ignores the set laws, procedure, or constitutional provisions. However, the accountability of judges for the decisions reached in the cases before them does not fall within the ambit of judicial accountability. Holding judges accountable for their decision, especially by other actors and through an external process may lead to a direct attack on the independence of the court. Accountability is mainly concerned with the conduct and behaviour of judges and not their decisions. Holding judges accountable for their judicial decisions, although regarded as a form of judicial accountability, can also be a subset of judicial transparency. This represents the point of convergence of the concepts of judicial accountability and judicial transparency. This is perhaps why many scholars treat both concepts under one umbrella of judicial impartiality. Maintaining the independence of a court while ensuring that it is accountable for its decision

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111 Brody (n 110); Kosař (n 59) 50
112 Brody (n 110) 123-124; Kosař, (n 59) 50-51
can be achieved by treating decisional accountability as a subset of judicial transparency which will be examined in chapter 10 below. Also, in some cases (mostly in national judiciaries), decisional accountability can be ensured through appellate reviews. And in the case of international courts, through the issuance of individual opinions, either concurring or dissenting which altogether inform the final judgement of the court.\textsuperscript{115}

The second form of judicial accountability sometimes considered by writers is the accountability of a court as an institution i.e., institutional accountability.\textsuperscript{116} It involves measures such as the publication of reports on the affairs of the court, financial audit of the court, disclosure of courts’ reasoning, etc.\textsuperscript{117} The consideration of institutional accountability as a form of judicial accountability has been criticised on two main bases. First, it adds no value to the assessment of the concept instead and it creates confusion. Also, it has been considered a misleading form because it does not separate ex-ante mechanisms from the ex-post mechanism.\textsuperscript{118} However, on the contrary, institutional accountability is an important form of accountability and will be assessed further in section 9.7. below.

The third form of judicial accountability is behavioural accountability which involves holding judges accountable for their acts and conduct during and sometimes shortly after their tenure.\textsuperscript{119} This form of accountability extends to various conducts within and outside judicial activities that may be prejudicial to the effectiveness, legitimacy, impartiality, and overall expeditious operation of the business of the court, whether or not they are incidental to the merits of their decisions.\textsuperscript{120} The concept of judicial accountability as assessed in this chapter will focus solely on behavioural accountability and institutional accountability but not the accountability of judges for their decisions.

\textsuperscript{115} See for instance, Statute of the International Criminal Tribunal for the Former Yugoslavia, Art 25; Statute of the International Tribunal for Rwanda, Art 24; Statute of the Court of Justice of the European Union, Art 56.


\textsuperscript{117} Andrew Le Sueur, ‘Developing Mechanisms for Judicial Accountability in the UK’ (2004) 24 Legal Stud 73, 79

\textsuperscript{118} Kosař (n 59) 52

\textsuperscript{119} ibid

\textsuperscript{120} Geyh (n 105) 919
9.6. Behavioural Accountability

Behavioural accountability involves accountability by judges for their explicit and implicit comments and acts or omissions which lead to actual or perceived bias. It also covers both judicial and extra-judicial conduct. The judicial aspect covers conduct that are directly related to the performance of judges’ judicial functions. It includes, for instance, engaging in ex-parte communications, showing bias towards a party, neglecting judicial duties, publicly taking a position on a pending matter, lack of respect for lawyers, prosecutors, fellow judges, and other actors. The extra-judicial aspect of behavioural accountability is targeted at conduct outside the bench such as personal relationships between judges and litigants, and the judge’s personal, social and political affiliation which may tarnish the image of a court or exhibit racial or gender discrimination.

Unlike decisional accountability, holding judges accountable for their conduct and behaviour does not undermine the independence of the judiciary. Behavioural accountability is generally accepted as an appropriate component of judicial accountability that does not hinder the independence of the judges. Behavioural accountability must be assessed from two mediums that must coexist and operate simultaneously. First is the existence of a functional normative set of standards of judicial accountability and the second is the existence of a formidable mechanism for enforcing these standards.


As stated in the Commentary on the Bangalore Principles of Judicial Conduct (Bangalore Commentary), the establishment of clear and adequate standards of conduct is a necessity in every Judiciary. It is generally accepted that judges are expected to maintain certain standards within and outside the court. The major question then becomes whether these standards should be considered mere expectations of voluntary decency to be exercised personally or whether the standards should be written and observed by professional bodies.

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123 Ibid para 21
or panels. It is imperative to bear in mind that judges operate in the real world like everyone else and therefore cannot be reasonably expected to cut all ties with society. Also, it is not beneficial for judges to be isolated from the rest of the world around them.

To borrow from the words of Shaman, “in the real world, judges do not live in ivory towers”. Judges have relatives, acquittances, and friends, some of whom are fellow legal practitioners, law school friends, professional associates, or partners. To take it even further, judges own properties, financial investments, and other business enterprises. Sometimes, judges are also members of social or sports clubs/organisations. In practice, a judge may believe that they can lay aside their interest or connection with parties and the matter in dispute and make legal decisions based on their conscientious knowledge of the law. While this is a viable position, it ignores the possibility that the partiality of judges is more likely to feed the unconscious mind of an adjudicator. Thus, the judge may have little or no conscious knowledge that he/she is being influenced by their relationship and society. Also, even where a judge is able to eliminate the impact of personal interests or affiliations, the appearance or presumption of bias or partiality may still be present.

Due to the ample degree of power wielded by judges and the effect of the exercise of these powers, it is important to ensure that persons whose behaviour and conducts are questionable are not entrusted with judicial power. It is also important to ensure that existing judges who have become biased or whose impartiality has become questionable are curtailed. Therefore, the applicable standards and mechanisms for judicial accountability must be established and defined preferably in written enforceable instruments.

The Bangalore Principles provide some standards of judicial conduct which represent a great starting point and provide minimum standards for international judiciaries in establishing their own standards. There are also other similar international instruments, but most of them are targeted at the accountability of national judiciaries. While the Bangalore Principles provide crucial standards, they cannot be considered as exhaustive as many other standards are sometimes specifically relevant in certain courts.

However, for the sake of this thesis, all of the standards provided for in the Bangalore Principles, the Rule of Procedure of the Judicial Council of the ECOWAS, and for the purpose

124 Jeffrey M Shaman, 'Bias on the Bench: Judicial Conflict of Interest' (1989) 3 Geo J Legal Ethics 245, 246
125 Ibid 247
of comparison, the Rules of Court of the ECtHR, and the Resolution on Judicial Ethics in the ECtHR will be used as a guide. These standards are impartiality, integrity, propriety, equality, competence, diligence, discretion, incompatible activities, favours and advantages, decorations and honours, and expression. The standards of judicial accountability in the ECOWAS Court are not as clearly stated as those of the ECtHR, they can only be deducted from the list of misconducts provided by the Rules of Procedure. These standards are all interrelated as one may result in another. The standards are categorised in this thesis into four broad sections i.e., impartiality; incompatible activities; conflict of interest; integrity/propriety/competence/and diligence; and others.

9.6.1.1. Impartiality

Many legal instruments providing for the independence of judicial institutions also provide in the same breath for the impartiality of the judges. Impartiality is considered one of the fundamental standards of judicial accountability.\textsuperscript{126} It is one of the minimum standards provided for in the Bangalore Principles which states that impartiality is “essential to the proper discharge of the judicial office”\textsuperscript{127} and it applies to the decision of the judges as well as the process through which they reach this decision.

Guidelines for the application of judicial impartiality is also provided in the Bangalore Principles. They are, a judge shall:

a. perform his or her judicial duties without favour, bias, or prejudice;\textsuperscript{128}

b. ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession, and litigants in the impartiality of the judge and the judiciary;\textsuperscript{129}

c. so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases;\textsuperscript{130}

\textsuperscript{126} Bangalore Commentary (n 122) para 52
\textsuperscript{127} The Bangalore Principles were developed by the Judicial Group on Strengthening Judicial Integrity 2002, Value 2
\textsuperscript{128} Ibid Value 2.1
\textsuperscript{129} Ibid Value 2.2
\textsuperscript{130} Ibid Value 2.3
d. not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue;\textsuperscript{131}

e. disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.\textsuperscript{132} Such proceedings include instances where the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings.\textsuperscript{133}

This provision of the Bangalore Principles provides an ideal model for judiciaries to follow. The impartiality of judges relates to their internal disposition, state of mind, and attitude towards matters in dispute, parties to the matter, and the positions maintained by the parties. It covers issues such as bias, personal prejudice, favour,\textsuperscript{134} and lop-sidedness.\textsuperscript{135} Bias or prejudice is defined in the Bangalore Commentary as a “leaning, inclination, bent or predisposition towards one side or another or a particular result.”\textsuperscript{136} In its application to the performance of judicial functions, it represents a propensity to decide a matter in a certain way that does not leave the judicial mind perfectly open to conviction.\textsuperscript{137}

While actual bias may be apparent and easy to determine, the case of perceived bias or prejudice may not be as easily determined. There are a few tests adopted to determine whether there is a reasonable apprehension of partiality or bias. They include a high propensity of bias, the real likelihood of bias, a substantial possibility of bias, and reasonable suspicion of bias.\textsuperscript{138} A recurring factor in all of these tests is that the perception of partiality must be reasonable and must be the perception of a reasonable, fair-minded, and duly

\textsuperscript{131} Ibid Value 2.4
\textsuperscript{132} Ibid Value 2.5
\textsuperscript{133} Ibid Value 2.5.1
\textsuperscript{134} Bangalore Commentary (n 122) para 24
\textsuperscript{136} Bangalore Commentary (n 122) para 57
\textsuperscript{137} Ibid para 81
\textsuperscript{138} Ibid
informed person. The test of a reasonable observer ensures objectivity and enhances the confidence of the public and other actors in the impartiality of the judges. The absence of judicial impartiality or perception thereof erodes the confidence of the public in a judicial institution.

An impartial judge is one who is free from all forms of bias and prejudices, both actual and perceived. Thus, the impartiality of judges must exist as a matter of fact and as a matter of reasonable perception. Either way, impartiality can result in actual or perceived injustice. The perception of impartiality may arise in four different scenarios: a) where a judge has personal interests in the outcome of a matter; b) where a judge has a relational interest in the outcome of a matter; c) where a judge has a political interest in the outcome of a matter; and d) where a judge has or exhibits some personal bias for or against parties to a matter.\(^{139}\)

In the ECtHR, the Resolution on Judicial Ethics provides that in exercising their judicial functions, judges must be impartial and must ensure that they are perceived to be so.\(^{140}\) The ECtHR in the case of Gregory v. United Kingdom\(^{141}\) stated that two aspects of judicial impartiality must be present. The first is subjective impartiality which requires that judges should not have or exhibit any form of prejudice or bias. This form of impartiality is presumed to exist for every judge unless there is evidence to suggest otherwise.\(^{142}\) The second aspect is objective impartiality which suggests that judges must conduct themselves in a manner that sufficiently guarantees their impartiality and raises no doubt as to their partiality in the eyes of a reasonable observer.\(^{143}\)

Similar provisions as those in the ECtHR on impartiality as a standard of judicial conduct can be found in the legal regime of many other international courts.\(^{144}\) However, the impartiality of judges is not expressly provided for in the ECOWAS Court. The Rules of Procedure of the Judicial Council which contains a list of judicial misconduct unfortunately omitted this standard. However, the requirement for the impartiality of judges in the ECOWAS Court can be deduced from the provision of the Court’s Protocol. Before assuming office, elected judges

\(^{139}\)Geyh (n 114) 499

\(^{140}\) ECtHR Resolution on Judicial Ethics (n 69) para II

\(^{141}\) Gregory v United Kingdom, European Court of Human Rights, (1997) 25 EHRR 577

\(^{142}\) Bangalore Commentary (n 140) para 53

\(^{143}\) Gregory v United Kingdom (n 159) 578

\(^{144}\) ECtHR Rules of Court (n 69); ECHR (n 34)
in the ECOWAS Court are required to take an oath or make a solemn declaration, before the Authority of Heads of States and Governments, to perform their duties and exercise the powers vested in them honourably, faithfully, **impartially**, and conscientiously.\(^{145}\)

The effect of this omission of partiality as misconduct in the Rules of Procedure is not very clear. However, since the judges take an oath or declare to be impartial, it is safe to conclude that the Authority can hold them responsible for failure to uphold this oath. The Judicial Council is empowered by the Authority to perform this function; therefore, one can also conclude that the Judicial Council can enforce judicial impartiality. Lastly, the provision of the Rule of Procedure listing disciplinary misconduct clearly states that the list is not exhaustive. It includes the clause “any of the following shall **among others** constitute a misconduct”.\(^{146}\) Therefore, an issue of partiality or bias of a judge may be qualified as judicial misconduct. However, there has been no incident of alleged partiality of judges in the ECOWAS Court, thus it is not clear what happens when a case of partiality is raised in the Court. The ideal response in such a situation will be the recusal of the judge from the case. In the case of Judge Harhoff of the ICTY, discussed in section 4.3.1. above, for instance, the judge was disqualified from a case for showing bias.\(^{147}\) However, the two categories of sanctions provided for in the Rules of Procedure of the Judicial Council do not include the recusal or disqualification of judges.

### 9.6.1.2. Conflict of interest

The avoidance of conflict of interest or the perception thereof is another minimum standard provided for in the Bangalore Principles.\(^{148}\) The presence or perception of a conflict of interest is one of many issues that may undermine the impartiality of a judge. Like impartiality, the provisions against conflict of interest must cover both actual conflicts between the interests of judges and their adjudicating duties and cases where a reasonable observer might apprehend the presence of a conflict of interest. The issue of conflict of interest may arise in many cases including where a judge has a previous or current relationship with parties to the matter or the subject matter of the case or where the judge has previously served as a lawyer.

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145 Protocol A/P.1/7/91 of the ECOWAS Community Court of Justice, Article 5
146 ECOWAS Court Judicial Council Rules of Procedure (n 101) Rule 25(2)
147 Marko Milanovic, ‘Breaking: Judge Harhoff Disqualified from the Seselj Case’ (EJIL TALK, August 28, 2013) [Breaking: Judge Harhoff Disqualified from the Seselj Case – EJIL: Talk! (ejiltalk.org)] accessed 4 March 2022
148 Bangalore Principles (n 127) Value 2.5.2 and 2.5.3
or was a material witness in the matter in controversy. It also includes cases where a judge or
members of his/her family has a personal, economic, or political interest in the outcome of
the case.

Conflict of interest is further elaborated by the Bangalore Commentary. It expatiates on the
duties of judges to avoid putting themselves in a position that conflicts with their duties.
Amongst others instances, it provides that judges must: avoid having their financial activities,
such as stock ownership, interfere with their duties; dissuade family members from engaging
in activities that may appear to exploit the position of the judge.

In the ECtHR, judges are required to ensure that they avoid conflicts of interest as well as
situations that may be reasonably perceived as giving rise to them. Just like impartiality, the
standard ensuring absence of conflict of interest is provided for in the legal regime of
other international judiciaries. This is however not the case in the ECOWAS Court. The Rules
of Procedure makes no express or implied mention of the issue of conflict of interest. As
earlier stated, as the legal regime does not provide a code of conduct or ethics for judges, one
has to rely on the subjective interpretation of the list of disciplinary misconducts provided in
the Rules of Procedure of the Judicial Council which is in itself insufficient.

The Rules of Procedure provide that any breach, on the part of a judge, of the propriety of his
profession, honour, discretion, or dignity of the function, shall constitute a disciplinary
offence liable to disciplinary proceedings against the judge. This provision is a blanket one
that may be used to accommodate many standards of judicial accountability including the
prohibition of conflicts of interest. One can argue that when judges put themselves in a
position where their personal interests conflict with their judicial functions, it constitutes a
breach of their professional honour and duty. But this interpretation may not apply in cases

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149 ECtHR Resolution on Judicial Ethics (n 69) para II
150 See for instance, in the Appellate Body of the WTO, the Rules of Conduct for the Understanding on Rules and
Procedures Governing the Settlement of Disputes WT/DSB/RC/1, Para II provides that persons on a panel or on
the standing Appellate Body shall avoid direct or indirect conflicts of interest in respect of the parties to
proceedings and the subject matter of the proceedings. Similar provisions are contained in Article 4 of the Code
of Conduct for Members and former Members of the Court of Justice of the European Union
(2016/C 483/01); Code of Judicial Ethics of the ICC (n 87) Art 4; and Article 3(2) of the Code of Professional
Conduct for the Judges of the International Criminal Tribunal for the former Yugoslavia (S/2016/976).
151 ECOWAS Court Judicial Council Rules of Procedure (n 101) rule 25(1)
of a perceived conflict of interest which does not necessarily mean there is an actual presence of a conflict.

In any case, considering the importance of regulating the presence or apprehension of conflict of interest, the absence of clear and precise provisions on the matter can have a daunting effect on a court. In the ECOWAS Court, the absence of a provision on conflict of interest is yet to be considered in practice. There has been no case of an alleged conflict of interest in the Court, therefore, it is not clear what will happen in such a case. However, one can conclude that the provision of Article 25(1) of the Rules of Procedure will apply. Also just like the case of impartiality, the non-exhaustive nature of the provision of the Rule of Procedure listing the disciplinary misconduct can also be a ground for the inclusion of the prohibition of conflict of interests.

9.6.1.3. Incompatible activities

Another major standard of judicial accountability is the prohibition of incompatible activities. The Bangalore Principles on the issue provide that “a judge shall not engage in conduct incompatible with the diligent discharge of judicial duties”. The duties and functions of a judge are considered incompatible with certain activities, especially political activities, which may cast a doubt on their impartiality and propriety.\textsuperscript{152}

In almost every judiciary both national and international, certain activities are considered incompatible with the duties of judges and are therefore prohibited. In the Federal Republic of Nigeria, for instance, the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria\textsuperscript{153}, established by the National Judicial Council, provides that judges must avoid activities that are incompatible with their judicial functions.\textsuperscript{154} It provides that judges in Nigeria may engage only in activities that do not detract from the dignity of the office of a judge or otherwise interfere with the performance of judicial duties.\textsuperscript{155} The Code of Conduct provides a list of activities that are considered compatible, they include: participating in non-profit making organisations or becoming a member of organisations such as universities,

\begin{itemize}
\item \textsuperscript{152} Bangalore Commentary (n 122) para 135
\item \textsuperscript{153} The Revised Code of Conduct for Judicial Officers of the Federal Republic of Nigeria \url{https://njc.gov.ng/code-of-conduct}
\item \textsuperscript{154} Ibid Rule 9
\item \textsuperscript{155} Ibid Rule 9.1
\end{itemize}
school councils, and charitable organisations or sitting on the governing bodies of these institutions. Judges may also engage in arts, sports, and recreational activities, as well as civic and charitable activities. They may also form or join an association of judges or other organisations representing their interests.

Additionally, the Code of Conduct provides a list of inappropriate and incompatible activities, including participating in organisations: whose objects are political or if its activities are likely to expose the judge to public controversy; which are involved in litigation; which are likely to make excessive demand of the judges’ time; where the judge serves or appears to serve as a legal adviser. The Code of Conduct also provides that the judges shall not practise law whilst holding a judicial office; take up a chieftaincy title; or serve as an executor, administrator, trustee, or other fiduciary position. The Code of Conduct further states that judges have to regulate their extra-judicial activities in order to minimise the risk of conflict between their activities and their judicial duties. Similar provisions, in different variants, can be found in the legal regime of international judiciaries across the world.

For instance, in the ECtHR, the Resolution on Judicial Ethics provides that the judges of the ECtHR must not engage in additional activities which are incompatible with their independence, impartiality, or their duties as judges. Also, all additional activities undertaken by judges must be declared by a judge to the President of the Court.

In the ECOWAS Court, however, there are no provisions on incompatible activities in the legal regime. Just like the case for impartiality and conflicts of interest, the Rules of Procedure do not expressly prohibit the engagement of judges in activities that are incompatible with the functions and duties of the judge. Therefore, once again one can only rely on the non-exhaustive nature of the list of disciplinary misconduct. Also, there has been no case of

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156 Ibid Rule 9.3 (a-e)
157 Ibid Rule 9.4
158 Ibid Rule 13.2
159 Ibid Rule 13.3
160 Ibid Rule 13
161 See for instance, Code of Conduct of the Court of Justice of the European Union, art 8(2); ICC Code of Ethics (n 69) art 10; ICTY Code of Professional Conduct (n 115) art 2(2); Rules of Court of the African Court on Human and People’s Right, rule 5; Statute of the International Court of Justice, art 16(1); and Statute of the International Tribunal for the Law of the Sea, art 7(1)
162 ECtHR Resolution on Judicial Ethics (n 69) para VII
incompatible activities reported in the Court so it is not clear what provisions will apply in such a situation.

9.6.1.4. Integrity, propriety, diligence, and competence

The integrity, propriety, diligence, and competence of judges are important standards for judicial accountability that cover a wide range of conduct. The crux of these standards is how they are perceived by a reasonable observer. For instance, private communications between a judge and a party in a pending case, even if it has no connection with the case at hand, is likely to appear to a reasonable person to be advantageous to the said party. Aside from inappropriate contacts, other conduct such as involvement in public controversies, gambling, frequent clubbing, parting, and other forms of socialization, joining secret societies, or other improper affiliations may be considered threatening to the image and perception of a judge.

The Bangalore Principles firmly established integrity and propriety as essential principles for the discharge of judicial functions and the performance of judicial activities. On the standard of integrity, the Bangalore Principles further provide that judges must ensure that their conducts are above reproach in the eyes of a reasonable observer. It requires, also, that judges always maintain the faith of other actors in the integrity of the court and ensure that justice is not only done but also perceived as done.

The Bangalore Principles also provide that judges must avoid impropriety or the appearance thereof. It further enumerated some specific means of ensuring propriety, including putting in place some personal restrictions on the conduct of judges which may be viewed as burdensome by others; ensuring that judges avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality; ensuring that judges do not participate in the determination of a case where a member of their family is a party, lawyer

\[163\] See Bangalore Commentary (n 122) para 111 for the importance of propriety of judges
\[164\] Ibid para 136
\[165\] Ibid para 117
\[166\] Ibid para 118
\[167\] Ibid para 127
\[168\] Bangalore Principles (n 115) Value 3.1
\[169\] Ibid Value 3.2
\[170\] Ibid Value 4.2
\[171\] Ibid Value 4.3
or otherwise involved in any manner\textsuperscript{172}; ensuring that judges do not use or lend the prestige of the judicial office to advance their private interests or that of their family or other persons\textsuperscript{173}; and ensuring that judges do not disclose confidential information obtained in their judicial capacity or make use of this information for their personal gains.\textsuperscript{174} Furthermore, the Bangalore Principle provides that as a prerequisite to the performance of judicial functions, judges must be competent and diligent.

To maintain the required competence and diligence, the Bangalore Principles provide that: the judicial duties of a judge take precedence over all other activities\textsuperscript{175}; judges must be devoted to their judicial duties as well as other tasks relevant to the judicial office or the court's operations\textsuperscript{176} and perform their duties efficiently, fairly, and with reasonable promptness\textsuperscript{177}; judges must always maintain and enhance the skills, knowledge and personal qualities which are necessary for the performance of their duties\textsuperscript{178} and also keep informed about relevant developments of the law \textsuperscript{179}; and judges must always maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in their relation to litigants, witnesses, lawyers and others with whom they deal in an official capacity\textsuperscript{180}.

The requirement of integrity, propriety, diligence, and competence of judges is provided for in the legal regime of many national and international courts.\textsuperscript{181} In the ECOWAS Court, the propriety and dignity of the judges of the Court are two of the few standards of judicial accountability expressly provided for in the Rules of Procedure. It provides that any breach, on the part of a judge, of the propriety of his profession, honour, discretion or dignity of the

\begin{thebibliography}{9}
  \bibitem{172} Ibid Value 4.4
  \bibitem{173} Ibid Value 4.9
  \bibitem{174} Ibid Value 4.10
  \bibitem{175} Bangalore Principles (n 115) Value 6.1
  \bibitem{176} Ibid Value 6.2
  \bibitem{177} Ibid Value 6.5
  \bibitem{178} Ibid Value 6.3
  \bibitem{179} Ibid Value 6.4
  \bibitem{180} Ibid Value 6.6
  \bibitem{181} See Statute of the International Tribunal for the Law of the Sea, art 2; ICTY Code of Professional Conduct, Preamble para 2 and Art 4; Code of Ethics of the ICC (n 87) art 5; CJEU Code of Conduct of the members of the (n 87) art 2, 3, and 9
\end{thebibliography}
function, will constitute a disciplinary offence liable to disciplinary proceedings against such judge.

On the requirement of integrity, diligence, and competence, although the Rules of Procedure does not expressly provide for these, it provides for standards geared towards maintaining them. The Rules of Procedure regulating the ECOWAS Judicial Council provides that the following amongst others will constitute disciplinary misconduct which is liable to sanctions: 182

a. divulging secrets of pre-judgement deliberations or other confidential information or communicating information on ongoing cases to the media; 183
b. not maintaining and exhibiting moral comportment, probity, and honesty; 184
c. accepting a favour or payment incompatible with judges’ obligations and duties to the Community; 185
d. committing misappropriation, theft or abuse of trust or being found guilty of fraud or corruption harmful to the Community; 186 and
e. dissertating official posts or duties. 187

The non-exhaustive nature of these provisions gives room for other similar misconducts to be accommodated as the need arises. Once again there has been no case of actual or perceived lack of the integrity, propriety, diligence, or competence of judges in the ECOWAS Court. Thus, it is difficult to determine how the provisions of the Rules of Procedure will be interpreted or applied by the Judicial Council in such cases. These provisions in the ECOWAS Court are similar to those applicable in the ECtHR. The Resolution on Judicial Ethics of judges in the ECtHR was adopted to enhance public confidence in the court. It clarifies the criteria for judicial office as provided for in Rules 3, 4 &28 of the Rules of Court of the ECtHR and also articulates the principles underlying these criteria while ensuring transparency. This Resolution provides, on the requirement of integrity, that the judges of the ECtHR must conduct themselves in manners consistent with high moral character which is one of the criteria for the office of a

182 ECOWAS Court Judicial Council Rules of Procedure (n 101) Rule 25 (3)
183 Ibid Rule 25 (3) (i-ii)
184 Ibid Rule 25(3) (iii)
185 Ibid Rule 25(3) (iv)
186 Ibid Rule 25 (3) (v)
187 Ibid Rule 25 (3) (vii)
judge. The judges are also required to be mindful of their duty to uphold their standing and reputation at all times.\textsuperscript{188} The Resolution also provides that judges must perform the duties of their office diligently. To maintain a high level of competence, they shall continue to develop their professional skills. However, unlike in the ECOWAS Court, the legal regimes of the ECtHR and many other international courts spell out these standards.

9.6.1.5. Other standards of accountability provided for in the ECOWAS Court. As earlier stated, there are no hard and fast rules for determining the standards of accountability to be enforced in a court, the standards vary from one court to the other. However, there are some minimum standards as provided by the Bangalore Principles. Those standards are discussed in the preceding subsections.

Other standards can be coined from the list of misconducts provided in the Rules of Procedure of the Judicial Council of the ECOWAS Court.\textsuperscript{189} These standards are discussed in the table below.

<table>
<thead>
<tr>
<th>Standard of accountability</th>
<th>Applicable rule(s)</th>
<th>Statutory provision(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Professional courtesy and respect</td>
<td>Rule 25 (2) (i) and Rule 25 (3) (vi)</td>
<td>The Rules of Procedure prohibit making insulting utterances, putting up insulting behaviour, or use of improper language or insults when writing to fellow judges or to other judicial officials. It also prohibits the assault by judges of fellow judges, members of staff, and judicial officials.</td>
</tr>
</tbody>
</table>

\textsuperscript{188} ECtHR Resolution on Judicial Ethics (n 98) para III

\textsuperscript{189} ECOWAS Court Judicial Council Rules of Procedure (n 101)
Judicial overreaching  
Rule 25 (2) (ii)  
This provision prohibits the deliberate overreaching of jurisdiction as conferred on judges in the texts relating to the Court or resulting from the organisational hierarchy of the Court.

Inciting disobedience  
Rule 25 (2) (iii)  
The Rules of Procedure provide that judges shall not incite fellow judges and members of the Court to disobedience.

Desertion and neglect of duty  
Rules 25 (2) (iv)-(v) and Rule 25 (3) (vii)  
These Rules provide that a judge shall not: desert his/her duty; absent himself/herself from duty except with the permission of the President of the Court to grant him/her permission; abstains from his/her duty without valid reasons; unduly prolong deliberations, or neglects to write rulings.

In conclusion, while the legal regime of the ECOWAS Court provides for a series of standards of judicial accountability, these provisions have some loopholes. First, there are no actual established rules of judicial conduct or ethics guiding the judges in the performance of their duties and their conduct or behaviours. This is far from the norm in other judicial institutions, both national and international.

Secondly, the available legal instrument simply provides the judges with a non-exhaustive list of misconducts to be used as a guide. Judges are therefore left, largely, to speculate what
conduct or behaviour will be deemed misconduct. The lack of clarity is another shift from the norm. In most judiciaries, the standards of accountability are clearly defined. Even in the ICC where there are many official documents regulating judicial conduct, the Independent Experts in their report in 2020 recommended that it must develop a single holistic court-wide ethics charter, that clearly sets out the minimum professional standards for all judges and other officials of the court.\textsuperscript{190}

The ambiguity of the provisions of the Rules of Procedure leaves the fate of the judges in the hands of the Judicial Council which determines whether or not particular conduct or behaviour amounts to misconduct. This will leave judges walking on eggshells, which is not the rationale for judicial accountability. For instance, would it be considered misconduct for a judge to take up additional jobs or activities for the sustenance of their family? If so what jobs or activities will be deemed compatible? Also, can a judge adjudicate on a matter where a party to the case is a friend, colleague, or relation if the judge is able to put aside their personal relationship with the party? Even more worrisome is the possibility that the lack of defined rules and guidelines regulating expected ethical behaviour may lead to an arbitrary determination of what the Judicial Council will consider unacceptable behaviour. The ECOWAS Court needs to establish clearer rules of conduct that give precise answers to these and many more questions.

\textbf{9.6.2. Sanctions.}

The establishment of judicial accountability standards can only become potent to ensure accountability where there are sanctions tied to the failure of judges to observe those standards. Thus, the establishment of standards and rules without sanctions defeats the purpose of accountability which is to ensure deterrent. The sanctions imposed differ from one court to another. In some international courts, there seems to be a blanket sanction of

\textsuperscript{190} Independent Expert Review of the International Criminal Court and the Rome Statute System (Final Report 30 September 2020) R. 106
dismissal of errant judges. Some have, in addition to dismissal, suspension, the loss of pension rights and other benefits, and other disciplinary measures.

In the ECOWAS Court, there are two degrees of sanctions. First degree sanctions are: reprimanding errant judges; issuing of written warning, and suspension of errant judges for a period not exceeding thirty days without salary. The second-degree sanctions are temporary suspension for up to three months without salary; and summary dismissal. The degree of sanctions imposed depends on the nature and gravity of the misconduct of the judge.


Asides from the establishment of standards to be maintained by judges in the performance of their duties and the conduct or behaviour in their day-to-day life and the clear establishment of sanctions imposed for the breach of these standards, the process of enforcing them is also a vital aspect of judicial accountability. The establishment of standards of accountability without an effective enforcement mechanism defeats the idea of accountability altogether. In the ICC for instance, even though the Code of Judicial Ethics provides adequately for standards of judicial conduct, in the recent report of an Independent Expert Review set up to identify ways to strengthen the court, the Experts acknowledged that there has been a number of allegations of conflict of interest, inappropriate behaviour and other ethical violations against members of the ICC which has been debated upon in academic publications and blog posts.

The Experts stated that in the absence of an effective and efficient enforcement mechanism, the ICC will be less able to defend itself. They concluded that the availability of an effective mechanism is crucial for ensuring high professional standards in the ICC and therefore welcomed the creation of an Independent Oversight Mechanism (IOM) equipped with the necessary resources required to carry out their functions. The Experts further advise that

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191 ECtHR Rules of Court (n 69) Rule 7; ECHR (n 34) art 23(4); Statute of the ICJ (n 150), art 18
193 Statute of the CJEU (n 115), art 6
194 Rome Statute of the International Criminal Court, art 46 and 47
195 ICC Independent Expert Review Report (n 190) para. 254
196 Ibid para. 256
197 Ibid para. 265
the IOM be complemented with a committed investigation model such as ad-hoc investigative panels set up by the IOM on a need basis.

In virtually every judicial system, there is an established mechanism for enforcing accountability.\textsuperscript{198} The difference between one judiciary to the other is the type of mechanism employed. There are two main systems of enforcement of judicial standards used by international courts i.e., internal enforcement mechanism and external enforcement mechanism. This section examines these mechanisms as well as the sanctions usually enforced in international courts with a focus on the ECOWAS Court.

An internal judicial accountability enforcement mechanism is internally conducted by a court within itself. It usually involves a vote cast by the members of a court to determine whether or not a judge is guilty of alleged misconduct. A typical example of an international court with an internal enforcement mechanism is the ECtHR. A judge of the ECtHR may not be dismissed from office “unless the other judges, meeting in plenary session, decide by a majority of two-thirds of the elected judges in office that he or she has ceased to fulfil the required conditions. He or she must first be heard by the plenary Court.”\textsuperscript{199} Also, only a serving judge of the ECtHR can set a procedure in motion for the dismissal of another judge.\textsuperscript{200}

The Rules of Court further established the enforcement process which involves four steps. First, the President of the ECtHR convenes the plenary session of the court.\textsuperscript{201} The judges meet and form a quorum of two-thirds of the elected judges in office.\textsuperscript{202} The second step is the deliberation of the plenary court which is conducted in private and with only the judges, the Registrar, interpreters, or any other member of the court’s registry, whose assistance is necessary, in attendance.\textsuperscript{203} Also, the process and details of the deliberation are kept secret.\textsuperscript{204} Upon deliberation, the judges are requested by the President to give their opinions

\begin{itemize}
  \item \textsuperscript{198} Kosař (n 59) 75
  \item \textsuperscript{199} ECtHR Rules of Court (n 69) Rule 7. See similarly, ECHR (n 34) art 23 (4)
  \item \textsuperscript{200} ibid
  \item \textsuperscript{201} ibid Rule 20 (1)
  \item \textsuperscript{202} Ibid Rules 20 (2) and (3)
  \item \textsuperscript{203} Ibid Rule 22 (2)
  \item \textsuperscript{204} Ibid Rule 22 (1)
\end{itemize}
on the matter at hand\textsuperscript{205} which leads to the last stage, voting.\textsuperscript{206} The vote of the majority of judges present is adopted as the decision of the plenary court.\textsuperscript{207}

The biggest advantage of the internal enforcement mechanism is that it secures the independence of a court by blocking out any form of outside influence in the accountability process. However, it raises concerns as to the merit of the process. The major issue is that having a judicial institution and its members accountable to itself may not adequately protect the interest of other actors. It may leave room for internal lobbying by judges, thus where a judge who has allegedly committed misconduct happens to be influential there is the possibility that he/she can sway the decision of fellow judges. On the other hand, if a judge does not have the support or love of the majority of the members of the court, this may harm the case of such a judge. Therefore, this enforcement mechanism may not be suitable for many international judiciaries, especially those with a lesser number of judges. In the case of the ECtHR, however, there are forty-seven serving judges on the bench. This makes it difficult, if not impossible, for an accused judge to get to all the serving judges and influence the decision of the plenary court.

The same enforcement mechanism is adopted in the CJEU. The enforcement of the standards of judicial accountability is the responsibility of the President of the CJEU who is assisted by the Consultative Committee, which is composed of the three longest-serving judges of the court, the Vice-President, and the Registrar (who assists the committee). The committee deliberates and delivers its opinion in cases of breach of judicial conduct.

The internal enforcement mechanism may, however, not be the best option in international courts with fewer judges like the ECOWAS Court. The close-knit nature of those courts casts doubts on the merit of an internal enforcement system. An external enforcement system is more suitable in such courts. The external enforcement mechanism involves the use of external professional bodies, which are independent of member states, such as a judicial council or an advisory body to enforce the standards of judicial accountability. The external enforcement mechanism exempts the members of a court from this process thereby reducing the chances of an accused judge swaying the decision of the body.

\textsuperscript{205} Ibid Rule 22 (3)
\textsuperscript{206} Ibid Rule 23 (1)
\textsuperscript{207} Ibid
The ECOWAS Court uses the external enforcement mechanism. The discipline and removal of the judges of the Court is solely the responsibility of the Authority of Heads of States and Governments an institution of the ECOWAS.\textsuperscript{208} To ensure that the judges of the Court are persons of high moral standing at the time of assuming office and throughout the judges’ tenure in office,\textsuperscript{209} the Authority in 2006 established the Judicial Council of the ECOWAS Community\textsuperscript{210} to serve as a credible independent disciplinary mechanism which guarantees transparency of deliberations and objectivity of decisions in disciplinary issues.\textsuperscript{211} One of the two major mandates of the Judicial Council is the examination of cases of judicial misconduct and the inability of a judge to perform his/her function due to physical or mental disability. One major disadvantage of the external enforcement system such as the mechanism in the ECOWAS Court is the possibility of the process posing as a constraint on the independence of the Court. To prevent this, the legal regime must provide not only for pre-established standards but also for a pre-established procedure for the enforcement to be followed by the external enforcement body. In the ECOWAS Court, the Rules of Procedure set out a detailed process to be followed by the Judicial Council. First to deliberate and decide on matters of judicial misconduct and inability to perform their duties the Judicial Council must be composed of the Chief Justices of the Supreme Courts or their representatives from the member states, whose nationals are not members of the Court of Justice, and a representative of the Court elected by his peers for one year. The Rules of Procedure also enumerates, step by step, the procedure for the implementation of its provisions including the process for instituting a disciplinary matter, the adducing of proof, and the right of defence.\textsuperscript{212}

A case of misconduct can be referred to the Judicial Council by a member state, an institution of the ECOWAS, a corporate entity, or any other person. The Judicial Council itself may also institute a disciplinary proceeding when there is alleged misconduct brought to its notice.\textsuperscript{213} For it to be valid, the complaint from a natural or legal person must comprise the full name,

\begin{itemize}
\item \textsuperscript{208} Protocol A/P.1/7/91 (n 145) Art 4 (6) and (7)
\item \textsuperscript{209} Decision A/DEC.2/06/06 Establishing the Judicial Council of the Community, Para 7 of the Preamble
\item \textsuperscript{210} Ibid art 1
\item \textsuperscript{211} Ibid para. 9 and 10 of the Preamble
\item \textsuperscript{212} ECOWAS Court Judicial Council Rules of Procedure (n 101) Rules 24-34
\item \textsuperscript{213} Ibid Rule 24 (1)
\end{itemize}
address, and signature of the complainant. The complaints or referrals shall be submitted through the President of the ECOWAS Commission to the President of the Judicial Council who then requests for a meeting of the Judicial Council to be convened and also inform the ECOWAS Court of the meeting.

Where the Judicial Council decides that there is a viable complaint and that it is necessary to institute disciplinary proceedings against a judge, the judge is promptly notified and given the details of the allegations against him/her. The President then appoints a rapporteur from among the members of the Judicial Council and informs him/her of the allegations and instructs him/her to commence the process as well as to conduct investigations. The rapporteur conducts all relevant investigations and hears the complainants and witnesses under oath. He/she also has the power to demand that a party produces evidence. Where the presence of the party or witness becomes necessary the President of the Judicial Council shall have them served with a summons. Upon concluding the proceeding the rapporteur prepares a report and submits it to the Judicial Council.

On the rights of the accused judge, the Rules of Procedure provide that he/she has the right to appear before the Judicial Council alongside a legal counsel of his/her choice. At least thirty days before the date of the judge’s appearance, the Judicial Council must send the accused judge the case file, all documents relating to the investigation, and the report of the rapporteur. The accused judge also has the right to cross-examine the witnesses. At the end of the proceedings, the Judicial Council examines the final report of the rapporteur and makes recommendations to the Authority through the President of the ECOWAS Commission.

While the external enforcement mechanism may be perceived as a suitable option for ensuring accountability, it presents a risk to the independence of the court. As stated in

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214 Ibid Rule 31 (6)  
215 Ibid Rule 24 (2-4)  
216 Ibid Rule 28 (1)  
217 Ibid Rule 28 (2)  
218 Ibid Rule 28(3)  
219 Ibid Rule 29  
220 Ibid Rule 28 (4) and (5)  
221 Ibid Rule 30  
222 Ibid Rule 31(2)  
223 Ibid Rule 31(7)  
224 Ibid Rule 36
subsection 6.1.3. above, to perform its function independently, efficiently, and based on merit, a judicial expert body like the Judicial Council must be adequately composed. A key factor for the proper composition of a judicial council is diversity. It must be composed of international law experts and scholars, judges and former judges. Also, the membership must be gender-balanced and must represent all legal systems and geographical areas covered by the court. In the ICC, the Independent Experts in their recent report recommended that in the long run, the investigation of complaints against judges and decision-making should be entrusted to a judicial council composed of current and former national and international judges.\textsuperscript{225}

In the ECOWAS Court, for the purpose of enforcing judicial accountability, the Judicial Council is composed of the Chief Justice of the Supreme Courts of member states whose nationals are not members of the Court. The composition of the Judicial Council does not ensure gender balance, geographical representation, or professional diversity. Also, as discussed in 6.1.3. above, the Chief Justices are appointed in that capacity by the members of the Authority which raises concerns as to their ability to perform their functions as members of the Judicial Council independently and without the influence of the Authority.

Another major shortcoming of the accountability mechanism is the dominating power of the Authority. In the ECOWAS Court, the decisions of the Judicial Council are mere recommendations that have no binding effect. The Authority is under no obligation to follow the recommendation of the Judicial Council. Thus, the enforcement of judicial accountability is ultimately left to the Authority.

9.7. Institutional Accountability

The accountability of a court as an institution is an important aspect of judicial accountability that barely gets any attention. More attention is paid to holding individual judges accountable for their actions and inactions. However, the accountability of judicial institutions as a body has become increasingly important, and the same needs to be assessed. A salient question that must first be answered is ‘why should stakeholders concern themselves with the internal administrative functioning of the court?’ The simple answer to this question is that the smooth and effective running of the administrative aspect of the judiciary is a prerequisite for

\textsuperscript{225} ICC Independent Expert Review Report (n 190) R.109
the quality performance of the legal functions of a court which in turn can influence litigants’ access to justice.

Therefore, making sure that judicial institutions give accounts of their administrative set-up and functioning is as important as the behavioural accountability of the judges. As international judiciaries are expected to act in the interest of the other stakeholders, it is only appropriate that they are accountable to those stakeholders. Whether one considers an international court and its judges to be agents or trustees, they operate as fiduciaries and therefore owe the stakeholders certain fiduciary duties and obligations. These include the duty of care, duty to avoid conflict of interest, duty of performance, duty of loyalty, and duty to account.226

In most judiciaries, national and international alike, these administrative functions are internally regulated and are carried out by a court within itself. The courts perform functions such as the allocation of cases, the allocation and disbursement of the courts’ budget, processing and service of court processes, record keeping, human resource management, and in some cases, such as in the ECtHR, the discipline and removal of erred judges. All these administrative functions are carried out by the court based on their discretion or based on the provisions of established rules and regulations.

Sadly, since this administrative functioning of the judiciary seems to have little or no direct effect on the member states and other actors, it is often overlooked when the issue of accountability is considered. However, in more recent years, institutional accountability has gained more prominence, and this is perhaps due to the increased interest of stakeholders and the public in the functioning of a court and the increase in the understanding of the effect of institutional accountability on the quality and effectiveness of the judiciary.

In many national judiciaries, including those of ECOWAS member states, institutional accountability has been long established as a crucial tool for ensuring checks and balances. In Nigeria for instance, in the Supreme Court, the country’s apex court, its day-to-day

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functioning is entrusted to the hands of an administrative department which performs key functions such as budget preparation and allocation, overseeing personnel and policy records, salary variation advice, processing pension, housing funds, and health insurance.227 The administrative department comprises different sections that perform more specific duties and report to the administration. For instance, the finance and accounts section ensures adequate supervision of the disbursement of funds and ensures proper monitoring of revenue collection; monitors proper accounting records such as books of accounts, main and subsidiary ledgers; and ensures the existence of an effective audit query unit to deal with all queries from internal audit unit inspectorate department, office of the accountant- general and public account committee.228 The courts in many other ECOWAS member states also have similar structures.229

In international judiciaries, similar administrative practices apply. International courts have continuously established different departments within the institution saddled with administrative responsibilities. In the ICJ for instance, the Registry performs administrative functions and consists of specialised divisions including the finance division, information/communication technology division, publication division, and personnel division.230 The reports of the activities of these divisions are included in the annual report. The ICJ issues annual reports on its activities to the United Nations General Assembly accounting for the court’s organisation, judicial activities, events, court publications as well as administrative and budgetary activities.231 Electronic copies of the annual reports of the ICJ from 1985 till date are available to the public on its website.232

In the ECOWAS Court, there are three main departments responsible for overseeing the operation and administration of the court, performing various functions to ensure the

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227 Supreme Court of the Federal Republic of Nigeria, Departments https://supremecourt.gov.ng/departments
228 Ibid, Finance and Accounts
229 See for instance, in the Liberian Judiciary, there are over 20 sections in the administrative department, including court administration, finance, procurement, budget, documentation, and asset management. All of which performs specific administrative function and reports to the department. The Judiciary, Republic of Liberia http://judiciary.gov.lr/sections/
230 International Court of Justice Registry https://www.icj-cij.org/en/registry
231 International Court of Justice Annual Report https://www.icj-cij.org/en/annual-reports
232 Ibid
efficient and effective performance of the Court’s mandate.\textsuperscript{233} The first is the registry department which is in charge of keeping judicial records of court cases and publications as well as the filing and services of court processes.\textsuperscript{234} The second is the department of research and documentation which oversees the Court library, legal services, research, and publications,\textsuperscript{235} while the third, the department of administration and finance, is responsible for the Court’s financial planning, fund disbursement as well as administration of the Court and human resource management.\textsuperscript{236} All three departments are supervised and managed by the Court management, i.e. the President and Vice-President of the Court. The management also determines the Court’s budget and defines procedures for the Court’s internal organisation.

According to information available on the ECOWAS Court’s website, the Court files bi-annual reports which are issued by the President, providing a comprehensive account of the activities of the Court and all its departments.\textsuperscript{237} However, the reports available on the website seem to be drawn and issued on an annual basis rather than bi-annually. Also, the reports available on the website only cover the period from 2002 to 2011.\textsuperscript{238} While the hard copies of annual reports for 2012 to date may be available in the Court’s library, they are not made readily available for other stakeholders. As earlier stated, the annual or bi-annual report, whichever the case may be, is the only means of ensuring accountability for the administration of the Court. Thus, the unavailability and inaccessibility of the report raise an issue of lack of adequate institutional accountability in the ECOWAS Court.

\textbf{9.8. Conclusion}

The accountability of an international court and its judges is an important factor that has only recently begun to attract the necessary attention. While many international courts have established rules of conduct or rules of ethics to guide judges’ conduct to ensure
accountability and have set up structures for institutional accountability, there is still a lot that needs to be done. Unfortunately, the legal regime of the ECOWAS Court does not include rules of conduct or ethics. The judges are therefore left with the provisions of the Rules of Procedure of the Judicial Council which in itself is not sufficient for ensuring judicial accountability. The vagueness of the provisions of the Rules of Procedure and the fact that it was not originally designed to operate as a code of conduct contribute to its insufficiency.

The legal regime of the ECOWAS Court fails to provide for the minimum standards of judicial accountability as provided for in the Bangalore Principles. Also, the list of misconducts provided in the Rules of Procedure is not exhaustive. Therefore, judges of the Court have no clear rules guiding their conduct and do not know for certain what may be considered misconduct. A good example will be the Code of Judicial Conduct of the Caribbean Court of Justice239 which expressly provides for standards such as propriety, integrity, impartiality, equality, competence and diligence, as well as accountability.240

Another problem with accountability in the ECOWAS Court is that the mechanism for the enforcement of the standards provided for in the Rules of Procedure poses a grave and consequential threat to the accountability of the Court. The lack of diversity in the composition of the Judicial Council, the non-binding nature of the decision of the Judicial Council, and the ultimate power of the Authority may be a constraint on the independence of the Court and cast doubts on the legitimacy of the disciplinary process. Again, the Regional Judicial and Legal Services Commission of the Caribbean Court of Justice is a good example. The Commission was established and empowered under the Agreement Establishing the Caribbean Court of Justice241 to exercise disciplinary control over the judges of the court. Also, the Commission is empowered to regulate its affairs and procedure, thereby eliminating the risk of interference from member states. The Commission designed its dedicated Judicial Discipline Regulation which took effect in May 2021.

Also, institutional accountability entails detailed and adequate accountability for all administrative functions performed by a court through an appropriate reporting system that is readily available to other stakeholders. While the ECOWAS Court has a well-designed and

239 Code of Judicial Conduct of the Caribbean Court of Justice, 2020
240 Ibid, Principles 2-7
241 Agreement Establishing the Caribbean Court of Justice, Article V.3(2) and V.14
functioning administrative department that files comprehensive annual reports, the most cogent aspect of the accountability which is the availability and accessibility of these reports are lagging.

To achieve the required level of accountability in the ECOWAS Court, there is a need for the adoption of dedicated rules/code of conduct or ethics stipulating the standards of accountability guiding the conduct and behaviour of the judges. There is also a need for ensuring diversity and representation in the Judicial Council and ensuring that the decision and recommendations of the Judicial Council need to be given a binding effect. The ECOWAS Court also needs to make its annual reports available and accessible to other stakeholders and the general public.
CHAPTER 10

10. THE TRANSPARENCY OF THE ECOWAS COMMUNITY COURT OF JUSTICE AND ITS JUDGES

10.1. Introduction

Transparency in judicial institutions is another principle tied to the quality of a court as well as the operation of checks and balances in a judicial institution. Just like judicial accountability, the transparency of the judiciary is a prerequisite to the enjoyment of judicial independence. The concept of judicial transparency is perhaps the most novel of the three concepts assessed in this thesis. It has been described as a modern buzzword in discussions relating to the legitimacy of the judiciary as well as other non-elected organisations.¹

Transparency as a general concept has been defined as the “availability of information about an organization or actor allowing external actors to monitor the internal workings or performance”.² Judicial transparency is also linked to efficiency and promotes the confidence of the public in a court and encourages judges to adjudicate fairly, impartially and ensure consistency of their decision-making process and reasoning.

As Voermans puts it, initially, the legitimisation of the judiciary was tied to the independence of judges as arbiters operating under the rule of law.³ However, this narrative does not represent the current reality of the ever-evolving setting and role of judicial institutions.⁴ With judicial institutions expanding in reach and jurisdiction, and with the global trend of judicialization, judicial institutions can no longer be totally protected by judicial independence.⁵ Thus, accountability and transparency in judicial institutions have become indispensable, especially in international judiciaries.

The transparency of the judiciary particularly enhances the legitimacy of a court as well as the public acceptance and enforcement of its judgements, especially in the case of international Courts. Also, due to the legal-political context in which international courts operate, they are

³ Voermans (n 1) 148
⁴ Kate Malleson, The New Judiciary: The Effect of Expansion and Activism (Routledge, 2016)
⁵ Voermans (n 1) 149
prone to a lot of backlash. Judicial transparency helps to enhance the trust of the other actors thereby avoiding or minimising these backlashes.

As international law entered into the age of adjudication, it ushered in an age of information. The foundation of the transparency of the judiciary is the right to information and the right to a fair trial. Similarly, several societal and political development have become tied to international law and the operation of international judicial institutions thereby bringing about several “codification initiatives and ethics statements on access to information”. The combined effect of the proliferation of international judicial institutions and the information boom play a vital role in bringing judicial transparency as well as accountability.

Thus, to maintain the independence of the judiciary, what judges do, the process of achieving them, and the end result of their adjudication must be largely open and clear to the public. Voermans described transparency, which he also referred to as openness, as an effective way to deliver justice while maintaining the interaction between politics and the judiciary. It has been established that international judiciaries cannot be totally guarded by the protection emanating from judicial independence since they operate in a partly political setting or, as Madsen puts it, a legal-political framework. Judicial transparency just like accountability work to curb the possible abuse of the independence of the judiciary.

However, unlike judicial accountability and independence, judicial transparency is yet to be widely analysed by scholars. It has been referred to using synonyms like openness,
decisional accountability\textsuperscript{15}, and soft accountability\textsuperscript{16}. Soft accountability, for instance, was defined by Ng as a form of accountability that deals with procedural transparency while maintaining sensitivity towards the interest of different actors and the evolving social environment.\textsuperscript{17}

10.2. Concept of Judicial Transparency

Whatever synonyms are assigned by a scholar, the concept of transparency has been given several meanings and definitions. In general parlance, transparency has been defined variously. It has been defined simply as “lifting the veil of secrecy”.\textsuperscript{18} It has also been defined as “the ability to look clearly through the windows of an institution”.\textsuperscript{19} Moser describes transparency as opening up the working procedures that are otherwise not immediately open to those who are not directly involved in order to show the good working of an institution.\textsuperscript{20} Also, Meijer, building on the works of Grimmelikhuijsen, defined transparency as “the availability of information about an actor that allows other actors to monitor the workings and performance of the first actor”.\textsuperscript{21} The crux of the definition of transparency is the presence of three main components, (i). transparency is a form of institutional relation; (ii). It involves the provision and exchange of information; (iii). The information involved relates to the workings and performance of the actor.

In the context of judicial adjudication, transparency has been defined by a few scholars and in every case, the definition presents the opinion of the author on what elements should be considered when assessing the operation of the concept. Judicial transparency has been used to refer to the accessibility of court proceedings to the public, the nature of the judges’

\textsuperscript{15} Daniela Piana, Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice (Farnham, 2010); Hakeem Yusuf, Transitional Justice, Judicial Accountability and the Rule of Law (Routledge, 2010).
\textsuperscript{16} Ng (n 14) 17
\textsuperscript{17} Ibid 17-18
\textsuperscript{20} Cornelia Moser, ‘How Open is “Open as Possible”? Three Different Approaches to Transparency and Openness in Regulating Access to EU Documents’ (2001) 80 Political Science Series, Institute for Advanced Studies
\textsuperscript{21} Albert Meijer, ‘Understanding the Complex Dynamics of Transparency’ (2013) 73 Public Administration Review 429, 430
deliberative processes, and the means used to disseminate a court’s judgements, among other elements.\(^{22}\)

Dunoff and Pollack, for instance, while assessing judicial transparency focused on the ability of the public to “identify a particular judge’s position or vote on a particular issue before the court, which might be called judicial identification”.\(^{23}\) They, therefore, defined judicial transparency (from the perspective of identifiability)\(^{24}\) as a mechanism that permits the identification of individual judicial positions, primarily through the publication of separate votes or opinions.\(^{25}\) On the other hand, Rogers considered transparency as a tool for facilitating the monitoring of judges.\(^{26}\) She defined judicial transparency as the availability of information about the decisional process to all interested parties.\(^{27}\)

Simply put, judicial transparency is the ability of the other stakeholders and the general public to monitor and follow the activities of the judiciary. The crux of the principle of judicial transparency is the openness of a court’s administration and adjudication process. It entails the ability of members of the public to attend court sessions, the availability of court records, the availability of comprehensive court judgements with full disclosure of the reasoning of the court, and the issuance of separate opinions whether dissenting or concurring.

Like many other legal concepts, the emergence and history of judicial transparency can be traced to national judiciaries. Up until the nineteenth century, the concept of judicial transparency was concerned mainly with making court proceedings open to the general public. The interest of the general public used to be limited to the observation of court proceedings. By the twentieth century, the public had come to expect and demand access not only to court proceedings but also to court documents and records.\(^{28}\) The operation of the principle has also been broadened by the technological development in many judiciaries. The use of an electronic filing system and electronic court reporting system has extended the access of the public to a court as members of the public can access these records online. The

\(^{22}\) Grimmelikhuijsen and Klijn (n 2) 996


\(^{24}\) Ibid 238

\(^{25}\) Ibid 226


\(^{27}\) Ibid 1307

\(^{28}\) Ellis (n 11) 941
major result of judicial transparency is public trust which is a salient factor for the voluntary acceptance of judicial decisions.  

There are two aspects of judicial transparency explored in this thesis. The first is decisional transparency, and the other is institutional transparency. Decisional transparency relates to the openness of the process through which individual judges and a court as a whole reach their decisions. It encompasses the openness of the laws, rules, and regulations that govern the decision-making process in the court, the availability of court documents as well as the rulings, and judgements issued by judges individually and by all judges collectively as a court. Institutional transparency on the other hand relates to the openness of a court as an institution. It encompasses the transparency of the administration and financing of a court.

Just like judicial accountability, the concept of judicial transparency must be unpacked in order to establish the perspectives from which the concept is considered in this thesis. To achieve this aim, it is imperative to answer four major questions: what are the aspects of judicial transparency? who owes the duty of judicial transparency? to whom is the duty owed? and what actors benefit from judicial transparency?

**Transparency by who and to whom**

The two aspects of transparency reveal clearly that the duty of judicial transparency is one owed by a court as an institution and by the individual judges in their capacities as members of the court. It is important to state, however, that in some courts, where members of a court do not issue an individual concurring or dissenting opinion, the duty to ensure transparency becomes solely that of a court as an institution.

The duty to ensure transparency is owed to other stakeholders. The stakeholders in this sense vary from one court to another. As will be discussed below, in some international courts judicial transparency flows only from the relationship between the courts and the parties to a matter before it. In other courts, some of the elements of judicial transparency extend to members of the general public. Thus, the answer to the question, of to whom is the duty of judicial transparency owed varies from one court to another.

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29 Grimmelikhuijsen and Klijn (n 2) 995
Beneficiaries of judicial transparency

To appreciate the importance of the concept of judicial transparency, it is imperative to understand which actors benefit from it and what they stand to benefit therefrom. A great starting point in assessing these is to first examine what the benefits of judicial transparency are. According to the European Network of Councils for the Judiciary (ENCJ), "an open and transparent system of justice is a further precondition for establishing and maintaining the public trust in justice, which is a cornerstone of the legitimacy of the judiciary. Similarly, judicial transparency can potentially improve the public’s perception of a court and promote confidence in the judiciary. To these ends, the judges, and the judiciary as a whole benefit from transparency.

The judiciary is not the only beneficiary of its transparency. Other stakeholders, i.e., parties to cases before a court, member states, citizens, residents, and corporations in the member state, academics, researchers, the media, and the general public also benefit largely from the transparency of the court. Judicial transparency encourages the efficiency and quality of a court as it motivates judges to perform their duties fairly, consistently, and impartially because transparency makes the performance of a court and its members open to public scrutiny. Thereby providing the public with a judicial system that ensures the fair administration of justice.

Judicial transparency also provides researchers, academics, and authors with the necessary access to court files, documents, and decisions for the evaluation and assessment of the performance and administration of a court. Also, the access to the decisions and reasoning of a court helps to settle the expectations of parties and the general public in future matters and may be considered as an element of a fair trial as it helps parties establish a basis for an appeal if any. Decisional Transparency ensures that the decisions of a court are in line with the legal regime and that the charters and other laws are accurately and justly applied.

10.3. Elements of Judicial Transparency

Generally, deliberations on the concept of judicial transparency usually merge the three elements of judicial transparency i.e., public access to court proceedings, availability of the rules that regulate adjudicatory and decision-making process and records of a court, and full

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30 Grimmelikhuijsen and Klijn (n 258) 997
disclosure of the reasoning of a court as well as the issuance of separate opinions whether concurring or dissenting. These three elements are mostly blurred into one, sometimes all three are used interchangeably, and simply referred to as transparency. When blurred into one concept, these three elements may appear synonymous. However, while all three elements are aimed at achieving and maintaining transparency in judicial institutions, they are separate and distinct elements. A more detailed analysis of these elements will reveal that each element plays a different role. The presence of one element does not remedy the absence of another. In fact, it has been argued that the three elements are not equal. To assess the transparency of any judicial institution, the divergence and convergence of all three elements must be defined.

While all three elements are vital, it is important to note that most courts do not necessarily apply all three of these elements. However, the more they apply, the more transparent a court is. One can be considered more important than the other in the bid to achieve judicial transparency. There are no hard and fast rules for determining the hierarchy of importance. However, for the purpose of this thesis, these elements will be assessed below in their order of importance.

10.3.1. The issuance of separate opinions and full disclosure of the reasoning of the court.

The first element of judicial transparency encompasses the full disclosure of a court’s reasoning in its judgements and the issuance of separate dissenting or concurring opinions by every judge. The major reasoning behind the issuance of separate concurring or dissenting opinions is the ability to ascertain the position of individual judges in a particular issue before the court. This has been termed “judicial identifiability”. Research has shown that there is a global trend in favour of judges issuing separate opinions. However, just like other elements of judicial transparency, the practice in international judicial institutions differs from one court to the other.

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31 Rogers (n 26) 1309
32 Ibid 1303.
33 This order is based purely on my opinion
34 Dunoff and Pollack (n 23) 236
In most international courts, judges have the option of issuing their individual opinion. In the ECtHR for instance, the ECHR provides that “if the final judgement does not represent, in whole or in part, the unanimous opinion of all the judges, any judge shall be entitled to deliver a separate opinion”. Additionally, the Rules of Court of the ECtHR provide for other components that must be covered in the judgements of the court. Rule 74 provides that the judgements of the ECtHR must contain, amongst other things, the names of the President, other judges constituting the Chamber or the Committee concerned, and the name of the Registrar or the Deputy Registrar; the dates on which the judgement was adopted and delivered, an account of the procedure followed to reach its decision; and the number of judges constituting the majority. The Rules of Court also reiterated that “any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgement either a separate opinion, concurring with or dissenting from that judgement, or a bare statement of dissent”.

Similar provisions to those in the ECtHR are applicable in the legal regime of many other courts including the ICJ. The Rules of Court of the ICJ provides additionally that its judgement must include the date on which it is read; the names of the judges who participated in the deliberation and decision; and the number and names of the judges constituting the majority. On the other hand, in a few other courts, the provisions are different. The CJEU and the ECOWAS Court are examples of such courts. The CJEU issues a single judgement with no provisions for separate opinions or judges’ votes.

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36 European Convention on Human Rights (n 52), art 45(2)
37 Rules of Court of the European Court on Human Rights, rule 74 (1) (a)
38 Ibid Rule 74 (1) (b)
39 Ibid Rule 74 (1) (e)
40 Ibid Rule 74 (1) (k)
41 Ibid Rule 74 (2)
42 See for instance, Statute of the Inter-American Court, art 24 (1-3); Rules of Court the African Court of Human and Peoples’ Rights, Rule 60 (5); Rome Statutes of the International Criminal Court, art 83 (4); United Nations Mechanism for International Criminal Tribunals, Rules of Procedure and Evidence (2016) R. 144 (b); International Tribunal for the Law of the Sea, Rules of Tribunal (2009), art 125 (2)
43 Statute of the International Court of Justice
44 Rules of Court of the International Court of Justice, art 95
45 Statutes of the Court of Justice of the European Union, art 36 and 37; Rules of Procedure Court of Justice of the European Union, art 87
In the ECOWAS Court, the Court delivers only one decision in respect of each dispute. The Court deliberates in secret and its decisions are taken by a majority of the judges. The judges of the ECOWAS Court have no right or responsibility to deliver separate opinions. Thus, there is no chance to deliver separate opinions, whether concurring or dissenting. There are two sides to the argument on the propriety of the issuance of individual or separate opinions. One major argument against the issuance of separate opinions is that it may undermine the perceived authority of a court as an entity or may underestimate the standing of a court as an institution, most especially dissenting opinions. Dissenting opinions have been considered as posing a risk of frustrating a court’s decisions by causing parties and other stakeholders to question the correctness of the decision.

The desirability of the issuance of separate opinions is very debatable. There are a few arguments against separate opinions. For instance, it can cause consternation between bench and bar, as several fractured opinions can cause ambiguity as regards the definite state of the law. It may also be argued that a fractured court can damage or undermine the legitimacy and collegiality of the court. Dissenting opinions, especially fundamental dissents which express strong sentiments of a judge about cogent legal issues or fact, or which challenges the lawfulness of the exercise of judicial powers by the court, may become a tool in the hands of parties to a suit that do not agree with the outcome of the case. For instance, in the ICC case of the Ocampo Four, during the pre-trial stage of the matter, the dissenting opinion submitted by Judge Kaul before the court quickly became the central point of media attention. Judge Kaul continuously voiced his dissentient views during the pre-trial.

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46 ECOWAS Court Protocol A/P.I/7/91, art 19 (2) & (3)
48 Request for Authorization of an Investigation Pursuant to Article15, Situation in the Republic of Kenya (ICC-01/09-3), Pre-Trial Chamber II CR2009_08645.PDF (icc-cpi.int)
The major premise of his dissenting view was that the ICC had no jurisdiction in the matter because the facts do not satisfy the requirements to qualify for the definition of crimes against humanity as defined under Article 7 of the Statute of the ICC and that the intervention of the ICC in this type of case may frustrate the pursuit the objectives of the court. He also stated that the intervention of the ICC may infringe on the sovereignty of the states. The basis of the judge’s opinion has been considered to undermine the substantive authority of the court even though the majority of the judges had determined that the court has the competence to adjudicate on the matter.51

In contrast to the above argument, by giving stakeholders an avenue to examine all the opinions of the judges involved in decision-making, the legitimacy of a court and the public trust it enjoys is strengthened. The issuance of individual opinions works to enhance the quality of judicial reasoning. It also provides practical direction for future similar cases and has the potential of influencing the development of legal doctrines.

Another important aspect of judicial accountability is the full disclosure of the reasoning behind the decision of the court. The judgements of the court as well as the individual opinions of the judges, both concurring and dissenting, must include a well-reasoned justification for the opinions and decisions. The practice of providing reasons behind judicial decisions is an essential principle for advancing the rule of law. It is one of the defining characteristics of courts and failure to provide reasons for judicial decisions may be considered as “not just an error of law but….. [also] a jurisdictional error”.52 In many national courts, stating the reasons and justification for judicial decisions is commonly regarded as a duty on the part of the judges. This could be imposed as a constitutional obligation53 or a statutory obligation. In Europe, for instance, the Guide on Article 6 of the ECHR states that the right enshrined in Article 6 includes the duty of courts to give an adequate reason for their decisions. This duty has been previously established by case law. In H v. Belgium, the ECtHR

53 Ibid 926
stated that it is an important requirement that the judgement of courts sufficiently provides reasons on which they are based. In a subsequent decision, the ECtHR stated that a reasoned judicial decision shows the parties that their case has truly been heard, and thus contributes to a greater acceptance of the decision.

The provision of reasoned judgement may also be an evolved practice (as is the case under common law). In the United Kingdom, for instance, the requirement for judges to give reasons for their decision has long been established by the Court of Appeal in many cases. As far back as 1997, in the case of *Coleman v. Dunlop Ltd*, Henry LJ stated that:

“It is true that, in relation to matters in these courts, there is no statutory duty on the judge to give reasons. It is also true that for a long time it has been contended that the common law imposed no such duty. But the common law is a living thing, and it seems to me that the point has now come where the common law has evolved to the point that the judge, on the trial of the action, must give sufficient reasons to make clear his findings of primary fact and the inferences that he draws from those primary facts and sufficient to resolve the live issues before him, explaining why he has drawn those inferences.”

In his submission, Henry LJ presented three main arguments for the importance of the requirement of reason. The first is that giving reasons for judicial decisions fosters efficient and reliable decision-making. Secondly, it gives parties to the suit an understanding of how the decisions are reached and to chance to determine whether or not a court has misdirected itself. Lastly, providing judicial reasons helps the appellate court by making available records to understand the judgement of a court of the first instance. Henry LJ however failed to assess how the issuance of judicial reason serves the interest of the public or how it connects

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55 *Magnin v. France*, Application no: 26219/08, 10/05/2012 para 29
57 *Coleman v Dunlop Ltd* [1998] PIQR 398
58 Ibid 403
59 Ibid 403
to the principle of open justice which is a fundamental element of a fair trial that simply requires that the administration of justice not only be done but be seen as done.\textsuperscript{60} This has been referred to as the broader duty to give reason\textsuperscript{61} and it has continued to be recognised in the domestic and international courts in many jurisdictions.\textsuperscript{62} The requirement of the provision of reasons and justification for judicial reasons is also established in Australia, New Zealand, and Canada.\textsuperscript{63} In many nations in the ECOWAS region, such as Nigeria, Ghana, and the Gambia, stating the reasons for judicial decisions is not provided for under the law. However, it seems to have evolved through practice as judgements delivered in their domestic courts are well-detailed with the reasons behind every decision.

In international courts, the requirement of reasoned justification for judicial decisions is an aspect of judicial transparency that is closely linked to judicial accountability. It serves to advance individual decisional accountability, most especially in courts where there is no chance for an appeal and ensures institutional accountability by ensuring transparency in the process leading to the final decision of the court. The disclosure of full reasoning is also a pathway for establishing the basis for critiquing the decisions and the operation of a court as well as giving an informed basis for scholarly articles and debates.

Again, just like other elements of judicial transparency, there is a variation of provisions in the legal regimes of different international courts. However, in most international courts, the requirement for a reasoned justification for the judicial decision is provided, especially in the final decision of the court. For instance, in the ICJ the judgements of the court state the reasons on which it is based.\textsuperscript{64} However, a judge who would like to record his concurrence or dissent without stating the reason behind their individual opinion can do so in form of a declaration.\textsuperscript{65} Thus individual opinions of judges do not necessarily have to include a justified reason.

\textsuperscript{61} ibid
\textsuperscript{62} See for instance, in the case of Capital and Suburban Properties Ltd v Swycher [1976] 1 Ch 319, 326, Buckley LJ state that by explaining on what grounds cases are decided is important for the legal profession, especially with cases involving questions of law.
\textsuperscript{63} H L Ho, 'The Judicial Duty to Give Reasons' (2000) 20 Legal Stud 42, 43
\textsuperscript{64} ICJ Rules of Court (n 44) art 56(1)
\textsuperscript{65} ibid art 95(2)
Similarly, in the ECtHR, the Rules of Court provide that its decision shall be reasoned.\(^66\) Generally, in practice, a judge in the ECtHR who issues a separate opinion, whether dissenting or concurring, states the reasoning behind his/her opinion.\(^67\) Other courts with a similar provision include the ACtHPR\(^68\), the ICC\(^69\), the ICTY and ICTR\(^70\), and the ITLOS\(^71\).

The provisions in the ECOWAS Court are identical in this regard. The Court’s protocol provides, simply, that all decisions of the Court must state the reasons upon which they are based.\(^72\) A quick assessment of the cases available in the Court digital report reveals that the reasoning of the Court on every issue before it is very well stated. Also, every judgement of the Court concludes by stating that the decisions are based on the reasoning of the Court as stated in the preceding paragraphs.\(^73\)

10.3.2. Access to court records and documents.

Another important element, similar to public access to oral court proceedings, is access to the documents that constitute the records of a court and the written proceedings before the court. This element encompasses three subsections:

1. Access to the legal documents that regulate the decision-making process of a court as well as the administrative process in a court.

The availability of and access to courts’ statutes, protocols, rules of procedure, practice directions, guidelines, and other similar documents play a major role in facilitating the monitoring of judges. It gives the other stakeholders and the general public a yardstick for accessing the conduct and decisions of a court. With the wide use of the internet, access to these legal documents has become easier in courts that have adopted ICT. In most courts, both domestic and international, documents constituting the legal regime are available in all the languages of the courts.

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\(^66\) ECtHR Rules of Court (n 37) rule 56 (1)
\(^68\) ACtHPR Rules of Court (n 37) rules 6(1), (2), and (3)
\(^69\) ICC Rome Statute of the (n 42) art 83(4)
\(^70\) UN MICT Rules of Procedure and Evidence (n 42) Rule 144(B)
\(^71\) Statute International Tribunal for the Law of the Sea, art. 30 (1)
\(^72\) ECOWAS Court Protocol (n 46) art 19 (2)]
In the ECOWAS Court, only a few of these documents, termed “basic texts”, are available and accessible on the Court’s website i.e., the Treaty of the ECOWAS which establishes the Court, the Protocol of the Court, the first Supplementary Protocol of 2005, the Rules of Procedure, and the Court’s Practice Direction. While these legal documents are important parts of the legal regime, they do not represent the complete body of rules regulating the Court. There have been other legal documents subsequently enacted. A new Supplementary Protocol that repeals and substitutes some important provisions of the Court’s Protocol and the Supplementary Protocol of 2005. The new Supplementary Protocol changes the process of selection of judges as well as the process for discipline and removal of judges. As important as its provisions are, the new Supplementary Protocol is not accessible via the Court’s website.

Also unavailable are Decision A/DEC.2/06/06 which established the Judicial Council of the ECOWAS Community as well as the Rules of Procedure of the Judicial Council. The Judicial Council serves as an independent body that conducts and oversees the selection, removal, and discipline of judges. These and many more important documents are not publicly available in the ECOWAS Court. This has posed one of the biggest challenges faced in the course of writing this thesis. To gain access to the Court’s library where the hard copies of these documents are kept, interested persons will have to go physically to the Court. Otherwise, a researcher will have to get scanned copies or photocopies from others who have gone through the process of getting them from the Court’s library which has been my experience in the course of writing this thesis.

**ii. Access to written submissions and other documents filed by litigants**

Just like access to the oral court proceedings, access to written submissions and other records of a court serves informational and transparency purposes. Access of the public to the records of a court enables stakeholders to observe how a court and the member states react to claims.\(^{74}\) In international procedural law, parties’ written submissions (such as the written submission of parties, exhibits tendered, and other annexes) in many international courts enjoy a certain level of protection from disclosure, especially while the case is still pending.\(^{75}\)

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\(^{75}\) Neumann and Simma (n 10) 438
In the Appellate Body of the WTO, for instance, the written submissions are treated as confidential and made available only to the parties to the dispute.\textsuperscript{76} The provisions in the ICJ are a bit more accommodating of public access to written proceedings. The court or its president has the power to decide if to make copies of the pleadings and other documents annexed should be made accessible to the public.\textsuperscript{77} The ECtHR is perhaps the most transparent in this regard. Documents deposited with the registrar in the ECtHR are made accessible to the public.\textsuperscript{78} Non-parties and other members of the public who are interested in accessing the documents request permission to consult the file by filling out an online form that is available on the ECtHR’s website, giving the exact reference of each case file they wish to access.

In the ECOWAS Court, the provisions of the Court’s Protocol on the access of the public to written submission are not clear. The Protocol provides that written proceedings consists of all application and notification of application entertained in the Court, the defence entered by parties, replies, counter statements, rejoinders, and any other brief or document.\textsuperscript{79} All documents comprising the written proceedings before the Court are addressed to the Chief Registrar of the Court and a copy of each document produced by a party is made available to the other parties.\textsuperscript{80}

Unlike access to oral submissions, the Protocol does not provide access to non-parties nor does it prohibit access for non-parties to written proceedings. One can therefore conclude that that implies that written proceedings in the ECOWAS Court are not available for the public to access.

iii. Access to court rulings and judgements

Generally, the statute of many courts, domestic and international, provide for the public availability of all the decisions of the court. In most international courts, judgements are read in open court.\textsuperscript{81} Accessibility of court decisions is further ensured by wide publications on the

\textsuperscript{76} Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), 1869 UNTS 401, Art 18(2)
\textsuperscript{77} ICJ Rules of Court (n 44) art 53(2)
\textsuperscript{78} ECtHR (n 36) art 40(2)
\textsuperscript{79} ECOWAS Court Protocol (n 46) art 13(2)
\textsuperscript{80} Ibid
\textsuperscript{81} See for instance, ICC Rome Statute (n 42) art 74(5); Statute of the Inter-American Court of Human Rights, art 24(3); IJ Statute (n 42) art 58 and art 67; ICJ Rules of Court (n 44), art 94(2) and 107(1); Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, rule 98ter(A) and rule 117(D);
courts’ website, an offline printed collection of judgements, availability at the courts’ libraries, or a registry which is accessible to the general public.

Different international courts ensure accessibility and availability through different means. In the ECtHR, for instance, to avoid information overload, the court publishes only a small selection of its judgements based on their jurisprudential interest. These selected judgements are published in a printed law report while all the other judgements of the court are available for the public to access on the ECtHR’s website.

The accessibility of court decisions in the ECOWAS Court has evolved from being available only in hard copies stored in the Court’s library, which is located in Abuja, Nigeria to being readily accessible on the Court’s website. However, only judgements from 2015 to date are available on the website.

10.3.3. Public access to court proceedings

One major aspect of judicial transparency in international judicial institutions is the ability of members of the public and members of the press/media personnel to gain access to a court in order to observe and follow the proceedings. The access of citizens and even the general public to proceedings in the domestic courts of many countries is regarded as a right. Therefore, court proceedings in most domestic courts, especially in common law countries, are open to the general public. This is however not the case in many international courts where access to proceedings is not the right of member states or citizens of the member states.

The main aim of public accessibility is to ensure that the public and other stakeholders can monitor the affairs of judges and how they carry out their duties. It fosters the checks of potential abuse of power by judges, by ensuring public scrutiny of court proceedings and decisions, all in a bid to enhance the quality of international judicial institutions. It is also an essential aspect of communication and openness between the courts and the other stakeholders, such as member states, citizens of the member states, and parties to the suits.

Statute International Tribunal for the Law of the Sea, art 30(4) and 40(2); ITLOS Rules of the Tribunal (n 71) art 112(4), 124(2) and 135(1); see, however, ECtHR Rules of Court (n 37) rule 77(2).

82 Neumann and Simma (n 10) 437
83 Rogers (n 26) 1304
Similarly, access of the public to court proceedings also serves informational needs for legal professionals, expert observers, and researchers.

It is important to state at this juncture that the access of the public to a court should not be mistaken for the right of participation of non-parties in a suit. Public access relates solely to the ability of members of the public to attend and observe proceedings. While the right to participation relates to processes aimed at directly influencing the outcome of the case, like amicus curiae. Thus public access is limited to access to oral proceedings in the courts and oral delivery of court rulings and judgements. However, public access may be a stepping stone to participation, as it may be an avenue for third parties, after observing, to submit their interest in the case before the court.

The position in international courts varies from one to the other. Whether or not the public and member states have access to the court depends on the provision of the statute of the particular court. However, most international judiciaries do generally allow for public access to proceedings.

In the ECOWAS Court, the Court’s sittings and hearings are generally open to the public. However, in exceptional cases, at the request of a party or for reasons only the Court can determine, the Court may sit in camera. Similar to the ECOWAS Court, the legal regime of the ECtHR provides that “hearings shall be public unless the court in exceptional circumstances decides otherwise”. Physical access to the ECOWAS Court by the public has however been restricted by the COVID-19 pandemic safety measures.

In May 2020, as most of the ECOWAS member states (especially Nigeria, the seat of the Court) entered into lockdown as a result of the pandemic, the Court issued a new Practice Direction. The Practice Direction is aimed at, amongst other things, ensuring the safety of the judges, court staff, and court users as well as introducing the use of suitable technology.

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84 Ana Koprivica Harvey, “Public and Media Access to Courtrooms: International Courts and Tribunals” 2019 MPEiPro
85 See for instance, in the ICJ Statute (n 43) art 46 and ICC Rome Statute (n 42) art 67 and 68(2)
See additionally, CJEU Statute (n 45) art 31; Statute of the International Criminal Tribunal for the Former Yugoslavia, art 20 (4); Statute of the International Criminal Tribunal for Rwanda, art 19 (4), 20 (2), and 22 (2); IACtHR Statute (n 81) art 24 (1); ITLOS Statute (n 81) art 26 (2), all of which contain similar provisions.
86 ECOWAS Court Protocol (n 46) art 14(3); Rules of Procedure of the Judicial Council of the ECOWAS, art 22(4)
87 ECHR (n 36) Art 40
88 ECOWAS Community Court of Justice Practice Directions on Electronic Case Management and Virtual Court Session, 2020
for the general case management system and court sessions.\textsuperscript{89} One of the major changes introduced by the new Practice Direction is the conducting of virtual court sessions mainly to ensure that all judges and stakeholders remain safe while access to justice is not affected. The effect of the new rule is that physical court sessions are avoided as much as possible during the pandemic. The parties and their counsels are to liaise with the Registry to schedule the virtual court sessions. Once scheduled, the Registry communicates to the parties and counsel through email or other electronic means, informing them of the following details:

- The date and time of the Court session
- The intending business for the day
- The electronic means of joining the virtual court session
- The meeting ID and password.\textsuperscript{90}

The effect of this position is that only parties, their agents, and counsel are privy to this information and have authorised access to the Court hearing.\textsuperscript{91} Members of the press and other external parties/stakeholders will have to apply to the Court to be accredited to attend virtual court sessions.\textsuperscript{92} The Practice Direction, however, does not specify how to qualify for accreditation or the process for accreditation.

In exceptional cases, the Court may still decide to hold physical court sessions after ensuring that certain measures are put in place to ensure the safety of the attendees.\textsuperscript{93} Among other things, the Court must ensure that not more than two (2) cases are fixed for the same day\textsuperscript{94}; each litigant or group of litigants shall not be represented by more than one counsel in the courtroom\textsuperscript{95} and in cases of class actions or other types of actions with multiple parties, only one representative is allowed in the courtroom.\textsuperscript{96} Also, until further notice, the Court may not entertain any case where there is a need to take oral evidence.\textsuperscript{97} Most importantly, in all

\textsuperscript{89} Ibid Art 2
\textsuperscript{90} Ibid Art 5
\textsuperscript{91} Ibid Art 5 (6)
\textsuperscript{92} Ibid Art 5 (6) (B)
\textsuperscript{93} Ibid Art 9
\textsuperscript{94} Ibid Art 9 (2) (a)
\textsuperscript{95} Ibid Art 9 (2) (d)
\textsuperscript{96} Ibid Art 9 (2) (f)
\textsuperscript{97} Ibid Art 9 (2) (g)
cases, apart from the judges, registrar, and other essential court staff, only parties to the suit and their clients are allowed into the courtroom, up to a maximum of five (5) persons.98 Thus, in cases where the Court decides to conduct a physical session, there is no provision for public access to the proceeding. While the prohibition of physical attendance of the members of the public is appropriate for ensuring social distancing during the pandemic, the access of the public to the Court can be ensured by making proceedings available to be streamed on platforms such as YouTube or other web streaming mediums.99

10.4. The Operation of the Judicial Trilemma in the ECOWAS Court.
In assessing judicial quality, this thesis identifies judicial independence, judicial accountability, and judicial transparency as variables for measuring the level of the quality of international courts.100 The conclusion reached in this thesis is that all three variables must be considered and assessed as interconnected rather than as separate or isolated concepts. However, various trade-offs exist in the operation of the three variables which makes it difficult to balance them. The thesis establishes that once these trade-offs are put into consideration in establishing the court, all three variables can be maximised simultaneously.

As earlier stated, Dunoff and Pollack’s article,101 the judicial trilemma, has become a constructive paradigm for examining and assessing the design and the trilemma in both international courts102 and domestic courts103. This section aims to examine how the judicial trilemma and the ideal responses postulated by Dunoff and Pollack operate in the ECOWAS Court.

There is no one ideal response to the judicial trilemma to be adopted by every international court. Every international court operates in peculiar social environments with distinctive social and cultural features that shape its normative structure and how they interact with the

98 Ibid Art 9 (2) (e)
99 This is already a practice in some international courts like the ICC and the ICJ.
100 Ibid
101 See section 2.5. above
stakeholders in order to maintain a court’s legitimacy.\textsuperscript{104} The question, however, is do all international courts fit into one of the three ideal type responses.

To achieve the objective of this section, it is important to briefly restate the operation of the individual concepts. In the assessment of the independence of the ECOWAS Court in Part III above, this thesis examining five selected variables concluded that the ECOWAS member states through the Authority of Head of States and Governments and the Council of Ministers play a dominant role in various matters affecting the Court’s independence such as the selection of judges, removal, and remuneration of judges, etc. Thus, the member states hold a high level of constraint over the Court’s independence. Consequently, the Court enjoys a very low level of judicial independence.

Similarly, in Chapter 9, this thesis reveals that the ECOWAS Court legal regime fails to establish the important rules of conduct and ethics to serve as a guide to the judges on what is considered misconduct. However, there is a mechanism set in place for the enforcement of judicial accountability that empowers the Judicial Council, a specialized body, to hold the judges accountable for their actions. While this is a suitable mechanism, the lack of diversity of its members and the non-bindingness of their decision defeats the essence of the entire mechanism. Thus, ultimately, the discipline and removal of a judge is the duty of the Authority which exercises its powers without checks, as they are not bound by the recommendations of the Judicial Council, nor required to state reasons for choosing not to follow the recommendations. Thereby leading to arbitrariness. Although this enhances the level of accountability of the members of the Court, it impairs the independence of the Court.

As regards transparency, the assessment of the elements of judicial transparency in the ECOWAS Court reveals that the Court is open for the public to observe proceedings and a good percentage of the Court’s rules, protocols, and other regulations, as well as its rulings and judgements, are accessible. However, the Court does not provide for the delivery of separate opinions by judges. Altogether, it is safe to conclude that the ECOWAS Court is only fairly transparent but exhibits a high level of accountability.

The response of a court to the trade-offs presented by the operation of the trilemma is heavily influenced by the historical and socio-political environment within which it operates. The

\textsuperscript{104} Dunoff and Pollack (n 23) 273
ECOWAS and its institutions, including the Court, apart from their socio-political peculiarities are also largely designed after their European counterparts. However, its peculiarities as discussed in 3.6. above makes it difficult to transpose the rules and practices which apply in the European courts to the ECOWAS Court.

Using Dunoff and Pollack’s Ideal type analysis, the operation of the concepts creating the trilemma in the ECOWAS Court does not correspond with any of the ideal responses proposed. The Court combines a low level of judicial independence and a low level of judicial transparency with a high level of judicial accountability. Thus, the main premise in this chapter, and the entire thesis, is that the judicial trilemma as proposed by Dunoff and Pollack provides a basis for assessing the triangle of judicial independence, transparency, and accountability, but to apply their ideal responses, modification has to be made.

This thesis has established that once these trade-offs are put into consideration in establishing the court, all three variables can be maximised simultaneously. In cases of already established courts a reform of the courts' legal regime, bearing in mind the trade-offs can achieve the same result.
PART V

CHAPTER 11

11. CONCLUSION AND RECOMMENDATIONS

11.1. Summary of the Research

The vital role played by international courts in the enhancement of international law, and access to justice is a major motivation for the assessment of the quality of these courts. In the case of the ECOWAS Court, it performs major roles in the areas of regional integration, trade, security, member states’ obligations, and human rights.¹ The quality of international courts goes a long way in enhancing their successful and efficient functioning. Therefore, it is an important factor that must be assessed. However, the quality of international courts is one of the least researched aspects of the operation of international judiciaries.

In assessing the quality of the ECOWAS Court, this thesis identifies and examines the operation of three selected variables - independence, accountability, and transparency. The decision to focus on the ECOWAS Court is the need to bridge the gap in the existing literature on the Court in comparison to other courts, especially outside Africa. The research questions, aims, and objectives of the thesis are set out in Part I which also discussed the research methodologies and provided a review of existing literature on the variables of judicial quality. Part II focused on introducing the ECOWAS Court and provided an in-depth analysis of the Court’s structure, organisation, jurisdiction, successes, and challenges. It also assessed the importance of examining the quality of the Court as well as the variables for its measuring.

In Part III, the first variable of judicial quality i.e., judicial independence was examined. The various indicators of the concept and how they operate in the ECOWAS Court in comparison with other international courts, especially the E CtHR, and the national court in ECOWAS member states was also assessed. Part III also highlighted the gaps in the provisions of the Court’s legal regime in relation to the identified indicators. It concludes by establishing the dominance of the Authority over its operation and the negative effect this has on the independence of the Court.

¹ See section 3.6. above on the role and impact of the ECOWAS Court in the West African Region.
The second and third variables of judicial quality examined are judicial accountability and judicial transparency. Part IV assessed these variables and their operation in the ECOWAS Court while comparing the same to other international courts, as well as national courts in member states. It analysed the consistency of the standards of accountability and transparency in the ECOWAS Court with international standards, particularly the Bangalore principles. It concluded that the absence of a code of conduct guiding judges’ behaviour and the role played by the Authority in the discipline and removal of judges creates a system which further undermines the independence of the Court rather than provides accountability. Also, the inaccessibility of court records and documents as well as the non-issuance of separate opinions continues to weaken the transparency of the Court.

The thesis has also assessed how the Court performs against the three variables and the practical interaction as well as the structural interrelation of the variables. The argument in this thesis is that all three variables can and should be simultaneously optimised. An optimal balance of the variables of judicial quality would be achieved in the ECOWAS Court when the Court and its judges can operate completely independent of constraints from the Authority and other actors while maintaining a system of accountability which ensures that judges are held to prescribed standards of ethics and conduct, and also ensuring that the Court’s guiding legal instruments and records are available and accessible to all stakeholders and that judges are allowed to issue separate opinions.

This part of the thesis will synthesise the arguments presented in the preceding parts of the thesis. It will present some novel and specifically curated recommendations that can potentially bridge the gaps in the operation of the three variables in the ECOWAS Court and enhance its quality.

11.2. Contributions and Originality.

The research in this thesis and the recommendations in section 11.3. below contributes to two major aspects of international adjudication. First, it contributes to the literature on the performance of the international judiciary. It looks at the performance of international courts from a novel point of view which goes beyond
the traditional output method and the goal-based approach and examines the composition of the courts and the process involved in the eventual output of the court.

While the output and goal-based approach provide a useful assessment of the effectiveness and efficiency of international courts, an in-depth understanding of the quality of the judges and the process involved in the court’s decision-making process is an important aspect of the courts’ performance which must be assessed. To expand the literature on international adjudication, this thesis assesses the quality of the international judiciary, particularly the ECOWAS Court, using judicial independence, accountability, and transparency as parameters. Although these three variables have attracted some scholarly attention, most scholars focus on judicial independence only and do not consider the variables as factors affecting judicial quality.

This thesis advances the idea that the independence, accountability, and transparency of international courts are vital to the achievement of their goals and builds on the acknowledged importance of the optimal performance of international courts. It however threads new grounds and makes major contributions to the existing literature on international adjudication. Part II establishes the parameters for the assessment of judicial quality and differentiates the concept of judicial quality from other concepts such as effectiveness and legitimacy, all of which are usually conjoined or used interchangeably.\textsuperscript{2} It goes further by establishing the variables for measuring the quality of an international court. This provides a framework for the assessment of the quality of international courts.

This thesis aligns with the body of literature which advances that international courts and their judges should be independent of other actors. It however goes further to propose, instead of constrained independence, the idea of qualified independence which suggests that international court judges should enjoy absolute independence with adequate mechanisms for checks and balances put in place. The other two variables, accountability and transparency, are also analysed. The importance of

\textsuperscript{2} See section 3.9. above
accountability and transparency mechanisms to operate as a counterbalance for the independence of the court is also discussed.

Finally, it established the interconnection and interrelation of the variables and how they can be simultaneously maintained an analysis that has only been attempted by Dunoff and Pollack\(^3\) albeit without analysing its relation to the quality of the courts. In other existing literature, these variables are assessed individually and in isolation without attention to how they are connected or how they affect the quality of international courts.

The second major contribution of this thesis to international adjudication literature is its focus on the ECOWAS Court, which makes it the first of its kind. This is a novel contribution to the limited literature available on the operation of the ECOWAS Court. As discussed in Section 2.6 above, the ECOWAS Court has been substantially left out in most research on the international judiciary. The existing literature available on the Court is limited to the assessment of its human rights issues, and the problem and effect of non-compliance with the Court’s decisions.

Many other issues affecting the performance of the Court have been overlooked by scholars.\(^4\) Thus, to date, there has been no research done on the operation of the three variables of judicial quality in the ECOWAS Court. To bridge this gap in existing literature, the various indicators of judicial independence, accountability, and transparency are analysed in relation to how they operate in the ECOWAS Court. This thesis has revealed the dominant influence of the member states, through the authority, on the Court and its judges. It also showed the weakness of the Court’s current accountability system and the need for an improvement in its transparency. Building on the analysis in the previous chapters, the next section, makes recommendations for the reform of the Court to enhance its quality.

11.3. Recommendations.

The assessment of the quality of the ECOWAS Court, informed by the standards established in international minimum standards such as the Burgh House Principles, Bangalore Principles, and the UN Basic Principles as well as the practices and legal regime of other courts (particularly the ECtHR), reveals that the independence of the Court is largely constrained by dominant role played by the Authority. It also shows the lapses in the provision of normative standards of judicial accountability in the ECOWAS Court and the enforcement mechanism. The thesis also established that of the three elements of judicial transparency, the regime of the Court only adequately provides for one, i.e., the open access of the public to court proceedings.

Considering the aforementioned, this thesis concludes that the quality of the ECOWAS Court falls short of some of the prescribed minimum standards and international practice. Therefore, there is a need for a reform of the Court’s legal regime to reflect these standards and the current best practices. To achieve the aim of this research, which is to enhance the quality of the Court, the following recommendations are put forward for the possible reform of the provisions of the ECOWAS Court legal regime to enhance its quality.

11.3.1. Reforms for judicial independence.

Constraining the independence of the judges is the biggest threat to the quality of the Court. To improve the independence of the Court, there must be a general preclusion of the Authority of Heads of States and Governments from the operation and functioning of the Court. As the Authority is composed of representatives of member states who established and empowered the Court, it is impracticable to completely alienate them from the Court’s functioning. While the nomination of candidates by member states is not an unusual practice in international courts, the process needs to be fair. Thus, the ECOWAS Court must adopt a more merit-based nomination process. The role played and the power wielded by the Authority must be limited for the enhancement of the Court’s independence. Therefore, it is important to regulate the process of allocation of vacant seats and the nomination of candidates to fill the seats.
To do so, two steps must be taken. First, an official guideline\textsuperscript{5} must be adopted to regulate the allocation and nomination process to ensure the true rotation of judicial positions amongst member states and ensure a merit-based process. Secondly, an independent body must be set up to oversee and check the selection process. This would require a change in the composition of the current Judicial Council to include more independent individuals and, most importantly, ensuring that their recommendations are binding on the Authority.

Also, the Authority must be excluded from the process of discipline and removal of the Court’s judges. An internal discipline and removal process will best suit the Court and protect its independence. However, for the purpose of accountability and to curb potential abuse of this process, the internal mechanism must be closely monitored by an independent duly constituted body - which consists of former judges of the court, judges of national courts, jurists, academics, and legal practitioners selected by the various stakeholders - similar to the Advisory Panel of the ECtHR. In the composition of the body, the diversity of the judicial system in the region, as well as gender parity, must be considered. Also, it is important to select the candidates based on their knowledge and experience of international and regional law.

To further advance the independence of the Court, the security of the Court and its judges must be ensured. The security of the ECOWAS Court judges will require the adoption of longer non-renewable tenure for judges to avoid the constraint that may result from the prospect of re-election or career advancement after a short term of office. To secure the Court, the financial autonomy of the Court must be established. The financing of the Court needs to the run by an independent internal system that should be charged with the drafting of the Court’s budget and the remuneration of judges.

Finally, a purposefully designed legal text which provides for the privileges to be enjoyed by the judges of the Court and the immunity to be accorded to them, as well as clear exceptions to the rule and an internal system for a waiver must be adopted. This legal text may be in form of an agreement such as the Agreement on the Privileges and Immunities of the International Criminal Court or a resolution such as

\textsuperscript{5} Similar to the PACE Resolution 1646 on Nomination of Candidates and Election of Judges to the ECtHR
the UN General Assembly, Privileges and Immunities of Members of the International Court of Justice, the Registrar, Officials of the Registry, Assessors, the Agents and Counsel of the Parties and Witnesses and Experts.

It must provide for privileges and immunity to be accorded to the Court and its members and include clauses mandating member states to respect its provisions and fulfil their obligations under the instrument. It must also specify the condition and process for the waiver of the privileges and immunity to prevent abuse. This will enhance the independence of the Court by ensuring that the judges are not open to backlash from disgruntled litigants, especially member states while preventing abuse of power. Apart from waiving immunity where necessary, as assessed in Part IV, with the enjoyment of judicial independence must flow accountability to curb possible overreaching.

11.3.2. Reforms for judicial accountability.

To ensure the accountability of the ECOWAS Court, an official code of conduct or ethics for the judges which spells out accountability standards and provides a structured system for enforcing the standards which do not empower the Authority must be adopted. This would provide the judges with a guide for judicial conduct and alleviate the fears associated with uncertainties of what may be frowned upon by the Authority or Judicial Council. The regulation of the conduct of judges is a standard practice in both national and international courts. Generally, a court’s code of conduct or ethics must satisfy the basic expectations of fairness, impartiality and propriety. To establish the code of conduct, the basic standards for the conduct of judges established under the Bangalore Principles, the Burgh House Principles, and the United Nations Basic Principles as well as some standards provided for in the Court’s current Rules of Procedure of the Judicial Council6 would be a great starting point.

While ethics are universal, each country or region has their peculiarities that may influence the specific standards of ethical conduct. In the ECOWAS Court, the specificity of the region must be put into consideration in drafting a code of conduct.

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6 The Rules of Procedure of the Community Judicial Council of the ECOWAS
Discrimination based on sex, religion, ethnicity, national origin, and social orientation is commonplace in ECOWAS member states. To ensure that these do not affect the access to justice in the courts, the codes of conduct in member states limit the degree of socializing of the judges and prohibits them from becoming members of social clubs and unions which may promote discrimination in any form. Also, due to the high rate of corruption in many ECOWAS member states and the history of bribery in their judiciaries, the code of conduct provides strict prohibition of acceptance of gifts, bequests, loans, favours, benefits, advantages, bribes, etc. These provisions cater to the peculiarities of the region and must therefore also inform the standards of the code of conduct of the judges of the ECOWAS Court. Also, a duly composed independent specialised body as discussed in 10.3.1. must be established to carry out the discipline and removal of judges.

11.3.3. Reforms for judicial transparency

The transparency of the ECOWAS Court is inherently weakened by the difficulty of accessing the Court’s records and legal documents, and the non-issuance of separate opinions by its judges. As a result, litigants and other stakeholders have limited information on how the decisions of the court are made. The limitation on access to legal instruments, written proceedings, decisions and court records is a result of the combination of the lack of requisite legal provisions mandating the same and the failure of the Court to adequately digitalise or otherwise provide access to other stakeholders.

10 See rule 2.4 of the Revised Code of Conduct for Judicial officers of the Federal Republic of Nigeria; rule 5 (C) of the Code of Conduct for Judges and Magistrate of the Republic of Ghana
11 Revised Code of Conduct, Nigeria (n 10) rule 6 ; Code of Conduct, Ghana (n 10) rule 5(D)
To enhance the Court’s transparency, all relevant legal instruments, written proceedings, decisions, and Court records must be made available to be assessed both physically and digitally, except for the internal deliberations of the Court. Given that the ECOWAS Court like many other international Courts is considered a collegiate institution where decisions are reached through an internal deliberation process guided by laws, rules, and norms and the internal deliberation should be kept private. However, to ensure transparency, the underlying reasoning of the Court and its judges must be made public. Also, judges of the Court must issue separate opinions whether concurring or dissenting.

As the ECOWAS Court, like other international courts, is established and mainly funded by member states, eliminating the influence of the member states, through the Authority, may not be desirable to them. It is therefore important that the interests of all stakeholders are duly considered in the reform process. To ensure this, a committee, comprised of national judges, ECOWAS Court judges, international law experts and lawyers, must be set up to review the Court’s legal regime and suggest possible reforms and how they may affect the rights of the stakeholders. The recommendation of the committee will be best suited if it is properly composed to include current and former judges of the Court, justice of the national judiciaries of member states, legal scholars, lawyers, jurists, and political scientists. Also, importantly, the recommendations of the committee must be duly considered in the reformation of the Court’s legal regime.

Lastly, the political influence of the executive and legislative arms of government on the functioning of national courts and the lack of adequate rules on the transparency of courts in West Africa is transposed to the ECOWAS Court. As the judiciaries of member states have considerable influence on the Court, enhancing the quality of the national judicial system would go a long way in enhancing that of the ECOWAS Court. The adoption of the recommendations has the potential of enhancing the Court’s quality.

The reforms recommended above will create a balance of the three variables and eliminate problems emanating from the trade-offs. The enhancement of the quality of the Court does not only benefit the judges of the Court, who will be free to carry out their duties conscientiously, but it can also affect the interests of other
stakeholders. The reforms proposed would provide the ECOWAS region with a functional quality judicial system that protects the rights of citizens and residents. It can provide other regional courts in Africa a system to emulate and also give national judiciaries in the ECOWAS member states a system to look up to. Lastly, with a quality regional court, the member states are more encouraged to make amendments to their legal culture based on the Court’s decisions. A well-functioning ECOWAS Court will promote the legitimacy of the Court and thereby drive compliance. With a higher compliance rate, the decisions of the Court will potentially propel changes in the laws and practices in member states.


The ECOWAS Community Court of Justice is an exemplar of the paradigm change in the architecture of international courts. It evidences the effect of international courts on domestic politics, and the protection of human rights. Sadly, the West African region is plagued with human rights violations, coups d’état, terrorism and insecurity and the national judiciaries are generally weak and considered corrupt. Therefore, the ECOWAS Court provides a fortress for citizens and residents of member states. Ideally, international courts are now able to bypass domestic legal and political obstacles and invoke change and have become key actors in the enforcement and application of international law.

The wave of new-style international courts that have been empowered with compulsory jurisdiction and perform diverse roles including dispute settlement, administrative review, enforcement of state compliance, and constitutional review present an evident shift from the old-style courts which lacked compulsory jurisdiction, restricted non-state actors and private litigant, and acted mainly as arbiters in cases of voluntary dispute settlement between member states.12

For the old-style courts, independence, accountability, and transparency were not an issue as the courts only had jurisdiction when both parties so desired. Thus, the courts were encouraged to attract states by deciding in their favour. On the other hand, in new-style courts, the institution of suits is not dependent on the willingness

of member states and their reluctance does not affect the courts’ jurisdiction. Therefore, they have more capability to effect shifts in the law without necessarily considering the feelings of member states or other actors. The participation of non-state litigants has also radically changed the dynamics of international adjudication. The courts are able to attract numerous cases thereby providing them more chances to influence reforms.

In the case of the ECOWAS Court, the numerous cases instituted by non-state litigants have allowed the Court to issue decisions on the legality of states’ behaviour and promote the rule of law even though the Court has no mechanism to ensure compliance. Bearing in mind the aforementioned and given the radically growing reliance and trust of citizens and residents of the ECOWAS member state on the Court, evidenced by the volume and types of matters brought before the Court, such as the Niger serfdom case\textsuperscript{13} the Nigeria twitter ban case,\textsuperscript{14} and the Nigeria #endSars movement case,\textsuperscript{15} now more than ever before the optimal quality and overall performance is of great importance.

The existing literature on the performance of international courts has shown a growing interest in some of the issues which go to the root of the courts’ performance. This thesis has established that while issues such as the effectiveness, legitimacy, and compliance which have been the focus of most scholars are important, the quality of the courts is also very vital to their performance, but it has been largely overlooked.

Sparingly, the various indicators of judicial quality have been assessed by a few scholars. However, such scholarship is focused on more developed courts. These gaps in existing literature propelled this research. To bridge this gap, this thesis has analysed, using the doctrinal and comparative method, the independence, accountability, and transparency of the ECOWAS Court. Thus, it is timeous for

\textsuperscript{13} Nouhou v. Republic of Niger ECW/CCJ/APP/21/19; ECOWAS Court Blog, ‘Descendants of Slaves Sue Niger for Violation of its Obligation to eliminate Serfdom’ (ECOWAS Court) \url{CCJ Official Website | Descendants of slaves sue Niger for violation of its obligation to eliminate serfdom (courtecowas.org)} accessed 6 March 2022
\textsuperscript{14} See the on-going case of SERAP & 12 others v. Federal Republic of Nigeria (consolidated) ECW/CCJ/APP/23/21
\textsuperscript{15} See the on-going case of Patrick Eholor v Federal Republic of Nigeria and Another ECW/CCJ/APP/17/21
academics to pay attention to the quality of the Court, its legitimacy, effectiveness, and other relevant concepts. These concepts examine different aspects of the Court’s performance. This thesis focuses on the quality of the Court by assessing the process leading to the decision of the Court as well as the factors influencing the decisions. The thesis identifies the lapses in the Court's legal regime and makes recommendations to enhance it.

Although the arguments and recommendations put forward are informed by the comparison of the ECOWAS Court with other international courts, considering the unique political climate in West Africa, this thesis does not suggest the transposition of the legal regime and practices of the other international courts. Instead, it proposes the adaptation of the rules and practices to suit the Court. While making recommendations for enhancing the quality of the ECOWAS Court, this research has also opened up more questions for future research on the quality, operation, and overall performance of the Court such as the role and quality of the other members of staff such as the registrar, interpreters, and clerks. Other important areas for future research are the legitimacy and effectiveness of the Court.
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