A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice

Laurence R. Helfer,[*] Karen J. Alter,[**] and Jacqueline R. McAllister[***]

The Community Court of Justice of the Economic Community of West African States (ECCJ or the Court) is an increasingly active and bold international adjudicator of human rights violations in West Africa. Since acquiring jurisdiction over human rights complaints in 2005, the ECCJ has issued several dozen decisions[1] against the member states of the Economic Community of West African States (ECOWAS or the Community).[2] One might expect a fledgling international court, especially one operating in a region that has little tradition of judicial independence, to be timid. But in its first seven years, the ECCJ has issued several path-breaking judgments, including against the Gambia for the torture and disappearance of journalists, against Niger for condoning modern forms of slavery, and against Nigeria for failing to regulate multinational oil companies that polluted the Niger Delta and for failing to provide free basic education to all children.[3] The Court has also broadly construed its access and standing rules, enabling individuals, NGOs and other private actors to bypass national courts and file suits directly with the ECCJ. Human rights advocates in West Africa are increasingly mobilizing around the Court and including ECOWAS litigation in their advocacy strategies.

The decision to confer broad human rights jurisdiction on the ECCJ is surprising. As its name suggests, the principal objective of ECOWAS is to build an economic community. By all accounts, however, the organization has made little progress toward achieving that goal. Trade

---

[*] Harry R. Chadwick, Sr. Professor of Law, Duke University. helfer@law.duke.edu The authors thank Kristina Alayan, Ethan Blevins, and Abraham Smith for excellent research assistance. For comments on earlier drafts, we thank the participants in conferences and faculty workshops held at the American Society of International Law Research Forum at UCLA Law School; the Cegla Center for Interdisciplinary Research at the University of Tel Aviv; iCourts: The Danish National Research Foundation's Center of Excellence for International Courts; the Hauser Colloquium at NYU Law School, and the Program of African Studies, Northwestern University.

[**] Professor of Political Science and Law, Northwestern University. kalter@law.northwestern.edu.

[***] Ph.D Candidate, Department of Political Science, Northwestern University.

[1] As of March 2012, the ECCJ had issued 47 interim rulings and 45 merits judgments, the large majority of which alleged violations of human rights treaties such as the African Charter. *West Africa: ECOWAS Court Decides 92 Cases in Nine Years*, Leadership (Abuja), Mar. 9, 2012, *available at* http://allafrica.com/stories/201203110048.html (reporting statement of the President of the ECCJ).

[2] Fifteen nations are currently members of ECOWAS: Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Nigeria, Senegal, Sierra Leone, and Togo.

[3] *E.g.*, Lydia Polgreen, *Court Rules Niger Failed by Allowing Girl's Slavery*, N.Y. Times, Oct. 28, 2008, at A6; *ECOWAS Court Orders Gambia to Pay Musa Saidykhan $200,000 in Landmark Case*, Jollofnews West Africa, Dec. 16, 2010; West Africa: ECOWAS Court Orders Nigeria to Provide Free Education for Every Child, Vanguard, Nov. 30, 2010, *available at* http://allafrica.com/stories/printable/201012010612.html; Amnesty International, *Nigeria: Ground-breaking judgment calls for punishing oil companies over pollution*, Dec. 17, 2012, *available at* http://www.amnesty.org/en/news/nigeria-ground-breaking-judgment-calls-punishing-oil-companies-over-pollution-2012-12-17.

levels among West African countries remain extremely low, and tariffs, customs regulations, and non-tariff barriers interfere with cross-border economic transactions.[4] Instead of creating a common market, the member states have restructured ECOWAS and extended its mandate, most notably by undertaking humanitarian interventions in several countries.[5] The recent inclusion of human rights issues is much a less well-known aspect of ECOWAS' evolution.

The ECCJ's transformation into a human rights court is surprising in another respect. All fifteen ECOWAS members are parties to the African Charter on Human and Peoples' Rights. Yet they have been as reluctant as other African nations "to subordinate themselves to a supranational judicial organ."[6] Governments delayed the creation of an African Court of Human and Peoples' Rights for nearly a decade,[7] and they adopted a design that restricts access by individuals and NGOs and requires them to exhaust domestic remedies.[8] During the same period, ECOWAS member states followed the opposite approach with regard to the ECCJ. They gave private litigants direct access to the court, granted broad discretion to the judges to interpret and apply international human rights law and, as we later explain, rebuffed challenges to the meaningful exercise of these powers.

This article explains why, in 2005, West African governments authorized the ECCJ to review human rights suits filed by individuals, but, at the same time, refrained from allowing private actors to complain to the Court about violations of ECOWAS economic rules, such as the free movement of goods and persons. Our analysis is based on original field research in Abuja, Nigeria, including more than two-dozen in person and telephone interviews with ECCJ judges, ECOWAS and national government officials, attorneys, human rights NGOs, and business associations.[9] We also draw upon archival materials as well as the first-ever coding of all ECCJ judgments and rulings through 2010.

The broad outlines of the story are as follows. The 1975 treaty that founded ECOWAS envisioned an international tribunal. But governments did not agree to create a community court until 1991, when they adopted a protocol that limited the court's jurisdiction to interstate

[4] S.K.B. Asante, *Economic Community of West African States* in THE OXFORD COMPANION TO POLITICS OF THE WORLD 233, 234 (Joël Krieger 2d ed. 2001).

[5] JOHN M. KABIA, HUMANITARIAN INTERVENTION AND CONFLICT RESOLUTION IN WEST AFRICA: FROM ECOMOG TO ECOMIL (2009).

[6] Gino J. Naldi, *Future Trends in Human Rights in Africa: The Increased Role of the OAU?*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986–2000 1, 12 (Malcolm Evans & Rachel Murray eds., 2002).

[7] GEORGE MUKUNDI WACHIRA, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: TEN YEARS ON AND STILL NO JUSTICE (2008).

[8] *See* Julia Harrington, *The African Court on Human and Peoples' Rights*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986–2000 __, 319 (Malcolm Evans & Rachel Murray eds., 2002). We compare the ECCJ and African Court's access rules in Part II(C) *infra*.

[9] These were on-the-record interviews, but names have been redacted to protect the anonymity of our sources.

disputes concerning the interpretation of ECOWAS legal instruments.[10] The actual creation of a court was delayed for another decade. And when the Court finally opened its doors for business in 2001, governments refrained from filing any cases against each other.[11]

In 2003, a Nigerian goods trader filed the first suit with the ECCJ, complaining that the closure of Nigeria's border with Benin damaged his import-export business. The suit cast in sharp relief the serious impediments to intra-regional trade. Nevertheless, the Court dismissed the complaint in 2004, relying on the member states' unambiguous decision to deny access to private parties.

The reaction to the decision was swift and striking. ECOWAS officials, civil society groups, and ECCJ judges all lobbied to expand the Court's jurisdiction, standing rules, and remedial powers. Less than nine months later, the Authority of Heads of State and Government (ECOWAS Authority)—ECOWAS' highest political body—agreed. It adopted a 2005 Supplementary Protocol that gives individuals direct access to the ECCJ for "the violation of human rights that occur in any member state" without the need to exhaust domestic remedies.[12] It does not, however, permit private actors to challenge laws or practices that impede regional integration. The seemingly counterintuitive result is that private actors can sue governments for violating their international human rights but not for violating ECOWAS rules.

The ECCJ's transformation illustrates how an existing international institution can be redeployed for new purposes. One interesting aspect of this transformation is how the judges themselves contributed to the expansion of their mandate. Most scholars expect international courts to engage in expansive judicial lawmaking to increase their power and the reach of international law.[13] ECCJ judges did not follow this strategy, rejecting an opportunity to expand their jurisdiction and access rules. Instead, they embarked on an extra-judicial campaign to redesign the Court. They traveled across West Africa on outreach missions and speaking engagements to build support among local bar associations, human rights groups, and government officials. This strategy culminated in the adoption of the 2005 Supplementary Protocol, a treaty that endorsed the redeployment of the ECCJ as a human rights tribunal.

Another theoretically interesting aspect of ECCJ's transformation is that ECOWAS member states have rejected opportunities to restrict the Court's authority to review and condemn human rights violations. Whereas other sub-regional courts in Africa have experienced political backlashes,[14] West African governments have responded to plausible critiques of the ECCJ by

---

[10] Protocol A/P.1/7/91 on the Community Court of Justice (1991 Protocol), *reprinted in* COMPENDIUM OF AFRICAN SUB-REGIONAL HUMAN RIGHTS DOCUMENTS 194 (Solomon Ebobrah & Armand Tanoh eds., 2010). The 1991 Protocol authorized the ECCJ to adjudicate "disputes referred to it . . . by Member States or the Authority, when such disputes arise between the Member States or between one or more Member States and the Institutions of the Community." *Id*. Article 9(3).

[11] *See infra* Part II.

[12] Supplementary Protocol A/SP1/01/05 Amending the Protocol (A/P.1/7/91) relating to the Community Court of Justice, adopted 19 January 2005 (2005 Protocol), Article 3 (revising Article 9(4) of the 1991 Protocol).

[13] Karen J. Alter and Laurence R. Helfer, *Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 Int'l Org. 563 (2010).

[14] During the same period that the ECCJ's docket of human rights cases was expanding, African governments

strengthening the Court's independence. They established an ECOWAS Judicial Council to depoliticize the appointments process and encourage the election of highly qualified judges, and they rejected an initiative by the Gambia to narrow the ECCJ's human rights powers in retaliation for decisions finding that Gambian officials had tortured dissident journalists. As we will explain in a future paper that analyzes ECCJ case law and member state compliance, the Court's jurisprudence became bolder following these events.

The remainder of this article proceeds as follows. Part I reviews the founding of ECOWAS and the ECCJ. We first examine the Community's economic underpinnings to help understand why member states remain weakly committed to regional economic integration. We then situate the ECCJ in the wider political and historical context of ECOWAS to explain West African governments delayed establishing a Community court, and, when they did so, why they remained reluctant to give it the authority to promote compliance with ECOWAS economic rules. These choices help to explain why governments did not bolster the ECCJ's economic mandate in 2005 when they granted the Court jurisdiction over human rights complaints from individuals.

Part II analyzes the events leading to the 2005 Supplementary Protocol. We review the first ECCJ ruling—the dismissal of a suit by a private goods trader—and explain its political salience. We then identify parallel lobbying campaigns by ECCJ judges, NGOs, and ECOWAS officials to expand the Court's jurisdiction to allow it to review human rights complaints from individuals. Finally, we analyze three unusual features of the restructured Court's design: direct individual access to the ECCJ,; the absence of an ECOWAS-specific human rights standards, and the decision not to require exhaustion of domestic remedies.

Part III analyzes two major challenges to the ECCJ's authority, the rejection of which ultimately strengthened the Court's legal and political foundations. The first challenge stemmed from a perception that the ECCJ had intervened in election matters within the exclusive jurisdiction of domestic courts. The member states responded by establishing a Judicial Council to improve the qualifications and independence of ECCJ judges. The second challenge concerned a 2009 proposal by the Gambia to narrow the ECCJ's newly-acquired human rights jurisdiction. The member states' decision to rebuff the Gambian proposal was a de facto validation of the ECCJ's authority under the 2005 Protocol, with the result that the formally provisional nature of that instrument became a political *fait accompli*.

Part IV considers the broader theoretical implications of these developments. We focus on three theories—regional integration theory, theories of institutional change, and the advocacy strategies of transnational networks—using these theories to make sense of and draw lessons from the surprising story of institutional transformation in ECOWAS. The conclusion links the

---

sanctioned two other Community courts—the East African Court of Justice and the Court of Justice of the Southern African Development Community—for interpreting their founding treaties to include review of human rights claims. Solomon T. Ebobrah, *Human Rights Developments in African Sub-Regional Economic Communities During 2009*, 10 Afr. Hum. Rts. J. 233 (2010) [Ebobrah, *Developments in 2009*]; Solomon T. Ebobrah, *Human Rights Developments in African Sub-Regional Economic Communities During 2010*, 11 Afr. Hum. Rts. J. 216 (2011) [Ebobrah, *Developments in 2010*].

ECCJ's experience to broader questions of how international legal institutions build their legitimacy in politically charged contexts.

I. THE POLITICAL, LEGAL AND INSTITUTIONAL FRAMEWORK OF ECOWAS AND THE ECCJ

This Part discusses the motives for creating economic integration regime in West Africa and why the commitment of ECOWAS member states to economic integration has remained shallow. We then explain how, in the 1990s, ECOWAS became increasingly involved in regional security and good governance issues, laying the foundation for its eventual embrace of human rights. We conclude by analyzing the creation of the ECCJ and linking them to these developments.

A. The First Phase of ECOWAS: The Failure of Economic Integration

Why were West African governments interested in economic integration? At its founding in 1975, the primary goals of ECOWAS were to promote cooperation and development in a wide array of issue areas, including commerce, agriculture, natural resources, monetary and financial policy, security, and social and cultural matters.[15] The project included removing intra-regional trade barriers, reflecting the conventional view that open markets attract foreign investment and encourage development. However, the member states understood from the project's inception that integration of national markets would be only one of many ECOWAS objectives.[16]

The names given to ECOWAS institutions mimicked their EC counterparts. In reality, however, the 1975 ECOWAS Treaty created a system of policymaking bodies tightly-controlled by governments. The principal Community institutions included an Authority of Heads of State and Government (the Authority), the highest ECOWAS decision-making body; a Council of Ministers, which served in an advisory capacity to the Authority; and an Executive Secretariat responsible for the day-to-day administration of ECOWAS policies. These bodies adopted initiatives that on paper committed member states to phase-out quantitative and other restrictions on intraregional trade, create a customs union, establish a common a commercial policy, and permit the free movement of goods and persons.[17]

In reality, the legal framework required to carry out these policies was lacking. The institutions created by the 1975 Treaty, unlike those of the EC, "left national sovereignty intact."[18] The decisions of the Authority and the Council of Ministers were binding only on ECOWAS

[15] Treaty of the Economic Community of West African States, May 28, 1975 [1975 Treaty], 1010 U.N.T.S. 17, 14 I.L.M. 1200.

[16] The economic theory motivating the creation of ECOWAS is discussed in KOFI OTENG KUFUOR, THE INSTITUTIONAL TRANSFORMATION OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES 2-8 (2006) [KUFUOR, INSTITUTIONAL TRANSFORMATION OF ECOWAS].

[17] Charles D. Jebuni, *The Role of ECOWAS in Trade Liberalization* in TRADE REFORM AND REGIONAL INTEGRATION IN AFRICA 489, 493 (Zubair Iqbal and Mohsin S. Khan, eds. 1998).

[18] *Review of the ECOWAS Treaty: Final Report of the ECOWAS Committee of Eminent Persons* 16 (June 1992) [Final CEP Report] (copy on file with authors).

institutions. They had no legal force for member states, which had merely agreed to "make every effort to plan and direct their policies with a view to creating favourable conditions for the achievement of" the Community's aims.[19] In the absence of delegated supranational decision-making powers, ECOWAS policies were formulated using a standard tool of public international law—a series of protocols adopted unanimously that each government then had to decide whether to ratify and implement into its national law, and that only entered into force after a majority of countries had ratified. This cumbersome and politicized decision-making process was a "slow and inadequate" mechanism for Community lawmaking.[20]

At a deeper level, there was also good reason to question the economic and political logic of a West African integration project. ECOWAS countries are geographically proximate, and instability in one nation can easily destabilize neighboring countries. But in other respects, the divisions among the member states were and remain profound. Regional infrastructure is woefully underdeveloped, which makes intra-regional trade costly.[21] Francophone countries are deeply linked to France's economic and political system, whereas Nigeria and Ghana—the two largest Anglophone economies—have different capabilities and economic goals.[22] The key trading partners for West African countries are outside of the region, and the little intra-regional trade that occurs involves natural resources, agricultural products and low-value-added consumption products such as rubber, plastics, and cosmetics.[23] Although some traders stand to benefit from easier access to regional markets, many local producers actively seek to avoid competition from firms in other ECOWAS countries.[24]

---

[19] 1975 Treaty, *supra* note __, Article 3.

[20] S.K.B. ASANTE, THE POLITICAL ECONOMY OF REGIONALISM IN AFRICA: A DECADE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS) 70 (1986) [ASANTE, THE POLITICAL ECONOMY OF REGIONALISM IN AFRICA]; *see also* MUHAMMED TAWFIQ LADAN, INTRODUCTION TO ECOWAS COMMUNITY LAW AND PRACTICE: INTEGRATION, MIGRATION, HUMAN RIGHTS, ACCESS TO JUSTICE, PEACE AND SECURITY 7 (2009) (explaining that "most often, Community texts adopted in the so-called areas of sovereignty were in the form of protocols, and there was considerable delay in their application owing to the slow pace of protocol ratification").

[21] Chukwuma Agu, *Obstacles to Regional Integration: The Human Factor Challenge to Trade Facilitation and Port Reforms in Nigeria*, 2 Int'l J. Private L. 445 (2009).

[22] *E.g.* ASANTE, THE POLITICAL ECONOMY OF REGIONALISM IN AFRICA, *supra* note __, at 48 (noting "the inability of Anglophone and Francophone West African countries to break their colonial heritages, and to form effective economic groupings that cut across them"); Julius Emeka Okolo, *The Development and Structure of ECOWAS* in WEST AFRICAN REGIONAL COOPERATION AND DEVELOPMENT 19, 42 (Julius Emeka Okolo & Stephen Wright, eds. 1990) (stating that the "multiplicity of intergovernmental organizations that exist side by side with ECOWAS divides loyalties and dissipates resources" and "cause[s] jealousies and uneasiness" among ECOWAS member states).

[23] Mary E. Burfisher and Margaret B. Missiaen, *Intraregional Trade in West Africa* in OKOLO & WRIGHT, *supra* at 185-213; Phoebe Kornfeld, *ECOWAS, The First Decade: Towards Collective Self-Reliance, or Maintenance of the Status Quo?* in OKOLO & WRIGHT, *supra* at 87, 91 (noting that intra-regional trade averaged between 2.8% and 4.1% during the first fifteen years of ECOWAS). Excluding Nigerian oil exports, intra-regional trade raises to a paltry 7%. These trade volumes have remained stable since the 1970s. IBRAHIM A. GAMBARI, POLITICAL AND COMPARATIVE DIMENSIONS OF REGIONAL INTEGRATION: THE CASE OF ECOWAS 40-41 (1991).

[24] *E.g.,* Agu, *supra* note __, at 455 (noting "consistent demands of [Nigerian] manufacturers for one form of protection or another"); Kofi Oteng Kufuor, *Sub-State Protectionism in Ghana*, 18 Afr. J. Int'l & Comp. L. 78, 80-81 (2010) (describing litigation by domestic industries seeking increased tariffs on imports in contravention of ECOWAS free trade rules).

Building a common market in West Africa was nonetheless attractive for a different reason. The 1975 ECOWAS Treaty signaled to its poorer neighbors that Nigeria—the "big brother"[25] of West Africa, which then accounted for nearly 70% of the region's total GDP[26]—favored regional cooperation. ECOWAS helped Nigeria to consolidate its status as regional hegemon by indicating to neighboring countries that they would benefit from Nigeria's oil wealth and from access to its large and lucrative market.[27] For example, the Community's goal of promoting the free movement of workers could enable desperately poor West Africans to move to a country where jobs and resources were more plentiful.[28] Nigeria's financial backing was also important. In 1975, import and export taxes comprised between fifteen and fifty percent of national revenues.[29] Governments envisioned that ECOWAS would replace these tax proceeds with a Fund for Cooperation, Compensation and Development. All member states were required to contribute to the fund, but in proportion to each country's gross domestic product and per capita income. Nigerian largesse thus provided the bulk of the Community revenue to replace domestic trade taxes.[30] It also provided extra funds to support the activities of Community institutions.[31]

This planned reduction in trade taxes notwithstanding, ECOWAS did not endorse a free market philosophy. To the contrary, its policies reflected the then-widely-held view that industrialized countries preyed on the economic weaknesses of the developing world. The remedy for this dependency, according to this view, was to build local industrial capacity and an export sector to replace reliance on foreign imports.[32] Nigeria in particular favored a region-wide effort to build

---

[25] *E.g.*, OLAYIWOLA ABEGUNRIN, AFRICA IN GLOBAL POLITICS IN THE TWENTY-FIRST CENTURY: A PAN-AFRICAN PERSPECTIVE 42 (2009) (explaining why "Nigeria has become the *big brother* (Super power) of West Africa").

[26] Okolo, *Development and Structure of ECOWAS*, *supra* note __, at 42.

[27] GAMBARI, *supra* note __, at 18 ("Nigeria sees region-wide integration as an instrument for (i) promoting its own economic and diplomatic interests in the region, (ii) collectively dealing with powerful economic groupings outside Africa, and (iii) demonstrating the benefits of cooperation between itself and smaller and poorer West African countries"); KUFUOR INSTITUTIONAL TRANSFORMATION OF ECOWAS, *supra* note __, at 22 (noting the great optimism for regional integration at the end of the Nigerian civil war (1967-70), with the expectation that Nigeria would use its oil largesse to help regional development); Olatunde Ojo, *Nigeria and the Formation of ECOWAS*, 34 Int'l Org. 571, 584 (1980) (reviewing evidence that Nigeria viewed ECOWAS as "providing an institutional framework for Nigeria's leadership and the erosion of France's political and economic influence").

[28] Julius Emeka Okolo, *Free Movement of Persons in ECOWAS and Nigeria's Expulsion of Illegal Aliens*, 40 The World Today 428, 431 (Oct. 1984) ("Since the end of the civil war in 1970, Nigeria has attracted immigrants . . . particularly from neighbouring countries. The reasons for this are not hard to see. Economic prosperity ushered in by the oil boom gave Nigeria the image of a country flowing with milk and honey.").

[29] GAMBARI, *supra* note __, at 42; Okolo, *Development and Structure of ECOWAS*, *supra* note __, at 49 n.43.

[30] Okolo, *The Development and Structure of ECOWAS*, *supra* note __, at 32 (explaining that Nigeria provided nearly one third of the contributions to the Community fund).

[31] GAMBARI, *supra* note __, at 58.

[32] ASANTE, THE POLITICAL ECONOMY OF REGIONALISM IN AFRICA, *supra* note __, at 42-43; Gambari, *supra* note __, at 42-43; KUFUOR, INSTITUTIONAL TRANSFORMATION OF ECOWAS, *supra* note __, at xii.

indigenous industries.[33] The Francophone countries, however, were heavily dependent on investment from France, and foreign investors were primarily interested in gaining access to regional markets. Voting as a bloc, the Francophone members of ECOWAS prevented the adoption of Community rules of origin. Anglophone members reacted in turn by opposing free trade rules that would have given French producers open access to their markets.[34] The net result of these intra-regional tensions was a stalemate within ECOWAS and rampant noncompliance with Community rules.[35] Not surprisingly, assessments of on-the-ground impact of the first phase of West African integration were overwhelmingly negative.[36]

B. The Second Phase of ECOWAS: The Rise of Regional Security and Human Rights

The 1980s were a period of economic turmoil and political conflict in West Africa. Early in the decade, the collapse of world oil prices and the mismanagement of oil revenues led Nigeria to focus on domestic priorities and deemphasize its commitment to ECOWAS.[37] A further low point followed in 1983 when Nigeria expelled hundreds of thousands of "illegal" workers from other member states. Mass expulsions had occurred before in West Africa. But the 1975 ECOWAS Treaty and its free movement protocols professed a commitment to a different and more open migration policy.[38] Nigeria's expulsions increased employment opportunities for domestic workers and thus were politically popular at home. But they were widely viewed as flouting the spirit, if not the letter, of ECOWAS free movement rules.[39]

The end of the Cold War had a significant impact on the Community. In the late 1980s, West African countries began to liberalize their economies as a condition of receiving loans from the World Bank, gaining access to European markets and, eventually, joining the World Trade

---

[33] KUFUOR, INSTITUTIONAL TRANSFORMATION OF ECOWAS, *supra* note __, at 27 (discussing Ghana and Nigeria's preference for 'economic indigenization programs' that would benefit national commercial and industrial classes over simple trade liberalization, which Nigeria saw as benefiting primarily foreign firms).

[34] *Id.* at 26-29.

[35] GAMBARI, *supra* note __, at 44 (identifying "the core of the problems faced by ECOWAS" as an "absence of political will by members of the community" as reflected in "their generally low commitment to implement the decisions and agreements collectively made at the highest political level of ECOWAS"); Jebuni, *supra* note __, at 495 ("[t]o a large extent, the ECOWAS protocols were not implemented" prior to 1990).

[36] *E.g.*, KUFUOR, INSTITUTIONAL TRANSFORMATION OF ECOWAS, *supra* note __, at 19-34; Jebuni, *supra* note __, at 490-99.

[37] GAMBARI, *supra* note __, at 47 (describing decisions and policies in the 1980s that "appeared to undermine Nigeria's commitment to ECOWAS," including its financial commitments to the Community).

[38] Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment [1979 Free Movement Protocol], Article 2.1 (recognizing "Community citizens have the right to enter, reside and establish in the territory of Member States"); ASANTE, THE POLITICAL ECONOMY OF REGIONALISM IN AFRICA, *supra* note __, at 151 ("As far as ECOWAS is concerned, the movement of labor is part of the philosophy of its founders").

[39] Okolo explains that Nigeria's expulsion orders—which were supported by most Nigerians and the nation's news media—did not violate the limited terms of the 1979 Free Movement Protocol. Nevertheless, they were widely viewed as inconsistent with the Community's free movement goals and with Nigeria's leadership role in ECOWAS. Okolo, *Free Movement of Persons in ECOWAS, supra* note __, at 432-33; *see also* GAMBARI, *supra* note __, at 47.

Organization. These powerful external forces made the embrace of regional economic integration newly attractive.[40]

The revival of ECOWAS was embodied in a new agreement (the 1993 Treaty)[41] that replaced the 1975 founding charter. The 1993 Treaty recommitted West African governments to economic integration, setting timetables for establishing the customs and monetary unions, and further reducing barriers to intraregional trade. The member states also endorsed structural changes to achieve these goals. They authorized certain ECOWAS decisions to be adopted by a vote of two-thirds of the member states, made those decisions expressly binding on the member states, created new ECOWAS institutions such as the Community Parliament,[42] and increased the power of existing bodies.[43] The decision to create the ECCJ was part of this broader recommitment to regional integration.[44]

Although the 1993 Treaty reads as a recommitment to economic integration, in practice the second phase of ECOWAS came to be dominated by security and human rights concerns. The Community had early on acquired a role in promoting regional security. A 1978 Protocol of Non-Aggression and a 1981 Protocol on Mutual Assistance on Defense provided the legal basis for these tasks. These initiatives were primarily aimed at deflecting foreign interventions, but they also established a Defense Council and Defense Commission that could supervise regional security initiatives more broadly.[45]

The Liberian civil war proved to be a turning point. Although there had been previous conflicts in the region, the civil war in Liberia led Anglophone member states to establish the Economic Community of West African States Monitoring Group (ECOMOG).[46] What began as a monitoring and mediation effort under the auspices of the Protocol on Mutual Assistance and

---

[40] *See* KUFUOR, INSTITUTIONAL TRANSFORMATION OF ECOWAS, *supra* note __, at 42-43. For a discussion of how global external forces reinvigorated regional integration movements, see KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS ch. 4 (forthcoming 2013) [ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW].

[41] Revised Treaty of the Economic Community of West African States, July 24, 1993, 35 I.L.M. 660 [1993 Treaty].

[42] Protocol Relating to the Community Parliament, A/P.2/8/94. The Protocol was signed on August 6, 1994 and entered into force on March 14, 2002. ECOWAS Parliament at a Glance, *available at* http://www.iss.co.za/af/RegOrg/unity_to_union/pdfs/ecowas/parlyglance.pdf.

[43] For an overview of the 1993 Treaty, see KUFUOR, INSTITUTIONAL TRANSFORMATION OF ECOWAS, *supra* note __, at 35-68; Akinrinsola, *supra* note __, at 504-08.

[44] Final CEP Report, *supra* note __, at 20-22; LADAN, *supra* note __, at 2.

[45] Protocol of Non-Aggression (Apr. 22, 1978) [1978 Non-Aggression Protocol], *available at* http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/14ProtNonAggre.pdf; Protocol on Mutual Assistance and Defense, A/SP3/5/8l, Official Journal of ECOWAS (June 3, 1981) [1981 Mutual Defense Protocol], *available at* http://www.iss.co.za/af/regorg/unity_to_union/pdfs/ecowas/13ProtMutualDefAss.pdf; *see also* Peter Jenkins, *The Economic Community of West African States and the Regional Use of Force*, 32 Denver J. Int'l L. & Pol. 333, 335-36 (2008).

[46] KABIA, HUMANITARIAN INTERVENTION AND CONFLICT RESOLUTION IN WEST AFRICA, *supra* note __, at 57-160; *see also* ADEKEYE ADEBAJO AND ISMAIL O.D. RASHID, WEST AFRICA'S SECURITY CHALLENGES: BUILDING PEACE IN A TROUBLED REGION (2004).

Defense ended up as a full-fledged military intervention.[47] Most observers credited the intervention with preventing the spread of violence and restoring a semblance of stability in the country. But the intervention also generated credible allegations of human rights abuses by ECOMOG forces.[48] Subsequent military missions to quell civil wars and armed conflicts in Sierra Leone in 1997, Guinea Bissau in 1999, and Côte d'Ivoire and Liberia in 2003 increased the political salience of ECOWAS security and human rights activities and led to the adoption of a new mechanism on conflict prevention that underscored the importance of protecting human rights and put regional intervention on a firmer legal footing.[49]

This shift in the Community's functions helped to trigger mobilization around human rights issues in West Africa. As part of 1993 overhaul, member states agreed to broaden public participation in the Community by expanding access for civil society groups. National NGOs were precluded from participating in ECOWAS policymaking, but regional civil society groups could be accredited to observe public meetings, make presentations, and circulate documents.[50] These institutional reforms created an incentive for NGOs to mobilize within ECOWAS and to create regional advocacy bodies.

In 2001, NGOs formed the West African Human Rights Forum, an umbrella organization that gained accreditation from ECOWAS and attempted to influence Community policymaking.[51] In the same year, the member states adopted a Protocol on Democracy and Good Governance (Good Governance Protocol) to deter military coups and unconstitutional changes of government by threatening countries that committed such violations with suspension from ECOWAS.[52] The

---

[47] *See* Jenkins, *supra* note __, at 342-44.

[48] KABIA, HUMANITARIAN INTERVENTION AND CONFLICT RESOLUTION IN WEST AFRICA, *supra* note __, at 86-87 (reviewing reports by human rights groups that painted "a very disturbing picture of ECOMOG as violators of human rights" and alleged that ECOWAS "has not done enough to incorporate human rights in its conflict resolution initiative[s]"); Chidi Anselm Odinkalu, *ECOWAS Court of Justice in the Protection of Human Rights* 175, 185 in COMPENDIUM OF THE INTERNATIONAL CONFERENCE ON "THE LAW IN THE PROCESS OF INTEGRATION IN WEST AFRICA" (Abuja, Nov. 13-14, 2007) [CONFERENCE ON LAW AND INTEGRATION IN WEST AFRICA] ("The onset of conflicts in Liberia in 1989 and Serra Leone in 1991 compelled a re-examination of the role of human rights in guaranteeing regional stability and security in ECOWAS.").

[49] Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Dec. 10, 1999), Article 2(d) [1999 Conflict Prevention Protocol], *available at* http://www.ecowas.int/publications/en/framework/ECPF_final.pdf (declaring as a "fundamental principles" the "protection of fundamental human rights and freedoms and the rules of international humanitarian laws"). For a recent discussion, see Isaac Terwase Sampson, *The Responsibility to Protect and ECOWAS Mechanisms on Peace and Security: Assessing their Convergence and Divergence on Intervention*, 16 J. Conflict & Security L. 507, 515-18 (2011).

[50] Decision A/DEC.9/8/94 Establishing Regulations for the Granting to Non-Governmental Organisations (NGOs) the Status of Observer within the Institutions of the Community (Aug. 6,1994), *discussed in* KUFUOR, INSTITUTIONAL TRANSFORMATION OF ECOWAS, *supra* note __, 49-50 .

[51] Telephone interview with Human Rights Advocate B, Feb. 3, 2011.

[52] Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security [2001 Good Governance Protocol], *available at* http://www.comm.ecowas.int/sec/en/protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf. For a recent assessment, see Frederick Cowell, *The Impact of the ECOWAS Protocol on*

Good Governance Protocol wove multiple references to human rights into the fabric of an ambitious regional effort to promote democracy, accountability, transparency, and the rule of law.[53] It also included a clause promising that the jurisdiction of the ECCJ "shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed."[54] These developments gave human rights advocates a legal foothold to build on when they later lobbied to retool the ECCJ's role from trade and economic issues to human rights.

C. The Decision to Create a Community Court of Justice for Interstate Disputes

We now return to the first phase of ECOWAS to situate the ECCJ's creation in the broader political and economic crosscurrents in West Africa. ECOWAS' founders envisioned a tribunal to "ensure the observance of law and justice in the interpretation of the provisions of [the 1975] Treaty" and to "settl[e] such disputes as may be referred to it" by the member states.[55] But the tribunal was never created during the founding period for two reasons. The first relates to Nigeria's regional hegemony. ECOWAS institutions have always depended on the largesse of Nigerian oil revenues, and Nigeria was reluctant to embrace "an organ that could circumscribe its role as the regional hegemon."[56] In addition, the legal underpinnings for a community court were lacking. ECOWAS Protocols did not have direct effect in national law,[57] and, as noted above, most were not implemented during the founding period.[58] In an environment in which member states neither implemented nor complied with Community rules, a supranational tribunal would have been "largely redundant."[59]

As governments prepared to re-launch ECOWAS in the early 1990s, a proposal to create a Community court was at last submitted to member states.[60] According to an ECOWAS Deputy Executive Secretary, the proposal originated with the member states' Interior Ministers, who wanted a court to resolve disputes relating to key ECOWAS instruments and programs, including the Protocol on Free Movement of Persons, Right of Residence and Establishment; the Trade Liberalisation Scheme; the Agricultural Cooperation Programme; and the Protocol on

---

Good Governance and Democracy, 19 African J. Int'l and Comp. L. 331 (2011).

[53] *See* Solomon Tamarabrakemi Ebobrah, *Legitimacy and Feasibility of Human Rights Realisation through Regional Economic Communities in Africa: The Case of the Economic Community of West African States* 100-02 (Ph.D dissertation, 2009) [Ebobrah Ph.D dissertation] (copy on file with authors) .

[54] 2001 Good Governance Protocol, *supra* note __, Article 39.

[55] 1975 Treaty, *supra* note __, Articles 11, 56.

[56] KUFUOR, INSTITUTIONAL TRANSFORMATION OF ECOWAS, *supra* note __, at 44.

[57] Iwa Akinrinsola, *Legal and Institutional Requirements for West African Economic Integration*, 10 L. & Bus. Rev. Am. 493, 503 (2004).

[58] See sources cited in note __ *supra* .

[59] Akinrinsola, *supra* note __, at 504.

[60] Kofi Oteng Kufuor, *Securing Compliance with the Judgements of the ECOWAS Court of Justice*, 8 Afr. J. Int'l & Comp. L. 1, 2 (1996) [Kufour, *Securing Compliance*].

Community Enterprises.[61] The renewed governmental support for a court in the early 1990s reflected a growing sense that further regional integration required a judicial body to resolve disputes and interpret legal rules.[62]

The 1991 Protocol that established the ECCJ created an international tribunal to carry out these tasks.[63] It authorized the Court to adjudicate two types of cases, both relating to "the interpretation and application" of ECOWAS legal instruments: (1) "disputes referred to it . . . by Member States or the Authority, when such disputes arise between the Member States or between one or more Member States and the Institutions of the Community;" and (2) proceedings instituted by a member state "on behalf of its nationals . . . against another Member State or Institution of the Community . . . after attempts to settle the dispute amicably have failed."[64] In other words, member states—and the Community institutions they controlled—intended to use the ECCJ to resolve their disagreements and settle disputes over the meaning of ECOWAS rules by issuing legally binding judgments.[65]

The 1991 Protocol also contained what in retrospect was a portentous decision. Anticipating the re-launch of ECOWAS two years later, the member states created the ECCJ as a permanent institution. At the time, member states were uncertain whether the Community needed an ad hoc or permanent judicial body. Officials in the ECOWAS Legal Affairs Directorate favored an ad hoc tribunal, which, they argued, would be less costly and appropriate for the small number of interstate disputes capable of judicial resolution. Member states, however, were more focused on expanding ECOWAS and creating new Community institutions. In this heady atmosphere of supranational expansion, "the Authority said, 'let's have a court.'"[66]

The 1991 Protocol did not, however, include another design feature favored by the supporters of supranational integration—a provision granting private actors direct access the ECCJ. As part of a review process leading to the restructuring of ECOWAS in the 1993 Treaty, the Authority appointed a Committee of Eminent Persons (CEP), chaired by General Yakubu Gowon of Nigeria, to assess the shortcomings of the founding period. The CEP's reports to the Authority stressed "[t]he importance of private actors and interest groups in the integration process," both in the interests of democratic legitimacy, and because "some of the Community decisions have to

[61] *ECOWAS Ministers of Justice Meet in Lagos*, Contact, Vol. 2, No. 3 at 15 (1990) (on file with authors) (reporting statements by ECOWAS Deputy Executive Secretary Adelino Queta).

[62] *Id.;* Akinrinsola, *supra* note __, at 507-08.

[63] The 1991 Protocol provided for a court comprised of seven "independent" judges, each of whom served for a five-year term renewable once. 1991 Protocol, *supra* note __, Article 3(1), 4(1). The judges were appointed "by the Authority and selected from a list of persons nominated by Member States" with qualifications similar to those of other international courts and tribunals. 1991 Protocol, *supra* note __, Article 3(1), 3(4).

[64] 1991 Protocol, *supra* note __, Article 9(2), (3). The 1991 Protocol also authorized the ECCJ to issue advisory opinions concerning the Treaty "at the request of the Authority, Council, one or more Member States, or the Executive Secretary and any other institution of the Community . . . ." *Id.* Article 10(1).

[65] Asante, *The Political Economy of Regionalism in Africa*, *supra* note __, at 68.

[66] Interview with ECOWAS Legal Affairs Directorate A, 7 March 2011, Abuja Nigeria.

be implemented either directly or indirectly" by these actors.[67] The CEP also expressed strong support for granting individuals and interest groups direct access to the Court:

> Where however a Community citizen alleges a breach or denial of a right conferred on him by a Community legislation, a Treaty provision or a protocol, it should be possible for him to seek redress in the national Court or the Community Court of Justice. . . . This proposal would also require amendment to Article 9 of the [1991] Protocol . . . . Under the present provisions, nationals do not have a *locus standi* in the Court of Justice. Member States have to act on their behalf, and even so, only in cases relating to the interpretation and application of the provisions of the Treaty, "after attempts to settle the dispute amicably have failed."[68]

We do not know why the member states did not act on the CEP proposal. Perhaps it was politically expedient to establish the court using a template that had previously been vetted and approved by the Authority. Or perhaps the member states, especially Nigeria, did not in fact want a tribunal with a design feature that would enhance the supranational aspects of ECOWAS or that constrained their freedom of action.[69]

The delay in establishing the ECCJ as a working court is consistent with the latter explanation. The 1991 Protocol did not formally enter into force until November 1996.[70] Even then, the ECCJ existed only on paper. The situation changed in 1999 when Olusegun Obasanjo assumed the Presidency of Nigeria. Obasanjo increased the country's international profile, in part by reviving its leadership of the Community.[71] With the region's economic powerhouse once again favoring integration, ECOWAS institutions—including the Court—became a priority. In December 2000, the member states appointed the first seven judges, who were sworn into office on January 31, 2001. The judges picked Hansine Donli from Nigeria as the Court's President. Donli explained

---

[67] ECOWAS, *Draft Report of the ECOWAS Committee of Eminent Persons*, ECW/CEP/TREV/VI/2 at 28 (June 1992) [Draft CEP Report] (copy on file with authors); Final CEP Report, *supra* note __, at 23-24 (containing a very similar statement).

[68] Final CEP Report, *supra* note __, at 20-21; Draft CEP Report, *supra* note __, at 20.

[69] ASANTE, THE POLITICAL ECONOMY OF REGIONALISM IN AFRICA, *supra* note __, at 68 (explaining that the member states created the ECCJ to help resolve "technical problems in interpreting" ECOWAS legal rules, not to "handle matters involving delicate national interests"); KUFUOR, INSTITUTIONAL TRANSFORMATION OF ECOWAS, *supra* note __, 54, 56 (stating that "there was probably very little real demand for supranational institutions and organizations within ECOWAS" in 1993); RICHARD FRIMPONG OPPONG, LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA 119 (2011) [OPPONG, LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA] (arguing that the "institutional structure of the community courts" in Africa, including the ECCJ, is shaped by a political environment in which governments maintain "a fetishist attachment to state sovereignty").

[70] The Protocol was provisionally effective from the date of its conclusion in 1991, but it did not enter into force "definitively" until it had been ratified by seven member states. 1991 Protocol, *supra* note __, Article 34.

[71] *E.g.*, JOHN ILIFFE, OBASANJO, NIGERIA AND THE WORLD 129, 217-24 (2011) (discussing Obasanjo's efforts to restore Nigeria's international relationships and his support for revitalizing ECOWAS); J. Shola Omotola, *From Importer to Exporter: The Changing Role of Nigeria in Promoting Democratic Values in Africa*, 31, 39 in AFRICAN POLITICS: BEYOND THE THIRD WAVE OF DEMOCRATISATION (Joelien Pretorius, ed. 2008) (discussing Nigeria's renewed leadership of ECOWAS under the Obasanjo regime).

that she was a natural choice to lead the Court. As a Nigerian with a history of contacts in the country, it would be easier for her to arrange the infrastructure that the ECCJ required.[72]

Among the Court's initial tasks were finding courtrooms and office space for the judges, the Chief Registrar, and their staff.[73] The judges secured the construction of a new building in Abuja, paid for by Nigeria. They next began outreach efforts to attract cases.[74] According to Donli, there was widespread lack of awareness among the member states about "the need to seek [the Court's] advice with respect [to] the different problems they will be facing, arising from interpretation of the Treaty and Protocols."[75] Notwithstanding these outreach efforts, however, the ECCJ remained idle for nearly three years after opening its doors for business.

II. EXPANDING THE JURISDICTION AND ACCESS RULES OF THE ECCJ

The ECCJ was created to adjudicate interstate disputes about ECOWAS economic rules. But as human rights advocates became more involved in regional policymaking following the humanitarian interventions of the 1990s—an involvement made possible by the Community's new openness to civil society—they saw an opportunity to use an existing institution to promote their objectives. The NGOs focused on a provision in the 2001 Democracy and Good Governance Protocol, which suggested that the not-yet-operational ECOWAS Court might one day hear "cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed."[76] In 2001, such a possibility seemed remote. This Part explains how advocates transformed this vague promise into a reality.

The opportunity for change presented itself following the ECCJ's first decision—*Olajide Afolabi v. Federal Republic of Nigeria*—a case involving Nigeria's blatant noncompliance with ECOWAS economic rules.[77] We first review the decisions and then explain how ECCJ judges, civil society groups, and ECOWAS officials mobilized to expand the Court's jurisdiction and access rules. Next we show how these actors intentionally created a human rights court with

---

[72] Interview with judges at the headquarters of the ECOWAS Community Court of Justice, March 11, 2011, Abuja, Nigeria [Interview with ECCJ Judges]; *Adelanwa Bamgboye, Nigeria: Some Judges are Strong Even at 80 – Hansine Donli*, Daily Trust (Nig.) Sept. 28 2010, http://allafrica.com/stories/printable/201009280476.html.

[73] The ECCJ was initially located in Lagos, Nigeria. It moved to its permanent headquarters the Nigerian capitol of Abuja after that country was designated in 2002 as the host country of the Court and of the ECOWAS Parliament. Adewale Banjo, *The ECOWAS Court and the Politics of Access to Justice in West Africa*, 32 Afr. Devel. 69, 77 (2007).

[74] Interview with ECCJ Judges, *supra* note __; *see also* Lillian Okenwa, *Law Personality: 'ECOWAS Court Jurisdiction Will Be Expanded'*, AllAfrica.com, Sept. 21, 2004 (interview with ECCJ President Hansine Donli describing outreach efforts by ECCJ judges).

[75] Banjo, *supra* note __, at 77.

[76] 2001 Good Governance Protocol, *supra* note __, Article 39.

[77] *Olajide Afolabi v. Federal Republic of Nigeria*, ECW/CCJ/APP/01/03 (complaint filed Oct. 10, 2003), ECW/CCJ/JUD/01/04 (judgment issued Apr. 27, 2004) [*Afolabi*], *reprinted in* 2004-2009 Community Court of Justice, ECOWAS Law Report 1 (2011).

design features quite different from other regional human rights tribunals. We conclude by discussing the conflation of human rights and economic freedoms.

A. The *Afolabi* Case: Justice Denied for Private Litigants

Olajide Afolabi was a Nigerian trader who had entered into a contract to purchase certain goods in the Benin Republic, which he intended to transport to Nigeria. Afolabi was unable to complete the transaction when Nigeria unilaterally closed the border between the two countries. Afolabi argued that Nigeria's action was an unambiguous violation of the 1993 Treaty,[78] an ECOWAS Protocol guaranteeing the right to free movement of persons and goods,[79] and Article 12 the African Charter on Human and Peoples' Rights.[80] He asked the ECCJ to order Nigeria to refrain from future border closures and to compensate him for his financial losses and litigation costs.

Nigeria responded by challenging the Court's jurisdiction and Afolabi's standing to bring the suit. The government argued that 1991 Protocol authorizes only member states and ECOWAS institutions, not private parties, to file complaints with the Court. Afolabi countered by invoking a provision in the 1991 Protocol that authorized governments to initiate proceedings on behalf of their nationals. The provision stated that "[a] member State *may*, on behalf of its nationals, institute proceedings against another member State."[81] Afolabi asserted that the word "may" permits states to raise such cases but did not preclude the ECCJ from receiving applications from individuals.[82] Afolabi also argued that ECCJ review of complaints from private actors was especially appropriate "where a party is instituting action against his Country." In such cases, Afolabi claimed, "the Member state cannot represent the party because the Member State cannot be both the plaintiff and the defender."[83] Lastly, Afolabi invoked "the principles of equity"[84] in the 1991 Protocol to support an expansive interpretation of the Court's jurisdictional rules to allow individual access.[85]

---

[78] 1993 Treaty, *supra* note __, Article 3(2)(d)(iii) (identifying the "aims and objectives" of ECOWAS as including "the removal, between Member States, of obstacles to the free movement of persons, goods, service and capital, and to the right of residence and establishment"); *id.* Article 4(g) (including among the Community's "fundamental principles" the "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights").

[79] 1979 Free Movement Protocol, *supra* note __, Article 2 (granting Community citizens a "right of entry" to other ECOWAS member states).

[80] African Charter, *supra* note __, Article 12(1) ("Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.").

[81] 1991 Protocol, *supra* note __, Article 9(3) (emphasis added).

[82] *Afolabi*, *supra* note __, ¶¶ 14, 23.

[83] *Id.* ¶ 15.

[84] 1991 Protocol, *supra* note __, Article 9(1) ("The Court shall ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty.").

[85] *Afolabi*, *supra* note __, ¶ 41.

The ECCJ rejected each of these arguments and dismissed the suit. The judges acknowledged that Afolabi's complaint "rais[ed] a serious claim touching on free movement and free movement of goods and his rights to challenge an infringement upon his person."[86] But they emphasized that the Court's jurisdiction must be expressly provided for in an ECOWAS legal instrument. Article 9 of the 1991 Protocol is "plain" and "unambiguous" on this issue: only states can institute proceedings on behalf of their nationals.[87] The provision must therefore be "applied as written," even if the result—effectively insulating member states against suits by their own nationals alleging violations of ECOWAS rules—seems "repugnant," "absurd[]" or "harsh."[88]

The ECCJ also rejected Afolabi's plea to broadly interpret the word "equity" in the 1991 Protocol. The Court compared this provision to a similar clause in EC Treaty concerning the European Court of Justice (ECJ),[89] which, according to the ECCJ, "activists [sic] judges" have applied to "define the role of the [ECJ] very broadly in the interests of justice," "to extend its review on jurisdiction to cover bodies which were not listed in the Treaty," and "to fill in gaps in treaties."[90] The ECCJ candidly concluded that, because "some of the [ECJ's] decisions [have] attracted criticisms," "[w]e therefore do not want to tow on the same line."[91]

The *Afolabi* case was a paradigmatic example of the physical and legal barriers confronting the region's importers and exporters. It also cast in sharp relief the political and legal challenges that ECOWAS faces in garnering respect for Community rules. Nigeria, the region's hegemon, had imposed a trade barrier that harmed its own traders and those of from other member states. But there was little incentive for those countries to challenge Nigeria over its border closure. And because the system did not allow private actors to file complaints or national judges to refer cases, there was no way for a suit such as Afolabi's to reach the ECCJ.

The ECCJ's response was a model of judicial restraint. The Court—which had actively publicized its existence to potential litigants and encouraged the filing of cases—was faced with a complaint from a highly sympathetic plaintiff involving a serious obstacle to intraregional trade. It was also aware that the ECJ, the mother of all community courts, had adopted a purposive interpretation of its founding treaty to grant direct access to private parties in similar circumstances.[92] Notwithstanding these factors favoring an expansive ruling, the judges strictly interpreted the 1991 Protocol, concluding, in effect, that ECOWAS political bodies must expressly grant the ECCJ jurisdiction to hear suits from private actors.

---

[86] *Id.* ¶ 55.

[87] *Id.* ¶¶ 59, 61.

[88] *Id.* ¶¶ 37, 54.

[89] Treaty Establishing the European Economic Community, Article 164, Mar. 25, 1957, 298 U.N.T.S. 3, 90 (requiring the ECJ to "ensure that in the interpretation and application of [the] Treaty [of Rome], the law is observed").

[90] *Afolabi*, *supra* note __, ¶ 56.

[91] *Id.*

[92] *E.g.*, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, [1963] E.C.R. 1, 12.

B. The Campaigns to Redesign the ECCJ

For many, the dismissal of the *Afolabi* suit was highly unsatisfactory and exposed a basic design flaw in the legal architecture of ECOWAS. Following the ruling, ECCJ judges, NGOs, and ECOWAS officials launched a coordinated campaign to expand the ECCJ's jurisdiction, access rules, and remedial powers. The campaign succeeded. Yet ironically, the institutional reforms did not address the unsatisfactory outcome in *Afolabi*. Instead, the changes reoriented the ECCJ's mandate to focus on human rights complaints from individuals. As we explain, the focus on human rights issues eclipsed efforts to allow private actors to challenge member states' noncompliance with ECOWAS economic rules.

1. Mobilization by ECCJ Judges

The ECCJ first confronted the problems created by the 1991 Protocol's narrow access rules shortly after opening its doors for business in 2001. As one judge explained: "Individuals started to come and asked us if they had access to the Court. They were surprised because ECOWAS has Protocols that affected them—such as free movement of people and goods—and they didn't understand how these Protocols were supposed to be effective." The judges explained that individuals "had to ask their Attorney Generals to bring cases on their behalf." But they also recognized that "[i]ndividuals can't really ask the Attorney General to bring a case against their own government," and that government lawyers "can't bring cases on behalf of everyone who has a problem."[93]

The judges discussed how to remedy these deficiencies, relying on a clause in the 1991 Protocol that allows the ECCJ President to propose changes to the Court's structure.[94] They were considering the issue when Afolabi filed his complaint in October 2003. The judges appreciated the seriousness of Afolabi's allegations. But they also recognized that the Protocol precluded them from reviewing complaints filed by private parties. Nevertheless, the case's sympathetic facts "assisted us in making a proposal" to expand the Court's jurisdiction and access rules.[95]

The ECCJ published a booklet that summarized the legal arguments of both parties—including Afolabi's logically persuasive reasons for allowing private party access—as well as the judgment dismissing the suit. The Court distributed the booklet widely, both to show that they had finally issued a decision and to highlight the serious flaws in the ECOWAS legal system.[96] Formally,

---

[93] Interview with ECCJ Judges, *supra* note __; *see also* Tony Anene-Maidoh, *Overview of the Rules of Procedure of the ECOWAS Court of Justice* 232, 234 in CONFERENCE ON LAW AND INTEGRATION IN WEST AFRICA, *supra* note __ (statement by ECCJ Chief Registrar that "the problem of lack of direct access . . . by individuals was of great concern to the court because it had an adverse effect on its operations").

[94] 1991 Protocol, *supra* note __, Article 33(1) (providing that "[a]ny member state or the President of the Court may after Consultation with the other members, submit proposals for amendments of this Protocol").

[95] Interview with ECCJ Judges, *supra* note __.

[96] Officials with Nigerian Federal Ministry of Trade and Commerce showed us a copy of the booklet and indicated that they were aware of the *Afolabi* case and the Court's efforts to expand access to individuals and private actors. Interviews at the Federal Ministry of Trade and Commerce of Nigeria, March 8, 2011, Abuja, Nigeria.

the ECCJ was publicizing its rulings and promoting the transparency of the judicial process. But the wide dissemination of the booklet also helped to support the judges' public campaign to expand the Court's jurisdiction.

As previously explained, the *Afolabi* decision applied a narrow, formalist analysis of ECOWAS legal texts. In striking contrast, ECCJ judges raised expansive policy arguments in extrajudicial statements advocating for an overhaul of the 1991 Protocol. On the same day that the Court released the *Afolabi* judgment, it also issued a press release urging governments "to enable individuals to bring actions before the Court[,] as there are cases which Member States cannot bring on behalf of [their] nationals."[97] During the next several months, the judges continued to publicize the need for Court reforms. For example, in a September 2004 conference of the Chartered Institute of Arbitrators in Abuja, ECCJ President Donli criticized the 1991 Protocol as "narrow and limited," adding that "a situation where nationals cannot directly file cases, but can only be represented by their countries was not good enough."[98] Similarly, Justice Aminata Malle Sanogo of Mali, in a speech to the Nigerian Bar Association, labeled the lack of private litigant access as "a major problem" that "had the potential of rendering [the ECCJ] redundant[,] as no member state or institution of ECOWAS [had] approached the Court on any issue. It also amounted to a denial of an important right to the Community citizens."[99]

2. Mobilization by Civil Society

As explained above, attention to human rights in ECOWAS increased during the humanitarian interventions of the early 1990s.[100] One human rights attorney whom we interviewed noted that the interventions "reorient[ed] thinking" regarding the role of the Community, highlighting the fact that national sovereignty was no longer an absolute barrier to Community action in this area.[101] Another advocate noted that the atrocities committed by ECOMOG forces increased the political salience of human rights issues in a way that compelled governments to respond.[102] In the same period, civil society groups in West Africa were beginning to mobilize outside of the security context, capitalizing on the shift to more democratically-oriented governments and strengthening their ties to transnational NGOs such as Amnesty International.[103]

---

[97] Lillian Okenwa, *ECOWAS Court Not Open to Individual Litigants*, This Day (Nig.), April 28, 2004, *available at* 2004 WLNR 7114967; *see also ECOWAS Throws Out Suit Against Nigeria Over Land Border Closure With Benin*, Vanguard (Nig.), Apr. 28, 2004, *available at* 2004 WLNR 7109799.

[98] Lillian Okenwa, *Broaden ECOWAS Court's Jurisdiction*, This Day (Nig.), Sept. 2, 2004, 2004 WLNR 7434626.

[99] Justice Aminata Malle Sanogo, *Practice and Procedure in ECOWAS Court*, Paper presented at the 2007 Annual General Conference of the Nigerian Bar Association at Ilorin, Kwara State, Nigeria, Aug. 26-31, 2007, quoted in A.O. Enabulele, *Reflections on the ECOWAS Community Court Protocol and the Constitutions of Member States*, 12 Int'l Community L. Rev. 111, 117 (2010) [Enabulele, *Reflections on the Court Protocol*].

[100] *See supra* Part I(C).

[101] Telephone interview with Human Rights Advocate A, Jan. 11, 2011.

[102] Telephone interview with Human Rights Advocate B, *supra* note__.

[103] Interview with Human Rights Advocate F, 7 March 11, Abuja, Nigeria [Interview with Human Rights Advocate F] (highlighting the importance of the visit of Amnesty International's executive director to West Africa).

When the ECCJ dismissed the *Afolabi* case, these groups seized the opportunity to make good on the member states' pledge in the Good Governance Protocol to give the Court jurisdiction over human rights issues.[104] The timing was also propitious. Mohammed Ibn Chambas, ECOWAS' Executive Secretary from 2002 to 2006 (and later the first President of the ECOWAS Commission from 2007 to 2010), had recently committed to making the Community a "people-centered" institution that was even more open to civil society.[105]

Shortly after the Court handed down the *Afolabi* decision, leaders of the West African Bar Association (WABA) met with ECCJ judges and staff. Everyone "agreed that we needed to do something to review the Court's founding protocol" and that "we needed a Court that could address human rights issues."[106] WABA attorneys then consulted with other NGOs and ECOWAS Commission officials to develop a proposal to revise the ECCJ's jurisdiction. All of the stakeholders came together in Dakar, Senegal in October 2004 at a "Consultative Forum on Protecting the Rights of ECOWAS citizens through the ECOWAS Court of Justice" organized by the Open Society Initiative for West Africa.[107] Those attending the Forum "agreed to make recommendations for a revision of the [1991] Protocol . . . that would include individual access and human rights."[108] The Forum "produced a Declaration on the proposed amendments to the ECOWAS Court of Justice Protocol" which urged member states "to ensure access to justice to citizens" of the Community and to bring the Protocol into force as a matter of urgency.[109]

---

[104] 2001 Good Governance Protocol, *supra* note __, Article 39 (stating that the jurisdiction of the ECCJ "shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights"); Interview with Human Rights Advocate C *supra* note__; Telephone interview with Human Rights Advocate B, *supra note* __.

[105] Interview with Mohamed Ibn Chambas, Executive Secretary of ECOWAS, U.N. Integrated Regional Information Network (Mar. 12, 2002), *available at* http://www.uneca.org/fda2001/coverage/fr_inthenews/020312_irin.pdf (acknowledging that ECOWAS needs to do more to promote the "involvement of civil society" because civil society participation "fosters greater public awareness about ECOWAS, its activities, and it brings home to the ordinary people the fact that ECOWAS is for the people of West Africa"); Interview with Human Rights Advocate H,10 March 2011, Abuja, Nigeria (noting that ECOWAS officials often invoked the importance of "people-centered regional integration" in speeches about the Community).

[106] Interview with Human Rights Advocate C, *supra* note ___; *see also* Femi Falana, *The Community Court of Justice, ECOWAS and the Experiences of Other Regional Courts* 143, 145 in CONFERENCE ON LAW AND INTEGRATION IN WEST AFRICA, *supra* note __ (after the *Afolabi* decision, the "West African Bar Association collaborated with the Court in the campaign" to give private actors direct access to the ECCJ "for the enforcement of their human rights").

[107] *See* Consultative Forum on protecting the rights of ECOWAS citizens through the ECOWAS Court of Justice, Dakar, Senegal, Oct. 18-20, 2004, http://aros.trustafrica.org/index.php/ECOWAS_Community_Court_of_Justice. In attendance at this key meeting were ECCJ judges, members of WABA, human rights lawyers from across the sub-region, the London-based NGO Interights, and ECOWAS Commission staff.

[108] Interview with Human Rights Advocate C, *supra* note __.

[109] Consultative Forum, *supra* note __; *see also* Nneoma Nwogu, *Regional Integration as an Instrument of Human Rights, supra* note __, at 352 ("Added pressure on the ECOWAS Authority also came from international and civil society organizations such as Open Society Justice Initiative, Interights, and West African Human Rights Forum.").

Civil society groups recognized that they "had to mobilize" to ensure the proposal's adoption.[110] The venue for the Consultative Forum, Dakar, Senegal, had been strategically chosen. Senegal was the only nation in West Africa that had never been ruled by a military dictatorship.[111] WABA leaders "met with the President of Senegal and told him that we wanted to have his support."[112] The attorneys argued that "we should not have a Community Court that was redundant" (meaning unused and superfluous), and that a court was "especially needed for countries whose legal and judicial systems are weak."[113] The Senegalese President agreed to support the proposal at the next meeting of the ECOWAS Authority, scheduled for January 2005.

The groups then launched a coordinated campaign to prepare the groundwork for the meeting. To counter potential opposition, WABA and its allies consulted sympathetic officials from the Ministries of Justice and Ministries of Integration in several states.[114] They also worked with the ECOWAS Legal Affairs Directorate, which was preparing a draft text of the new protocol. The lobbying continued up to the day when the Authority approved the Protocol by consensus.[115]

Our research reveals that the critical discussions about reforming the ECCJ primarily involved human rights NGOs rather than trade or industry associations. Many of these NGOs had been in active dialogue with ECOWAS policymakers as part of the Community's outreach to civil society. They were also well organized, both in West Africa and transnationally, in contrast to trade and market liberalization groups.[116] Focusing the reform campaign on human rights may also have been a strategic decision, reflecting an implicit understanding that the political climate would not support giving the Court the power to review noncompliance with ECOWAS economic rules. This ultimately led to human rights concerns to eclipse economic issues.

3. Mobilization by ECOWAS Officials

ECOWAS officials also supported an expansion of the ECCJ's jurisdiction and access rules. The ECOWAS Executive Secretariat had long supported efforts to make ECOWAS more relevant to civil society and to add human rights protection to Community legal instruments. Giving the

---

[110] Interview with Human Rights Advocate C, *supra* note__; Telephone interview with Human Rights Advocate B *supra* note __.

[111] Interview with Human Rights Advocate C, *supra* note __.

[112] *Id.*

[113] *Id.*; *see also* Femi Falana, *West Africa: Public Interest Litigation in Region*, Vanguard (Nig.), Dec. 17, 2009, available at http://allafrica.com/stories/printable/200912170989.html.

[114] Interview with Human Rights Advocate C, *supra* note __.

[115] ECOWAS, Community Court of Justice, *Supplementary Protocol (A/SP.1/01/05)* 15-17 (Jan. 19, 2005) (pamphlet reproducing the original text of 2005 Supplementary Protocol, including signatures of fifteen heads of state) (copy on file with authors).

[116] OPPONG, LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA, *supra* note __, at 148 (describing the "minimal participation of interest groups in Africa's economic integration processes" in contrast to widespread NGO activity in human rights).

ECCJ a human rights mandate provided a way to "institutionalize" the Community's commitment to human rights.[117]

The Secretariat was also quite frustrated by the Court's budgetary needs. As explained above, the ECCJ was established as a permanent judicial body. But with no cases on its docket, the Court was, in the words of one official, a "huge body with nothing to do."[118] The Secretariat wanted the Court to "pay its own way" by giving it enough work to justify the large expenditure of Community resources that the judges, staff, and facilities were consuming.[119] When the ECCJ decided the *Afolabi* case in 2004, the officials saw an opportunity for reform. They supported the judges' public campaign to revise the 1991 Protocol, attended the Consultative Forum in Senegal, and prepared a draft text of the 2005 Supplementary Protocol.[120]

The support of ECOWAS officials greatly increased the likelihood that the advocacy efforts of ECCJ judges and human rights NGOs would succeed. In interviews with the Legal Affairs Directorate, we asked whether the proposal to restructure the ECCJ created controversy with the member states. "They trusted us" was the response. "When we draft [legal] texts, we consult a lot. We write memoranda that explain why we are making the proposal. We exchange views with the member states. Member states comment on the draft proposals before we convey any draft legislation. We incorporate all of this input before the actual meeting where the proposal is discussed."[121] In short, ECOWAS officials spent the second half of 2004 carefully laying the groundwork for the expansion of the ECCJ's jurisdiction and access rules.

* * * * *

In sum, these three coordinated mobilization campaigns led to a radical revision of the ECCJ's authority. To be sure, the power to adjudicate human rights claims by private parties was not the only institutional change brought about by the 2005 Supplementary Protocol. The Protocol also authorized the Court to interpret ECOWAS conventions, protocols, regulations, directives, and decisions; to determine "the failure by Member States to honour their obligations" under those legal instruments; and to hear damage actions against Community institutions or officials "for any action or omission in the exercise of official functions."[122] The Protocol also authorized national courts to refer cases to the ECCJ when "an issue arises as to the interpretation of a provision of the Treaty or other Protocols or Regulations."[123] By far the most important changes, however, concerned the ECCJ's expansive human rights jurisdiction and access rules. The next section analyzes those changes in more detail.

---

[117] Nwogu, *Regional Integration as an Instrument of Human Rights*, *supra* note __, at 350.

[118] Interview with ECOWAS Legal Affairs Directorate A, *supra* note __.

[119] *Id.*; Interview with ECOWAS Legal Affairs Directorate B, Abuja, Nigeria, March 7, 2011.

[120] Interview with ECOWAS Legal Affairs Directorate A, *supra* note __; Interview with ECOWAS Legal Affairs Directorate B, *supra* note __.

[121] Interview with ECOWAS Legal Affairs Directorate B, *supra* note __.

[122] 2005 Protocol, *supra* note __, Article 3 (revising Article 9(1)(a)(b)(d) & (g) of the 1991 Protocol).

[123] *Id.* Article 4 (inserting a new Article 10(e) into the 1991 Protocol).

C. The Distinctive Features of the ECCJ's Human Rights Jurisdiction and Access Rules

With the provisional entry into force of the 2005 Supplementary Protocol, the ECCJ acquired the authority "to determine cases of violation of human rights that occur in any Member State" in response to complaints from "individuals" seeking "relief for violation of their human rights."[124] On first impression, these provisions seem straightforward. In reality, they mask several design features that distinguish the ECCJ from other regional human rights tribunals.

First, the ECCJ is unusual for a young human rights court in granting direct access to individuals. For the vast majority of cases in the African and American human rights systems (and in the European system prior to 1998), private litigants submit their allegations to a quasi-judicial commission that screens complaints and, for those petitions it deems admissible, issues nonbinding recommendations. Review by a regional human rights court with the power to issue legally binding judgments occurs only if a state has voluntarily accepted the court's jurisdiction and, in addition, if the Commission or the state refers the case for a judicial resolution.[125]

This structure—a commission to vet complaints, optional judicial jurisdiction, and limiting the actors who can refer cases to the court—provides states with multiple layers of political protection. The European Commission on Human Rights, for example, dismissed the vast majority of complaints as inadmissible during the European Convention's early years.[126] In the Inter-American system, the Commission was reluctant to refer any cases to the Inter-American Court during the first decade of that tribunal's existence.[127] And in the African Union system—the youngest of the three regional human rights regimes—a court did not exist until 2006, and the ability of private litigants to file suit directly against states that have accepted the African Court's jurisdiction remains extremely limited.[128]

---

[124] *Id.* Article 3 (revising Article 9(4) of the 1991 Protocol); *id.* Article 4 (revising Article 10(d) of the 1991 Protocol).

[125] Thomas Buergenthal, *The Evolving International Human Rights System*, 100 Am. J. Int'l L. 783, 791-801 (2006).

[126] A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN EUROPE 264, 273 (3d ed. 1993) (characterizing the Europe Commission's screening procedures as strict and noting that 90% of cases were dismissed at the admissibility stage); see also Henry G. Schermers, *Acceptance of International Supervision of Human Rights*, 12 Leiden J. Int'l L. 821, 825 (1999) (explaining that, between 1954 and 1961, the Commission declared admissible less than .5% of 1307 applications and that the ECtHR issued only seven judgments in its first decade of operation).

[127] LOUIS HENKIN ET AL., HUMAN RIGHTS 572 (2d ed. 2009) (explaining that "for nearly a decade after the [Inter-American] Court's establishment, the Commission declined to refer any contentious cases" with the result that the Court had scant work during its early years.").

[128] Where states have both ratified the Protocol accepting the Court's jurisdiction *and* filed a separate declaration granting private access to the court, private litigants may file complaints directly with the African Court of Human and Peoples' Rights after domestic remedies have been exhausted. Although all 53 African nations are members of the African Charter, only 26 have accepted the Court's jurisdiction and only five of these countries—Burkina Faso, Ghana, Malawi, Mali, and Tanzania—have agreed to allow private litigants bring cases directly to the African Court. List of Countries Which Have Signed, Acceded to, Ratified the Protocol, *available at* http://www.au.int/en/sites/default/files/992achpr.pdf.

Second, the 2005 Supplementary Protocol is unusual in that it does not indicate which human rights the ECCJ can adjudicate. Other regional human rights systems are associated with specified human rights conventions, so that courts and commissions apply an enumerated set of rights.[129] By not specifying a human rights instrument, the Supplementary Protocol avoided provoking political controversy about which human rights the ECCJ would review. However, the absence of a catalogue of human rights in ECOWAS also "present[ed] a challenge for the Court in terms of determining what normative instruments should be applied."[130]

Third, "[t]he drafters of the [2005] Supplementary Protocol clearly decided against making the exhaustion of local remedies a condition precedent to the accessibility" of the ECCJ in human rights cases."[131] In all other international human rights systems, by contrast, a litigant must first seek relief in a domestic venue, for example in national courts or administrative bodies.[132] If a petitioner does not exhaust such remedies, or explain why they are unavailable, ineffective or insufficient, the international tribunal will dismiss her complaint as inadmissible.[133] Described by a leading West African human rights attorney as "the procedural pivot of human rights redress procedures,"[134] the exhaustion requirement serves several functions. At the most basic level, "exhaustion provides a compromise between state sovereignty and international supervisory mechanisms."[135] It reflects a belief that "human rights are best protected at the domestic or national level," and that national actors should "have a first shot at addressing the complaints raised."[136] An exhaustion rule also reduces "forum shopping and unnecessary rivalry between municipal and international courts," as well as the risk of conflicting or inconsistent judicial

[129] Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. Pa. L. Rev. 285, 301 (1999).

[130] Solomon Tamarabrakemi Ebobrah, *Litigating Human Rights before Sub-Regional Courts in Africa*, 17 Afr. J. Int'l & Comp. L. 79, 93 (2009) [Ebobrah, *Litigating Human Rights*]. This challenge is enhanced by the 1991 Protocol's instruction that the ECCJ "shall apply, as necessary, the body of laws as contained in Article 38 of the Statute of the International Court of Justice." 1991 Protocol, *supra* note __, Article 19.

[131] *Musa Saidykhan v. The Republic of the Gambia*, ECW/CCJ/RUL/05/09 ¶ 39 (30 June 2009).

[132] The African Charter provides the African Commission "can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged." African Charter, *supra* note __, Article 50; *see also* Nsongurna Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 Am. J. Int'l L. 1 (2003).

[133] According to the African Commission, "a remedy is *available* if the petitioner can pursue it without impediment; it is deemed *effective* if it offers a prospect of success; and it is found *sufficient* if it is capable of redressing the complaint." *Dawda Jawara v. the Gambia, Afr. Comm'n Hum. & Peoples' Rts*., Comm. No. 147/95 & 149/96 ¶ 31, 3 Ann. Activity Rep., Annex V (1999-2000).

[134] Chidi Anselm Odinkalu, *Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa*, 47 J. Afr. L. 1, 22 (2003).

[135] Ebobrah, *Litigating Human Rights*, *supra* note __, at 92; *see also* OPPONG, LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA, *supra* note __, at 52 (noting that the exhaustion rule "serves as a source of deference to states; it upholds and protects state sovereignty").

[136] Ebobrah, *Litigating Human Rights*, *supra* note __, at 88.

decisions.[137] And it prevents international courts and review bodies from being overburdened by a flood of human rights complaints.[138]

Taken together, these three design features of the 2005 Supplementary Protocol—direct access by individuals, open-ended legal norms, and non-exhaustion of domestic remedies—give the ECCJ expansive authority to scrutinize the human rights practices of West African governments. These features also dramatically enhance the legal and political salience of the ECCJ in West Africa.[139] Litigants can bypass national courts and immediately file suit in Abuja, enabling ECOWAS judges to adjudicate their complaints within months or even weeks after the alleged violations occurred. Human rights attorneys, NGOs, and commentators identified the speedy review of complaints and the power to issue legally binding judgments as key factors in choosing to file complaints with the ECCJ rather than with the African Commission or national courts.[140] Yet these same features also create the potential for conflicts between ECCJ judges and their domestic counterparts, an issue we address in Part III.[141]

Why did ECOWAS member states give the ECCJ this broad and distinctive authority, especially when those same states have insisted on a more sovereignty-protective design for the African Court and Commission? The member states' decision is especially surprising in light of the 2001 Democracy and Good Governance Protocol, which envisioned that access to the ECCJ in human rights cases would occur only "after all attempts to resolve the matter at the national level have failed."[142] Our interviews with key stakeholders suggest several plausible explanations for this change of policy.

First, human rights NGOs lobbied hard for these design features, in particular the omission of an exhaustion of local remedies requirement. They argued that exhaustion would make it too difficult for West Africans to access the ECCJ, especially since most countries "had weak

[137] A.O. Enabulele, *Sailing against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice*, 10 U. Botswana L.J. 57, 58 (2010).

[138] Ebobrah, *Litigating Human Rights*, *supra* note __, at 92.

[139] One indication of this salience is the increasing discussion of ECCJ cases in the West African news media. A search for "ECOWAS Court" and "Community Court of Justice" on AllAfrica.com—a news aggregator web service—yielded the following number of "hits" each year:

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
6	4	2	12	50	28	47	61	53	67	79	90

[140] Interviews with Human Rights Advocates A, B, C and G, Abuja Nigeria and by phone, February and March 2011. Ebobrah, *Developments in 2010*, *supra* note __, at 238 ("Set against the delay that is commonly associated with a procedure before the African Commission, there exists a sure motivation for prospective litigants in West Africa to approach ECCJ rather than the African Commission.").

[141] Enabulele, *Reflections on the Court Protocol*, *supra* note __, at 115 (describing the danger of "conflicts and unhealthy rivalry between [the ECCJ] and national courts and warning that "national courts will naturally withhold cooperation with an international court that unlawfully invades their jealously guarded jurisdiction").

[142] 2001 Good Governance Protocol, *supra* note __, Article 39.

judiciaries" and lacked "any functioning human rights apparatus."[143] They also highlighted their frustrations with the African Charter, in particular the African Commission's slow review of complaints and the low levels of compliance with its nonbinding recommendations.[144] Second, ECOWAS officials were receptive to the advocates' suggestions. They recognized that it was difficult for individuals to access national courts in human rights cases. And they understood that an exhaustion rule would do little to remedy the lack of cases on the ECCJ's docket.[145]

Two additional factors influenced the content of the Protocol. First, governments assumed that the references to the African Charter in the 1993 Treaty and in other ECOWAS legal texts would lead the ECCJ to view the Charter as the Community's primary source of human rights norms.[146] Second and more importantly, they viewed the absence of an exhaustion requirement as an experiment that could be revisited if the system proved to be unworkable. The fact that the 2005 Supplementary Protocol—like other ECOWAS Protocols—entered into force on a provisional basis was thus crucial to overcoming member states' skepticism about giving individuals direct access to the ECCJ in human rights cases.[147]

D. The Strategic Conflation of Human Rights and Economic Freedoms

In Part I, we explained the redeployment of ECOWAS from a regional integration project primarily aimed at promoting intraregional trade and economic development into an organization that also encompasses security, good governance, and human rights. The focus on human rights slipped gradually into the language of the Community's security initiatives. The early protocols on nonaggression and mutual defense did not mention human rights at all.[148] And the ECOMOG intervention in Liberia was not initially justified in human rights terms but as a regional security initiative.[149] References to human rights first appeared in the 1993 Revised Treaty, and they became more prominent in the 1999 Conflict Prevention Protocol and the 2001 Good Governance Protocol.[150] Seen from this perspective, the 2005 Supplementary Protocol is a

[143] Human Rights Advocate C, *supra* note __; Interview with Human Rights Advocate I, Abuja, Nigeria March 9, 2011.

[144] Interview with Academic A, Abuja, Nigeria and by telephone, February and March 2011; *see also* Frans Viljoen, *A Human Rights Court for Africa, and Africans*, 30 Brook. J. Int'l L. 1, 18 (2004) ("The African Commission . . . has serious problems with delays in finalizing its communications. Often, a change of government has already taken place by the time the African Commission has reached a finding and recommended a remedy.").

[145] Interview with ECOWAS Legal Affairs Directorate B, *supra* note __.

[146] Interview with Human Rights Advocate C, *supra* note __.

[147] 2005 Protocol *supra* note __, Article 11 (providing that the Protocol "shall enter into force provisionally upon signature by the Heads of State and Government" and "shall definitively enter into force upon the ratification by at least nine (9) signatory States"); Interview with ECOWAS Legal Affairs Directorate A, *supra* note __; Telephone interview with Human Rights Advocate A, *supra* note__; Telephone interview with Human Rights Advocate B, *supra* note__; Interview with ECCJ Court Official C, Abuja, Nigeria, Mar. 11, 2011.

[148] *See* 1978 Non-Aggression Protocol, *supra* note __; 1981 Mutual Defense Protocol, *supra* note __.

[149] Jenkins, *supra* note __, at 136.

[150] 2001 Good Governance Protocol, *supra* note __, Article 1(h); 1999 Conflict Prevention Protocol, supra note __, Article 2(d); 1993 Revised Treaty, *supra* note __, Article 4(g).

logical—but significant—step in the ECOWAS' commitment to promoting human rights.

Yet even if the decision to confer human rights jurisdiction on the ECCJ is understood as an extension of these trends, the breadth of that jurisdiction remains surprising. Equally puzzling is the marginalization of economic issues,[151] especially given that the *Afolabi* case had challenged violations of ECOWAS free movement and free trade rules.

ECCJ judges appear to favor giving private litigants access to the Court in both economic and human rights cases. We found a document, seemingly prepared by the Court, that included a plea for "access to justice" for both West African traders and human rights victims:

> The development of the Community law and the interpretation and application of the ECOWAS Treaty would be a mere illusion if Community citizens, individuals and corporate bodies do not have direct access to the ECOWAS Court of Justice. Without access to the Court there cannot be access to justice. We must therefore recognize that the right of access to the Court is the keystone in the development of the Community law. The promotion and protection of human rights and fundamental freedoms of Community Citizens cannot be ensured, if right of direct access to the Community Court of Justice is not guaranteed. A cardinal objective of ECOWAS is the formation of an economic union and a common market. The ECOWAS Trade liberalization Scheme is an important programme for the realization of the common market. It should however be noted that this scheme and the intended benefits cannot be realized, unless individuals, consumers, manufacturers and corporate bodies that are the prime movers in commercial transactions have direct access to the Court of Justice.[152]

The ECCJ's statement is illustrative of a broader tendency among ECOWAS officials, advocates and NGOs to conflate human rights and economic freedoms.[153] For example, a human rights attorney told us that ECOWAS was created in response to problems, such as Nigeria's expulsions of West Africans in the 1970s, that were widely viewed as implicating both sets of issues.[154] The ECOWAS Executive Secretary linked economic and security objectives in a

---

[151] The Supplementary Protocol allows national judges to refer cases to the ECCJ for an interpretation of ECOWAS law. 2005 Protocol, *supra* note __, Article 4 (revising Article 10(d) of the 1991 Protocol). In theory, such cases could involve a state's noncompliance with ECOWAS rules. But whether private actors have standing in national legal systems to challenge such noncompliance is unclear, and national judges have yet to refer a single case or question of interpretation to the ECCJ. As Richard Oppong recently noted, "[n]ational borders have been arbitrarily closed, illegal fees have been levied at border posts and nationals have been deported from member states, but [apart from the *Afolabi* case] none of these issues has been challenged judicially." OPPONG, LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA, *supra* note __, at 225-26.

[152] *The Community Court of Justice, ECOWAS: Court Procedure and the Application of Protocols* 10-11 (undated) (on file with authors). Circumstantial evidence suggests that it this document was prepared by the Court. ECCJ judges also echoed the document's theme of access to justice in press interviews. *E.g.*, Lillian Okenwa, *ECOWAS Court: Individuals to Have Access*, This Day (Nig.), Feb. 9, 2005, *available at* 2005 WLNR 1832047.

[153] *E.g.*, Nneoma Nwogu, *Regional Integration as an Instrument of Human Rights: Reconceptualizing ECOWAS*, 6 J. Hum. Rts. 345, 348-49 (2007) [Nwogu, *Regional Integration as an Instrument of Human Rights*] (suggesting that the regional economic integration provisions of the 1993 Treaty also promotes the right to development in the African Charter); OPPONG, LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA, supra note __, at 148 ("The links between economic development and human rights are too obvious to mention. Indeed, there is a human rights to development.").

[154] Telephone interview with Human Rights Advocate B, *supra* note__.

speech delivered on the Community's 30th anniversary in 2005. He noted that the Community had made "tremendous strides in the free movement of peoples, goods and services," but that "conflicts in member states, such as Liberia, became a stumbling block to this free movement."[155] And a national trade association described in human rights terms the plight of poor traders who borrow money to buy perishable foodstuffs that rot when borders close without warning, causing a catastrophic loss of livelihood.[156]

These examples illustrate the close connections in the minds of key actors between economic freedoms and individual liberties. Human rights NGOs and attorneys drew on these connections to anchor their judicial reform campaign.[157] Yet we found no "smoking gun" to explain why private party access in economic cases was omitted from these reforms. The NGOs were clearly most interested in transforming the ECCJ into a venue for challenging human rights violations. In contrast, trade and business associations did not participate in the court reform negotiations. Those associations also seem quite adept at couching demands for greater economic freedom in human rights terms, just as the Nigerian trader Afolabi invoked the right to free movement in the African Charter to bolster his border closure complaint to the ECCJ.[158]

At bottom, however, the decision to not shore up the enforcement of economic rules reflects a political choice to prioritize one set of Community goals over another. Perhaps ECOWAS member states believed that they were making only a vague promise to promote human rights. If so, we would expect them to respond negatively when the ECCJ began to exercise its judicial review powers.

III. CHALLENGES TO THE AUTHORITY OF THE ECCJ

This Part considers two challenges to the ECCJ's authority that created an opportunity for member states to revisit the 2005 Supplementary Protocol's distinctive design features. First, when the ECCJ intervened in a contested Nigerian election, triggering protests from Nigerian judges and politicians, the member states responded by creating a new ECOWAS institution—the Judicial Council—to improve the qualifications of ECCJ judges and make their terms of office nonrenewable, decisions that arguably increased the Court's independence. The second and more serious challenge involved an effort by the Gambia to curtail the ECCJ's jurisdiction and access rules in response to decisions holding the government responsible for the torture and disappearance of journalists. As we explain, the ECCJ emerged from these challenges largely unscathed and arguably strengthened.

---

[155] *ECOWAS Has Lived Up To Expectations, Says Chambas*, ECOWAS 30th Anniversary Document, *available at* www.africasia.com/uploads/ecowas_1004.pdf.

[156] Interview with the National Association of Nigerian Traders (NANTs), March 9, 2011, Abuja, Nigeria.

[157] Ebobrah Ph.D dissertation, *supra* note __; Nwogu, *Regional Integration as an Instrument of Human Rights*, *supra* note __.

[158] As Richard Oppong notes when discussing the campaign to revise the ECCJ's jurisdiction, "[e]ven when interest groups have paid attention to economic integration issues, they have emphasized mainly the human rights dimensions." OPPONG, LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA, *supra* note __, at 148.

A. The Intervention in Domestic Elections and the Creation of the Judicial Council

The first group of ECCJ judges did not have any experience or expertise in international human rights law, an unsurprising fact given that the Court at the time had no jurisdiction over human rights issues. When, after the adoption of the 2005 Supplementary Protocol, the Court began to issue its first decisions, some ECOWAS officials and attorneys questioned whether ECCJ judges were interfering in matters within the exclusive jurisdiction of domestic courts. These concerns came to a head in a 2005 ECCJ ruling involving a contested Nigerian election.

The case concerned a dispute involving two candidates seeking election to the Nigerian Federal House of Representatives. One candidate, Jerry Ugokwe, was initially declared the winner by the Independent National Electoral Commission. His opponent, Christian Okeke, appealed the decision to the Nigerian Elections Tribunal, arguing that Ugokwe was not a legitimate candidate for office. The Elections Tribunal annulled Ugokwe's election, and the Federal Appeals Court—the final court of review for all election disputes—upheld that decision.

Dissatisfied with this outcome, Ugokwe attempted to appeal to the High Court of Nigeria. At the same time, he filed a complaint with the ECCJ, alleging that the Election Tribunal and Federal Appeals Court had violated his right to a fair hearing.[159] Ugokwe asked the ECCJ to issue a special interim order to prevent the Nigerian authorities from invalidating his initial election victory or from seating his opponent.[160]

ECCJ President Donli issued the interim order barring the National Assembly from swearing in Okeke while Ugokwe's complaint was pending.[161] Nigeria promptly asked the ECCJ to dismiss the suit for lack of jurisdiction and because Ugokwe's appeal was still pending before the High Court. The government accused Ugokwe of "forum shopping with courts."[162] The ECCJ responded by renewing the interim order prior to leaving for a recess.[163] These were audacious acts. But President Donli justified them as necessary temporary measures to preserve "the *res*"—the existence of a justiciable controversy—until the ECCJ could review Ugokwe's allegations.[164]

Concerns over the orders' validity notwithstanding, Nigerian officials complied the ECCJ's directives. Specifically, the Attorney General and Minister of Justice informed the Speaker of the

---

[159] Iheanacho Nwosu, *West Africa: I Am at ECOWAS Court to Get Fair Hearing - Hon. Ugokwe*, Daily Champion (Nig.), June 21, 2005, *available at* http://allafrica.com/stories/200506210089.html.

[160] Specifically, Ugokwe requested a "special interim order" enjoining (1) the INEC from (a) invalidating Ugokwe's election or (b) "tak[ing] any steps" towards his replacement; and (2) the Federal National Assembly from relieving Ugokwe of his seat. *Jerry Ugokwe v. Federal Republic of Nigeria*, ECW/CCJ/APP/02/05 (2005), ¶¶ 7, 14.2–14.3.

[161] Lillian Okenwa, *Election Petition: ECOWAS Court Stops Ugokwe's Successor*, This Day (Nig.), June 2, 2005, 2005 WLNR 8843638 [Okenwa, *Election Petition*].

[162] *FG Asks ECOWAS Court to Dismiss Ugokwe Suit*, Vanguard (Nig.), June 17, 2005), *available at* http://allafrica.com/stories/200506170727.html.

[163] Ise-Olu-Oluwa Ige, *ECOWAS Court Goes On Recess*, Vanguard (Nig.), July 7, 2005, 2005 WLNR 10668904.

[164] Okenwa, *Election Petition*, *supra* note __.

House of Representatives of the Court's order "not to swear [Okeke] in until the case is fully settled by the [ECCJ]."[165] The request created a political uproar that spilled onto the front pages of the country's newspapers. Nigerian lawyers, activists, and citizens characterized the election dispute as a matter outside the ECCJ's authority. They noted that the Nigerian Constitution clearly states that "decisions of the Court of Appeal in respect of appeals arising from election petitions shall be final."[166] And they argued that Ugokwe had received a fair opportunity to contest the election at the national level. In short, many observers questioned whether the ECCJ had the power to issue the interim order under its human rights jurisdiction.[167]

After returning from its month-long recess, the ECCJ dramatically reversed course and dismissed the suit. The decision reasoned that "no provision, whether general or specific, gives the Court powers to adjudicate on electoral issues or matters arising thereof."[168] It also asserted that the ECCJ "is not a Court of Appeal or a Court of cassation" over domestic courts. As a result, the ECOWAS judges declared themselves without authority to intervene "against the execution of the Judgment already made by the Federal Appeal Court of the Member State of Nigeria."[169] The ECCJ did not explain the about face from its preliminary order, but its categorical nature of the decision suggests that the judges wanted to send a clear message—they would not intervene in future election disputes.

The ECCJ's dramatic change of position did little, however, to quell the underlying legal and political controversy. As one ECOWAS official observed, "national high courts were upset that [ECOWAS] judges with less qualifications and experience than they had could issue rulings that would be final and binding on them."[170] The *Ugokwe* case exacerbated these anxieties by putting the ECCJ in direct conflict with the Nigerian judiciary and political establishment.

The member states quickly responded to these concerns. In 2006, as part of a wider review of all ECOWAS institutions,[171] the member states created "a Community Judicial Council to ensure that the Court is endowed with the best qualified and competent persons to contribute, by virtue

---

[165] Jerry Ugokwe v. Federal Republic of Nigeria, ECW/CCJ/APP/02/05 ¶ 10 (2005), reprinted in 2004-2009 Community Court of Justice, ECOWAS Law Report 37 (2011) [*Ugokwe*].

[166] Constitution of the Federal Republic of Nigeria, 1999 Article 246(3), *available at* http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#CourtOfAppeal; Okenwa, *Anambra Election*, *supra* note __. Those we interviewed repeated this argument. Telephone Interview with Academic A, Jan. 6, 2011; Interview with Human Rights Advocate C, March 9, 2011, Abuja, Nigeria; Interview with ECOWAS Legal Affairs Directorate B, *supra* note __.

[167] Ige, *supra* note __; Interview with Human Rights Advocate C, *supra* note __; Interview with ECOWAS Legal Affairs Directorate, Legal Adviser A, *supra* note __.

[168] *Ugokwe*¸ *supra* note __, ¶ 19.

[169] *Id.* ¶¶ 32, 33.

[170] Interview with ECOWAS Legal Affairs Directorate A, *supra* note __; *see also* Donald Andoor, *Nigeria: Ugokwe Loses House Seat*, This Day (Nig.) Sept. 22, 2005, *available at* http://allafrica.com/stories/200509230288.html.

[171] Decision aloec. 2/06/06 Establishing the Judicial Council of the Community (adopted June 14, 2006) (on file with authors); *see also* ECOWAS Newsletter, Issue 1, Oct. 2006 [ECOWAS Newsletter], *available at* www.ecowas.int/publications/en/.../ECOWAS_NewsLetter_01-Eng.pdf.

of their quality and experience, to the establishment of Community laws capable of consolidating and accelerating the regional integration process."[172]

The Judicial Council increases the influence of national judges in the selection of ECCJ judges. The Council is composed of chief judges from ECOWAS countries not represented on the seven-member ECCJ.[173] ECCJ judges are "statutory appointments"—high-level positions that rotate among the member states. The governments make a political determination as to which country is next in line to appoint a judge. The ECOWAS Legal Affairs Directorate then advertises the position and collects applications. Every application that meets specified criteria is forwarded to the Judicial Council, which vets applicants and interviews candidates. The Council then selects three candidates and forwards their names, together with point-based rankings, to the ECOWAS Authority, which decides which candidate to appoint to the Court.

This process is still very new. As of 2012, only one set of appointments had been made using the new procedures. The ECOWAS Authority appointed the judges that the Council had recommended.[174] Appointments will become more frequent in the future, since the reforms that created the Judicial Council also reduced the tenure of ECCJ judges—from five years with the possibility of one reappointment to a single four-year nonrenewable term.[175]

In addition to this new selection process, the Judicial Council oversees the procedures under which ECCJ judges can be dismissed for malfeasance.[176] To an outsider's eyes, the procedures seem problematic in that they contemplate dismissals for psychological impairments and public statements.[177] However, ECOWAS officials and lawyers explained that detailed dismissal procedures of this kind are standard for government positions and judgeships in West Africa. Viewed in this light, the fact that a council of chief judges from unrepresented member states oversees the application of judicial disciplinary procedures makes it more difficult for governments to punish ECCJ judges for embarrassing rulings.

The reforms brought about by the Judicial Council have been favorably received by stakeholders. As one lawyer noted: "Now that the Judicial Council exists, the stature of the Court will be higher, which will improve the quality of judges. The higher profile also means that more

---

[172] ECOWAS Newsletter, *supra* note __, at 4.

[173] *Rules for Regional Judicial Council Approved*, PanaPress (Sept. 15, 2007), *available at* http://www.panapress.com/Rules-for-regional-judicial-council-approved--12-507868-100-lang2-index.html.

[174] ECOWAS Council of Ministers Seeks Regional Infrastructural Development, *available at* http://appablog.wordpress.com/2008/11/30/burkina-faso-ecowas-council-of-ministers-seeks-regional-infrastructural-development/ (reporting results of a 2008 meeting of the ECOWAS Council of Ministers at which the "Council . . . endorsed the report of the ECOWAS Judicial Council on the appointment of three new judges for the Community Court of Justice"); Interview with ECOWAS Legal Affairs Directorate B, *supra* note __.

[175] ECOWAS Newsletter, *supra* note __, at 4.

[176] Article 5 of the Decision creating the Judicial Council discusses in very general terms procedures for the Council to deal with complaints against ECCJ judges.

[177] Regulation C/Reg.23/12/07, Adopting the Rules of Procedure of the Community – Judicial Council (Dec. 14-15, 2007 (on file with authors).

qualified candidates will apply."[178] Some concerns over judicial qualifications persist, however. The Court's Vice President implicitly recognized these concerns, stating in 2008 that, "the human rights competence of prospective appointees should be taken into consideration even though it should not be expressly stated as a criterion for appointment."[179]

B. A Political Backlash by the Gambia

The next political flashpoint for the ECCJ concerned two decisions against the Gambia—both involving the disappearance and torture of journalists—that were widely viewed as legally sound. Unable to challenge the judgments as poorly reasoned or as an improper interference with domestic authority, the Gambian government launched a campaign in 2009 to scale back the ECCJ's jurisdiction.

The case of Chief Ebrima Manneh involved a reporter for the *Daily Observer* who disclosed information to a foreign journalist that later appeared in a news article critical of the government.[180] Manneh was arrested in July 2006 by plainclothes intelligence agents. He disappeared until January 2007, when reports emerged that he was being detained at a local police station. Intelligence officials and the police denied that he was in their custody.[181] In May 2007, the Media Foundation for West Africa filed a complaint with the ECCJ charging the Gambian government with illegal arrest, detention without trial, and inhuman conditions of detention. The NGO demanded Manneh's immediate release and compensation for his injuries.[182] The Gambia refused to respond to the complaint and later ignored multiple requests to appear or file documents, delaying the proceedings.[183] In June 2008, the ECCJ ruled in favor of Manneh, ordering the Gambia to release him from "unlawful detention without any further delay," to restore his human rights, "especially his freedom of movement," to pay US $100,000 in damages, and to bear the costs of the litigation.[184]

The Gambia ignored the ruling, a decision that received a great deal of unfavorable publicity, including from the African Union, the United States Senate, the International Press Institute, the Committee to Protect Journalists, and the NGOs Freedom Now and Reporters Without

---

[178] Interview with Human Rights Advocate C, *supra* note __.

[179] Solomon Tamarabrakemi Ebobrah, *A Critical Analysis of the Human Rights Mandate of the ECOWAS Community Court of Justice*, Research Partnership Programme at the Danish Institute for Human Rights 1, 47 n.194 (2008).

[180] *Gambia; IPI Calls on the Government to Cooperate with ECOWAS Legal Proceedings*, Freedom Newspaper, March 15, 2008.

[181] *Chief Ebrimah Manneh v. Republic of the Gambia*, ECW/CCJ/JUD/03/08 (June 5, 2008), ¶¶ 7-8 [*Manneh*], *reprinted in* 2004-2009 Community Court of Justice, ECOWAS Law Report 181 (2011).

[182] *Id.* ¶ 3. Established in 1997, the Media Foundation for West Africa defends and promotes freedom of the press and freedom of speech and expression more generally. *See* http://www.mediafound.org/index.php?option=com_content&task=category&sectionid=6&id=14&Itemid=36.

[183] The Gambia's failures to respond to the complaint requests are described in the judgment. *Manneh, supra* note __, ¶¶ 4, 28.

[184] *Id.* ¶ 44.

Borders.[185] The International Press Institute noted that "[t]he Gambian media environment has long been hostile and dangerous, but the government's flagrant disregard for the ECOWAS legal proceedings represents a low point."[186] The African Commission on Human Rights called on the Gambia "to immediately and fully comply" with the ECCJ's judgment.[187]

The second case, concerning the illegal detention and torture of Musa Saidykhan, was harder to ignore because the plaintiff was alive, demonstrated clear evidence of torture, and pursued the case from the safety of another country.[188] After a coup attempt in March 2006, *The Independent* newspaper published the names of individuals whom the Gambian National Intelligence Agency had arrested. Shortly thereafter, soldiers and policemen arrested Saidykhan, the newspaper's editor, without a warrant.[189] Security agents took Saidykhan to a detention center, where he was imprisoned for twenty-two days and repeatedly tortured.[190] The agency eventually released Saidykhan, but officials continued to monitor his movements and threaten his family.[191] Ultimately, Saidykhan and his family fled the country.

In November 2007, Saidykhan, with the support of the Media Foundation for West Africa, filed a complaint with the ECCJ seeking a declaration that his arrest and detention were illegal and that he had been tortured and denied a fair hearing.[192] This time, the Gambia participated in the proceedings. It asked the ECCJ to dismiss the complaint on the grounds that it lacked jurisdiction, was "an affront to [its] sovereignty," and that the suit should be heard by a national court.[193] In June 2009, the Court issued a ruling rejecting these arguments and reaffirming that the 2005 Supplementary Protocol does not require exhaustion of domestic remedies.[194]

The Gambian government's political attack on the ECCJ occurred while the *Saidykhan* case was pending. In fending off criticism of its response to the *Manneh* decision, Gambian Attorney

---

[185] *E.g. U.S. Senators Call for Release of Journalist*, FOROYAA Newspaper (Serrekunda), April 28, 2009, *available at* http://business.highbeam.com/437649/article-1G1-198772071/us-senators-call-release-journalist; *Durbin, Other Senators Press Commonwealth Nations on Case of Missing Journalist*, States News Service, March 18, 2010, *available at* http://www.highbeam.com/doc/1G1-221599405.html.

[186] International Press Institute, *IPI Calls on the Gambian Government to Cooperate with ECOWAS Legal Proceedings*, Senegambia News (Mar. 13, 2008), *available at* http://www.senegambianews.com/printFriendly.cfm?articleID=2202.

[187] Linda Akrasi Kotey, *Ghana: Akoto Ampaw, Two Others in Gambia*, Ghanaian Chronicle, July 17, 2009, *available at* http://allafrica.com/stories/200907171086.html.

[188] *ECOWAS Torture Case against the Gambia Nears an End*, Afrol News, Sept. 22, 2010, *available at* http://www.afrol.com/articles/36623.

[189] *Musa Saidykhan v. Republic of the Gambia*, ECW/CCJ/RUL/05/09 ¶ 4 (June 30, 2009).

[190] *Id.* ¶ 7.

[191] *Id.* ¶¶ 8-9.

[192] *Id.* ¶ 2. Saidykhan also sought an order restraining the government from harassing or intimidating members of his family, as well as US $2,000,000 in compensation. *Id.*

[193] *Id.* ¶ 11.

[194] *Id.* ¶ 37.

General and Justice Minister Marie Saine stated: "The government of the Gambia is aggrieved by the decision of the court and has since set the political process in motion to take the matter to the next level and get the decision set aside."[195]

In September 2009, the Gambia called for a Meeting of Government Experts to revise the 2005 Supplementary Protocol and restrict the Court's authority.[196] Most notably, the Gambia sought to limit the ECCJ's human rights jurisdiction to treaties ratified by the respondent state and to require exhaustion of domestic remedies—two distinctive design elements that human rights groups had previously lobbied to include in the Protocol.[197]

On their face, these proposals seem uncontroversial, if only because they are similar to the jurisdictional and procedural rules that other international human rights tribunals follow. According to a consortium of NGOs, however, the "Gambian government propose[d] these amendments so that the Court will be weakened in its capacity to deal effectively with tyrannical governments trampling on citizens' rights." The proposal to add an exhaustion of local remedies requirement aimed to "depriv[e] citizens of free access to the Community Court"—an "independent judicial instrument that is not usually available in many countries" in a region "where the judiciary is an arm of the executive." And the proposal to limit the ECCJ's jurisdiction to ratified human rights treaties was intended "to prevent the Court from adjudicating on the [*Saidykhan*] case against the Gambia"—one of "the rare African countries which have not ratified the United Nations Convention Against Torture."[198]

The ECOWAS Commission responded to the Gambian proposal by invoking the procedures for public participation in ECOWAS decision-making. The Commission also invited West African legal experts to consider the proposal.[199] Based on their input, the ECOWAS Committee of Legal Experts recommended against revising the Supplementary Protocol. In October 2009, the Council of Justice Ministers endorsed the Committee's recommendations, which had the effect of shelving the proposal.[200]

---

[195] *Gambian Attorney-General Denies Holding Missing Journalist*, Agence France Presse, Apr. 7, 2009.

[196] *West Africa: Country Submits Proposals to Amend ECOWAS Protocol*, FOROYAA Newspaper (Serrekunda) (Sept. 25, 2009) [*Country Submits Proposals*], *available at* http://allafrica.com/stories/printable/200909250810.html; *see also* Nana Adu Ampofo, *Gambian Authorities Seek to Limit Reach of Regional Human Rights Court*, Global Insight (Sept. 28, 2009); Innocent Anaba, *SERAP, CHRDA Challenge Plans to Amend ECOWAS' Court Powers*, Vanguard, Nigeria (June 26, 2008).

[197] *See supra* Part II(C). The Gambia also proposed that cases should be admissible for only twelve months after the exhaustion of domestic remedies, that applicants should not be anonymous, and that complaints submitted to the ECCJ should be barred from later being filed with other international courts. The Gambia also reiterated the need for a process to appeal all ECCJ decisions. *Country Submits Proposals*, *supra* note __.

[198] Media Foundation for West Africa, *Statement from Civil Society Organisations: ECOWAS Court Should be Preserved* (Sept. 24, 2009) [*Statement from Civil Society Organizations*], *available at* http://www.mediafound.org/index.php?option=com_content&task=view&id=442&Itemid=45.

[199] *Statement from Civil Society Organizations*, *supra* note __; Interview with Human Rights Advocate C, *supra* note __.

[200] Media Foundation for West Africa, Press Statement: Justice Ministers Endorse Experts' Decision, (12 Oct. 2009), *available at* http://www.mediafound.org/index.php?option=com_content&task=view&id=451&Itemid=45.

The Gambia's proposal provided a clear opportunity for the member states to review the 2005 Supplementary Protocol and revise the ECCJ's jurisdiction. That they did not do so is striking. The individuals whom we interviewed provided different explanations for their inaction. One said that governments did not want to reward the Gambia for its poor human rights record. They also understood that country's officials were acting in a blatantly "self-interested way" by attempting to circumvent the Court's review of serious human rights abuses that were widely known in the region.[201] Also critical to defeating the proposal were the intensive mobilization efforts of human rights NGOs and attorneys, who made sure that the issue was well covered in the press. One interviewee even suggested that the ECOWAS officials had a hand in opposing the Gambian challenge by leaking information about the proposal to human rights lawyers.[202]

In December 2010, the ECCJ issued a judgment finding that the Gambia had illegally detained and tortured Saidykhan and denied him a fair hearing, and it ordered the government to pay him US $200,000 in damages.[203] The attorney for government responded by stating that he "would ensure that the authorities implement the ruling."[204] However, the Gambia has since refused to comply with either the *Saidykhan* or the *Manneh* judgments. In addition to denying responsibility for Manneh's alleged death,[205] in March 2011 the government asked the ECCJ to set aside both judgments, attacking the *Saidykhan* decision as "miscarriage of justice since the court failed to properly appraise the evidence on record." The Media Foundation for West Africa opposed the application and reiterated its demand for compliance.[206] In February 2012, the ECCJ rejected the government's arguments and reaffirmed the two judgments.[207]

Although the Gambia continues to resist the ECCJ's authority, the rejection of the country's proposal bolstered the Court's human rights authority. As previously explained, the 2005 Supplementary Protocol entered into force provisionally pending ratification by individual ECOWAS member states—a process that is still ongoing. In 2006, however, the Community

---

[201] Interview with ECOWAS Legal Affairs Directorate A, *supra* note __.

[202] Interviews with Human Rights advocates B and C, *supra* note __ & __; Interview with ECOWAS Legal Affairs Directorate A, *supra* note __; *see also* International Freedom of Expression Exchange, *Four IFEX members, civil society groups fear Gambia proposal will prevent ECOWAS court from ruling in Saidykhan case*, Sept. 28 2009, *available at* http://www.ifex.org/west_africa/2009/09/28/ecowas_court_jurisdiction/ (listing regional civil society groups that mobilized against Gambia's proposal).

[203] *ECOWAS Court Awards Musa Saidykhan $200,000*, FOROYAA Newspaper, Serrekunda, Dec. 17, 2010.

[204] Media Foundation for West Africa, *Gambian Editor Tortured under Dictatorship of President Jammeh Wins Case at the ECOWAS Court*, Dec. 16, 2010, *available at* http://www.mediafound.org/index.php?option=com_content&task=view&id=602.

[205] In 2011, the country's President suggested that Manneh had died, but that "the government has nothing to do with" his death. International Freedom of Expression Exchange, *Critical activists and journalists detained under "bogus charges,"* July 27, 2011, *available at* http://www.ifex.org/the_gambia/2011/07/27/bogus_charges/.

[206] *ECOWAS Court adjourns hearing on Gambian government request for review of two landmark judgements*, Senegamia News, Oct. 2, 2011, *available at* http://www.senegambianews.com/printFriendly.cfm?articleID=19778.

[207] *Gambia: ECOWAS Court Rules in Favour of Musa Saidykhan*, FOROYAA Newspaper, Serrekunda, Feb. 11, 2012.

reformed its policymaking processes to increase their supranational dimensions. The reforms authorize the Authority to adopt "Supplementary Acts," legal instruments that are equivalent to Protocols, but with one key difference—they are "binding on Member States and the institutions of the Community" without the need for ratification.[208]

The effect of these reforms on previously adopted legal texts is unclear. One attorney worried that the provisional status of the 2005 Protocol is a "liability" for the ECCJ because the Protocol is not governed by the new rules.[209] Even if this interpretation is correct as a legal matter, there was widespread agreement among those we interviewed that, following the rejection of the Gambian challenge, the provisional nature of the Supplementary Protocol is a non-issue politically. Nevertheless, some stakeholders expect that the member states may reconsider the exhaustion of domestic remedies issue in a less politically charged context, for example if the ECCJ becomes overburdened with cases.[210]

IV. THEORETICAL IMPLICATIONS OF THE ECCJ'S TRANSFORMATION

ECOWAS, like most regional organizations, is a state-dominated institution. Yet human rights advocates, working in conjunction with ECOWAS officials, managed to transform the ECCJ from a court that adjudicated interstate disputes over regional economic rules into a court that adjudicates human rights complaints from private litigants. Many observers will be surprised by this transformation. We too are surprised that West African governments agreed to submit themselves to supranational judicial review of their human rights practices, especially given their reluctance to do so for the African Court of Human and Peoples' Rights. We do not, however, find it odd that an international institution established ostensibly to promote regional integration ended up serving a fundamentally different purpose.

This section reviews three distinct literatures to gain explanatory leverage on the ECCJ's transformation. We first apply regional integration theory to explain why ECOWAS member states have repeatedly professed a desire to build a regional common market yet have not designed the ECCJ to help achieve that goal. We then apply theories of institutional change to explore how an international court nominally tasked with interpreting regional economic rules was transformed into an increasingly high-profile venue for human rights litigation. Finally we turn to bottom-up theories of social mobilization to understand how international structures provide opportunities for non-state actors to promote agendas that differ from those of governments. Taken together, these theoretical frames help to explain why a court set up to enforce international economic rules has no economic cases, why a judicial institution designed for one purpose ended up performing a fundamentally different task, how human rights NGOs leveraged changing political tides to their advantage, and what lessons the ECCJ's transformation teaches us about how international courts can help to strengthen the rule of law.

---

[208] ECOWAS Newsletter, *supra* note __, at 2.

[209] Interview with Human Rights Advocate A, *supra* note __ .

[210] Interview ECOWAS Legal Affairs Directorate A, *supra* note __; Interview with Human Rights Advocate C, *supra* note __; Interview with ECCJ Official C, *supra* note __.

A. Why the ECCJ's Docket is Bereft of Economic Cases: Insights from Regional Integration Theory

Most international relations and regional integration theories look to the preferences of states and the functional incentives for interstate cooperation to explain the creation and evolution of international institutions. Applied to the ECCJ, this functional approach expects the court's docket to be dominated by cases alleging violations of ECOWAS common market rules.

Part I explained the economic impetus for creating ECOWAS. Even today, ECOWAS identifies its mission as "promot[ing] economic integration in all fields of economic activity . . . . "[211] It is not hard to imagine why governments continue to strive for this goal. Proponents of economic liberalism argue that a commitment to free and integrated markets will attract foreign investment, capture economies of scale, promote growth, and further economic development. In seeming endorsement of this mantra, West African leaders have repeatedly affirmed their pledge to the Community and to facilitate the free movement of peoples, services and goods. The decision to create the ECCJ was one manifestation of this pledge. Yet when later presented with an opportunity to enhance enforcement of ECOWAS economic rules by allowing private litigants to file complaints with the ECCJ, the member states declined to do so.

The fifty-year history of regional integration theory helps to explain why West African governments have continued to profess a commitment to creating an economic community while making choices that hinder that objective. Regional integration theory began as an attempt to predict international cooperation in general. Writing in the 1940s, David Mitrany, famously argued that functional demand would drive countries to work together to resolve common problems. Only a few years later, however, the Cold War brought a halt to many multilateral initiatives, revealing that the prospect of capturing joint gains was an insufficient motivator of interstate cooperation.[212]

Ernst Haas later drew on Mitrany's ideas but narrowed Mitrany's broad claims, focusing on economic issues and regional institutions as natural starting points for interstate cooperation.[213] Economic policymaking is dominated by experts who believe that promoting industrial development and reducing trade barriers enhances societal welfare. For Haas, the best way to achieve these goals was to allow apolitical technocrats to create programs that responded to functional needs. Haas assumed that the benefits of these programs would be obvious, helping to build political support for deeper integration.

---

[211] ECOWAS Commission, ECOWAS in Brief, *available at* http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en (last visited Feb. 10, 2013).

[212] David Mitrany, *The Functional Approach to World Organization*, 24 Int'l Aff. 350 (1948).

[213] Ernst Haas, *International Integration: The European and the Universal Process*, 15 Int'l Org. 366, 372 (1961); ERNST HAAS, THE UNITING OF EUROPE (1958); ERNST HAAS, BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION (1964).

Haas recognized the challenges of asking governments to cede sovereign control over economic policymaking. But his neofunctionalist theory of the 1960s, like neoliberal theory of the 1990s, was premised on the belief that economic self-interest would be integration's engine. It would inspire governments to make binding international commitments to attract foreign investment and build industrial capacity, and it would motivate firms and workers to lobby governments to carry out these commitments to achieve these goals.[214] Allowing private litigants to challenge violations of ECOWAS economic rules fits with these Haasian and neoliberal visions, because it harnesses the interests of intra-regional traders (like Afolabi, the first ECCJ complainant) to promote West African integration through law.[215]

The 1960s witnessed the apogee of regional integration theory due to the early achievements of the European Community (EC) and copycat initiatives in Latin America and Africa.[216] Yet even as these efforts proliferated, problems with the theory's application emerged as integration efforts began to stall. Some scholars responded by seeking to identify the preconditions for integration, such as economic interdependence and a convergence of government preferences.[217] Joseph Nye, in a 1965 study of the East African Community, suggested a different explanation. Nye found that government leaders' highest priority was nation building, which was impeded by preexisting colonial institutions and political structures that favored free movement of labor and capital.[218] As a result and contrary to Haas' expectations, East African leaders dismantled these institutions and structures. Drawing on these and other examples, by 1975 Haas had declared regional integration theory "obsolescent."[219]

In the 1990s, scholars such as Walter Mattli revived regional integration theory but modified its functionalist premise. Mattli argued that bottom-up demand from market actors was necessary but not sufficient for regional integration. Equally as important were supply-side factors, such as a regional "paymaster" who would fund institutions, ease distributional tensions and serve as integration's the primary proponent.[220] By the early 1990s, ECOWAS fit Mattli's hypothesis, in that Nigeria was established as the Community's political and financial heavyweight and local traders and workers were beginning to demand greater integration to pursue economic activities

---

[214] Walter Mattli, *Ernst Haas' Evolving Thinking on Comparative Regional Integration: Of Virtues and Infelicities*, 12 J. Eur. Pub. Pol. 327, 330-31 (2005).

[215] This is also Alec Stone Sweet's vision of the logic of judicial access and legal integration. *See* Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 Comp. Pol. Stud. 147 (1999).

[216] On the link between regional integration theory and the network of regional integration supporters in Latin America, see Osvaldo Saldias, *Networks, Courts and Regional Integration: Explaining the Establishment of the Andean Court of Justice*, Working Paper of the KFG, The Transformative Power of Europe (2010).

[217] *E.g.*, Philippe Schmitter, *A Revised Theory of European Integration*, 24 Int'l Org 836, 850-59 (1970).

[218] Joseph S. Nye, *Patterns and Catalysts in Regional Integration*, 19 Int'l Org. 870, 874-81 (1965).

[219] Ernst Haas, *The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing*, 24 Int'l Org. 607 (1970); Ernst Haas, *The Obsolescence of Regional Integration Theory*, Institute of International Studies Research Series No. 25 (1975); Ernst Haas, *Turbulent Fields and the Theory of Regional Integration*, 30 Int'l Org. 173 (1976).

[220] WALTER MATTLI, THE LOGIC OF REGIONAL INTEGRATION 14 (1999).

across borders. After its re-launch, ECOWAS thus appeared to satisfy the prerequisites for success under a refashioned theory of regional integration.

Yet ECOWAS has in fact made only limited progress toward realizing its economic goals. We do not want to undervalue the Community's formal accomplishments. For its first three decades, ECOWAS expanded its reach through protocols that required state-by-state ratification and implementation. Today, its regulations are directly applicable in national legal orders, and the Secretariat has been transformed into a Commission with greater autonomy and agenda setting power.[221] Nevertheless, most observers view these developments as mostly cosmetic changes with limited practical consequences.[222] The explanation is much the same as it was during the first wave of integration in the 1960s: the prospect of collective functional benefits is insufficient to overcome the short-term pull of nationalist policies, such as closing borders for security reasons or to stop the flow of migrant workers. Stated differently, Haas' insight that integration requires deeper ideological and political drivers remains as apt today as when he first wrote it. [223]

In sum, the history of regional integration theory helps to explain why meaningful economic integration in West Africa remains elusive even as governments repeatedly profess their commitment to the Community's lofty economic goals. The lack of progress does not mean that governments have eschewed the benefits of deeper regional integration. Rather, it suggests that they want those benefits without having to incur the political and economic costs. Seeking both outcomes is an incoherent policy choice, but it is an understandable political choice.

The theory's history also helps to explain the disconnect between the design and use of the ECCJ as an economic tribunal. ECOWAS member states envisioned the Court as part of a grand plan to build regional institutions. The decision to create a court and to make ECOWAS rules directly applicable reflects a sincere commitment by governments. National policies and misunderstandings about ECOWAS rules were hindering regional integration, and these changes increased the likelihood that some of these impediments might be removed. But the ECCJ could not surmount the political challenges that remained. Seen from this perspective, it is not surprising that member states continue to prefer diplomacy over litigation to resolve disputes over trade barriers and market access. Nor is it unexpected that they have not acted on proposals to allow private litigants—who do have the incentive to file suits—direct access to the Court. The result is that the ECCJ remains moribund as an enforcer of regional economic rules.

B. From an Economic Court to a Human Rights Court: Explaining Institutional Change

We now turn to theories of institutional change to understand the ECCJ's transformation from an economic court to a human rights court. Traditional accounts of institutional change have two distinctive characteristics: they analyze critical junctures—key historical events that are said to explain the creation and redesign of institutions—and they are state-centric, focusing on

[221] ECOWAS Commission, *available at* http://www.comm.ecowas.int/.

[222] *See* KUFUOR, INSTITUTIONAL TRANSFORMATION OF ECOWAS, *supra* note __, 54, 56; OPPONG, LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA, *supra* note __ at 119.

[223] Ernst Haas, *The Uniting of Europe and the Uniting of Latin America*, 5 J. Comm. Mkt. Stud. 315, 327-28 (1966).

decisions made by political leaders and governments. These explanations for institutional change dovetail with the assumption of many international relations theorists that states are the primary architects of international institutions. Applied to the ECCJ, this state-centric account would ask why ECOWAS member states decided to create a court in the early 1990s, and why they elected its first group of judges in 2000.

Our account of institutional change is fundamentally different. We explain the ECCJ's transformation as the result of a series of incremental decisions that ultimately led to the Court's redeployment for a new purpose. Several interrelated events facilitated this change. The expansion of ECOWAS' humanitarian and security mandate and the reports of abuses of ECOMOG forces interjected the human rights issues into ECOWAS institutions. The 1990s, when these events occurred, was also a time of rising mobilization of human rights activists worldwide.[224] Human rights groups leveraged both sets of events to their advantage. As Part I explains, the groups gained additional voice in ECOWAS following the 1993 overhaul of the Community. Accredited regional NGOs could now attend meetings, make presentations, and circulate documents to member states and ECOWAS officials. This expanded access provided an opening for non-state actors to join forces with the Secretariat when the opportunity for court reform presented itself in the wake of the *Afolabi* ruling.

The judges' active participation in the reform campaign is especially noteworthy. The ECCJ refrained from using an expansionist interpretation of existing law to claim the power to review human rights cases. The Court instead invoked a provision in the 1991 Protocol that authorized it to submit reform proposals to the member states. The judges combined that submission with a public relations and outreach campaign to drum up support for the proposal. Their strategy of pairing a conservative judicial ruling with bold extrajudicial advocacy was a shrewd political move, one that was a good fit with the new emphasis in ECOWAS on civic engagement.

For scholars who emphasize the decisions of states and the importance of critical junctures as explanations for institutional change, the role of non-state actors and judges in driving ECCJ reforms may be surprising. However, recent historical institutionalist studies have revealed how actors both inside and outside of institutions—including administrators, consumers, and interest groups—use incremental approaches to address smaller-scale problems that political leaders often ignore. Kathleen Thelen has accumulated the insights of these studies to argue that institutional adaptation and redeployment by non-state actors can produce changes that, over time, are more significant than "big decisions" made by governments in response to exogenous shocks.[225] To scholars who object that governments would not permit such revisions, historical

[224] *E.g.*, KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011); BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005).

[225] KATHLEEN THELEN, HOW INSTITUTIONS EVOLVE: THE POLITICAL ECONOMY OF SKILLS IN COMPARATIVE-HISTORICAL PERSPECTIVE 31-37 (2004). Other well-known studies include Terry Moe, *Interests, Institutions, and Positive Theory: The Politics of the NLRB*, Studies in American Political Development, vol. 2, 236-302 (1987); Mayer N. Zald and Patricia Denton, *From Evangelism to General Service: The Transformation of the YMCA*, 8 Admin. Sci. Q. 214-231 (1963).

institutionalists counter that initial decisions can produce unintended consequences that constrain future behavior even of powerful actors.[226]

Our historical institutionalist account of the ECCJ's transformation should not be misread as a claim that states are no longer influential actors in the region. To the contrary, the Community's expansion into security issues demonstrates that states remain fundamental drivers of ECOWAS decision-making. Moreover, Nigeria's tacit support was a necessary condition for creating the ECCJ and broadening its jurisdiction. But Nigeria was not a driver of court reform. The impetus for change came from a coalition of civil society groups, Secretariat officials, and ECOWAS judges. Their efforts were facilitated by the new Community zeitgeist of openness to civil society and the awareness that, in a post-Cold War world, expanding the ECOWAS' human rights mandate could garner financial support and praise from international institutions and foreign governments. The accretion of these events helps to explain what is perhaps our most striking finding—the decision by states to redeploy an international court in a way that foreseeably constrains national sovereignty.

C. Transnational Legal Mobilization and the Campaign to Redesign the ECCJ

A third theoretically consequential aspect of the ECCJ's transformation is the court reform campaign by lawyers, civil society groups, and ECOWAS judges and officials. As we explained in Part II, these actors quickly mobilized in the weeks following the dismissal of the *Afolabi* case. They developed a sophisticated multifaceted strategy that included issuing press releases, making public speeches, partnering with human rights NGOs outside the region, and lobbying sympathetic political leaders. Their efforts ultimately persuaded the member states to radically overhaul the ECCJ's jurisdiction and access rules. Social mobilization theory—and in particular studies of how international laws and institutions shape mobilization strategies across borders—help to explain why the court reform campaign succeeded and the particular form that it took.

A large literature examines how social movements use legal mobilization, litigation, and rights-claiming strategies to achieve their goals. Law shapes social movements in numerous ways. It facilitates the formation of collective identities and interests, it helps nascent movements frame grievances in response to particular rights violations, and it provides concrete mechanisms for group members to seek redress for those violations.[227]

Although most studies of legal mobilization focus on domestic level, a growing number of scholars consider its transnational aspects. In an early and influential work, Keck and Sikkink explain how domestic advocacy groups pressure states to comply with international law. Where governments respond with resistance or repression, local groups can reach out to "transnational

[226] *E.g.*, Paul Pierson, *The Path to European Integration: A Historical Institutionalist Analysis*, 29 Comp. Pol. Stud. 123, 147 (1996). For an analysis of how change occurs in other international organizations, see MICHAEL BARNETT AND MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS (2004); Michael Barnett and Liv Coleman, *Designing Police: Interpol and the Study of Change in International Organizations*, 49 Int'l Stud. Q. 593 (2005).

[227] *E.g.*, Tamara Kay, *Legal Transnationalism: The Relationship Between Transnational Social Movement Building and International Law*, 36 Law & Soc. Inquiry 419, 421-22 (2011) (reviewing studies).

advocacy networks" that share their objectives.[228] Linking up with these transnational allies enables activists to create "boomerang patterns of influence" that pressure governments from above and from below.[229]

Recent scholarship examines a range of factors that shape transnational legal mobilization strategies, including litigation before international courts. These factors include agenda setting, issue framing**,** the influence of lawyers, and opportunities to create and disseminate new legal norms.[230] Studies of courts explain how standing and other procedural rules affect judicial mobilization.[231] They also demonstrate how advocacy groups provide judges with opportunities to develop new legal doctrines[232] and serve as "compliance constituencies" that pressure governments to adhere to favorable judicial rulings.[233]

The insights of this literature help to explain the modalities and the successful outcome of the ECCJ reform campaign, as well as the Secretariat's ability to translate political challenges to the Court into productive institutional change. Human rights lawyers and NGOs in West Africa have long lamented the barriers to public interest litigation in national courts.[234] Beginning in the 1990s, these groups sought to circumvent these domestic blockages by organizing at the regional level. They formed new organizations, such as the West African Human Rights Forum, to mobilize around supranational legal institutions. These groups, in turn, lobbied ECOWAS officials to expand the Community's human rights mandate. Early evidence of the groups' influence appears in the 2001 Democracy and Good Governance Protocol, which envisioned that the newly-created ECCJ would eventually be empowered to hear human rights cases.

---

[228] MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998)

[229] *Id.* at 12-13; *see also* Alison Brysk, *From Above and Below: Social Movements, the International System, and Human Rights in Argentina*, 26 Comp. Pol. Stud. 259, 261 (1993). As described by Risse and Sikkink:

> A "boomerang" pattern of influence exists when domestic groups in a repressive state bypass their state and directly search out international allies to try to bring pressure on their states from outside. National opposition groups, NGOs, and social movements link up with transnational networks and INGOs [international nongovernmental organizations] who then convince international human rights organizations, donor institutions, and/or great powers to pressure norm-violating states.

Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 18 (Thomas Risse et al. eds., 1999).

[230] Jamie Rowen, *Mobilizing Truth: Agenda Setting in a Transnational Social Movement*, 37 Law & Soc. Inquiry 686, 689-690 (2012).

[231] Lisa Vanhala, *Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK*, 46 Law & Soc'y Rev. 523, 527 (2012).

[232] *E.g.*, ALTER, THE EUROPEAN COURT'S POLITICAL POWER, *supra* note __, at 63-91.

[233] *E.g.*, Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 Int'l Org. 457, 478 (2000); Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 Int'l Org. 661, 675 (2000). For an updated analysis, see ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW, *supra* note __, ch. 2.

[234] *E.g.*, Femi Falana, *West Africa: Public Interest Litigation in Region*, Vanguard (Dec. 17, 2009), *available at* http://allafrica.com/stories/printable/200912170989.html; Adam Adedimeji, *Nigeria: Judicial Activism and Public Interest Litigation*, Daily Independent (Lagos) (Aug. 13, 2009).

When the ECCJ dismissed the *Afolabi* suit in 2004 and publicized the need to restructure the Court, human rights groups sprang into action. The Community's new openness to civil society and its publicly-professed desire to promote a cluster of good governance norms—including the rule of law, transparency, and accountability as well as human rights—shaped the strategies that activists deployed. The new zeitgeist in ECOWAS embraced these norms only in a general way. Because the norms were both poorly-defined and potentially controversial, activists could foresee that demands for compliance with specific human rights treaties might generate political opposition. So they chose a safer course. They framed their appeals for court reform using the more nebulous and less threatening language of access to justice. They also left the ECCJ's new human rights mandate undefined, allowing different observers to read in their preferred conceptions of rights—including calls for the politically popular a right to economic development. Finally, advocates ensured that supranational litigation would not get bogged down in domestic courts by omitting a requirement to exhaust local remedies.

These framings of the court reform campaign also appealed to ECOWAS judges and officials. Both actors favored giving private litigants access to the ECCJ—the judges to attract cases and increase their influence, and the Secretariat to justify the expenses of a permanent court. Law and lawyers were also central to these efforts. Bar associations had a distinguished pedigree in the region's Anglophone countries. This was especially true in Nigeria, where some attorneys had challenged the military dictatorship in court and continued to view litigation as a useful—if sometimes slow and cumbersome—tool for policy change.[235] A campaign to expand access to justice was also naturally attractive to influential transnational NGOs such as the Open Society Justice Initiative and Interights, which were themselves dominated by lawyers.

Yet the strategic focus on access to justice also raises a puzzle—why did governments ultimately grant private litigants access to the ECCJ only in human rights cases? Transnational legal mobilization scholarship helps to answer this question as well. Unlike in the area of human rights, there was no meaningful advocacy for judicial access to challenge violations of economic rules. The very low levels of formal trade among West African nations meant that few well-resourced firms had an incentive to litigate over tariffs, border closures, and similar violations. To be sure, small traders in the informal sector, such as Afolabi, were harmed by the many impediments to intra-regional trade. But these individuals had neither the resources nor the organizational networks to mobilize effectively.[236]

In addition, governments had little interest in opening the ECCJ to economic disputes. Political leaders were comfortable resolving these disputes through diplomacy; supranational litigation by private firms was a far riskier and less controllable alternative. And unlike in the area of human rights, where a policy change in favor of access to justice would garner praise from external

[235] *E.g.,* Femi Falana, *The Role of Public Interest Law in Advancing Goals of the Constitution: Key Gains, Challenges and Limitations of Nigerian Democracy (1999–2007)*, 1 J. W. Afr. Pub. Interest Litig. Ctr. 13 (2009).

[236] In fact, it was not until 2011, that the National Association of Nigerian Traders (NANTs) ask the Nigerian government to revise the 2005 Supplementary Protocol to grant their members access to the ECCJ. *E.g.,* Crusoe Osagie, *West Africa: Traders Task ECOWAS On Regional Integration,* This Day (Nig.), Aug. 29, 2011, *available at* http://allafrica.com/stories/printable/201108300754.html.

actors, the member states perceived little if any benefit from empowering the ECCJ court to promote economic integration.

In sum, when examined though the lens of transnational legal mobilization, both the manner in which the ECCJ reform campaign unfolded and the unusual features of the 2005 Supplementary Protocol seem much less surprising. Our review of these events also adds to the literature on legal mobilization. Whereas most studies focus on efforts incrementally to expand judicial access rules, the ECCJ reform campaign reveals that advocates can deploy many of the same strategies to radically overhaul the functions of existing courts.

V. CONCLUSION: A NEW HUMAN RIGHTS COURT FOR AFRICA

This article has examined how the ECOWAS Community Court of Justice emerged as a new international human rights court in Africa. Most "lists" of such tribunals include only judicial and quasi-judicial bodies that are exclusively tasked with overseeing state compliance with human rights treaties.[237] In Africa, that view has led most scholars to focus on the African Charter system and the (arguably limited) contributions of the African Commission and Court to redressing human rights abuses on the continent. It is our contention, however, that the ECCJ belongs on any list of international human rights tribunals. In this conclusion, we provide support for this claim and lay the groundwork for future research on the human rights activities of sub-regional courts in Africa.

First, the ECCJ functions in practice far more as a human rights tribunal than a regional integration court. The cases on the ECCJ's docket in the last seven years overwhelmingly concern private actor suits alleging human rights violations. To a much lesser degree, the Court has ruled on employment disputes involving Community staff and questions relating to power sharing among ECOWAS institutions. It has not, however, adjudicated a single case relating to ECOWAS economic rules.[238]

Second, the ECCJ at least as active as the African Court and the African Commission although it has jurisdiction over fewer states. We attribute the rapid expansion of the ECCJ's human rights docket to the absence of an exhaustion of domestic remedies requirement and to the strategic decision of many NGOs and attorneys to file suits against West African governments before the ECCJ rather than before the African Commission or national courts. The ECCJ's ability to act quickly—often within a few months—and to issue legally binding judgments that apply an open-ended list of international legal norms are highly attractive features for litigants seeking to

[237] An important exception is the work of Solomon Ebobrah. *E.g.*, Solomon T. Ebobrah, *Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice*, 54 J. Afr. L. 1 (2010) [Ebobrah, *Critical Issues*].

[238] *See* ECOWAS Community Court of Justice, *List of Decided Cases From 2004 Till Date*, *available at* http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=157&Itemid=27 (last visited Feb. 15, 2013). The ECCJ has reviewed complaints alleging violations of the right of free movement without distinguishing between the right as protected in the African Charter and in an ECOWAS Protocol on Free Movement. *E.g., Femi Falana & Anor. v. Republic of Benin & 2 Ors.*, ECW/CCJ/JUD/02/12 (Jan. 24, 2012).

remedy human rights violations. So too is the willingness of ECCJ judges to engage in publicity and outreach campaigns to attract cases and encourage compliance by governments.

If the ECCJ's docket becomes overburdened in the future, we expect that ECOWAS judges, government officials, and Secretariat lawyers will favor adding an exhaustion requirement and clarifying which human rights instruments are within the ECCJ's purview. There is also support for creating an appellate mechanism to enable litigants to challenge decisions by a first-instance judicial body. These design revisions, if they do occur, are unlikely to be rebukes of the ECCJ and its judges. To the contrary, they will be hallmarks of a maturing legal system.

Third, as Solomon Ebobrah has documented, the ECCJ is making important contributions to regional human rights jurisprudence.[239] ECOWAS judges have considered a range of legal issues that have not yet come before the African Court or Commission. They have also endorsed a broad interpretation of standing rules, which encourages NGOs to file creative lawsuits challenging rights-restrictive laws and repressive practices. In addition, the ECCJ's open-ended subject matter competence allows it interpret multiple human rights instruments in the a single case, reducing the risk of judgments that contribute to the fragmentation of international rules.

Fourth, broadening the focus beyond the African Charter system will facilitate comparative institutional analyses that explore how stakeholders navigate the often fraught domestic and international politics of human rights compliance. The slow evolution and limited impact of the African Commission and Court have contributed to lawyers and civil society groups urging sub-regional courts on the continent to expand their authority into human rights. As both a theoretical and an empirical matter, it makes sense to examine these developments together, not the least because they offer natural experiments to evaluate the different ways that executive officials, legislators, and national judges have responded to these judicial transformations.[240]

This article has not addressed whether ECCJ decisions are inducing greater respect for human rights by changing the behavior of governments. We intend to take up that issue in future work. Our preliminary assessment is that compliance is partial and incomplete in many cases.[241] Even if borne out by future research, however, this finding must be seen in perspective. The ECtHR and the IACtHR took decades to establish their authority, whereas sub-regional tribunals in Africa are still in its their infancy. Recent studies also suggest that partial compliance is the norm for human rights tribunals,[242] a finding that may also hold true for national high courts.[243]

---

[239] *E.g.*, Ebobrah Ph.D dissertation, supra note __; Ebobrah, *Critical Issues, supra* note __.

[240] As previously noted, the East African Court of Justice and the Southern African Development Community Tribunal have interpreted their review powers to include human rights, eliciting a backlash from member states.

[241] An emerging pattern of noncompliance by Nigeria is troubling. In 2012, ECCJ President Awa Nana Daboya publicly "decried the attitude of the Nigerian government for not honoring any of [the Court's] 10 rulings" against it. Yet she also praised Nigeria for its decision to designate the attorney general to oversee implementation of ECCJ judgments. Eyo Charles, *West Africa: Nigeria Doesn't Respect Our Rulings – ECOWAS Court*, Daily Trust, Mar. 13, 2012, *available at* http://www.dailytrust.com.ng/index.php/other-sections/law-pages/166086-nigeria-doesnt-respect-our-rulings-ecowas-court.

[242] *E.g.*, Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Court of Human Rights*, 6 J. Int'l L. & Int'l Rel. 35, 56-83 (2010); Alexandra Huneeus, *Courts Resisting Courts:*

Finally, it is noteworthy that ECCJ appears confident in exercising its expanded mandate. The Court has continued to issue bold pronouncements in high-profile human rights cases. At the same time, however, it has limited remedies in ways that make its decisions more politically palatable to governments.[244] The ECCJ has also maintained a high public profile, promoting the Court in speeches, press releases, and meetings with bar associations, judges, and NGOs across West Africa.[245] Taken together, these events reveal that the ECCJ, although still a very young institution, has made a promising start on its difficult and ambitious project of providing a judicial forum to redress human rights violations in West Africa.

Lessons from the Inter-American Court's Struggle to Enforce Human Rights, 44 Cornell Int'l L.J. 493, 509-29 (2011).

[243] *E.g.*, Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 Harv. L. Rev. 1791 (2009).

[244] The most prominent example is *SERAP v. Federal Republic of Nigeria*, ECW/CCJ/JUD/18/12 (Dec. 14, 2012), in which the ECCJ held that Nigeria was responsible for the environmental degradation of the Niger Delta by multinational oil companies, but refrained from ordering the US $1 billion in damages requested by the plaintiffs.

[245] *E.g., Media Foundation for West Africa Press Release, MFWA Holds Forum On ECOWAS Court in Abuja*, July 27, 2012, *available at* http://www.mediafound.org/index.php?option=com_content&task=view&id=857. In 2011, for example, the ECCJ celebrated its tenth anniversary with burst of activity, including a conference with national supreme court judges and government officials. Press Release, *The Court of Justice of ECOWAS welcomes the Presidents of the Supreme Courts of Member States and other regional courts of Africa*, July 6, 2011, *available at* http://www.courtecowas.org/site/index.php?option=com_wrapper&view=wrapper&Itemid=60&lang=en.