

ENFORCEMENT OF JUDGMENTS OF THE ECOWAS COURT OF JUSTICE

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I. INTRODUCTION:

The judicial mandate of the ECOWAS Community Court of Justice (ECCJ) has been clearly spelt out by the Revised Treaty, the Protocol on the Court as amended and various Community texts. As was set out in the preamble of the 1991 Protocol on the Court, “the essential role of the Community Court of Justice is to ensure the observance of law and justice in the interpretation and application of the Treaty and the Protocols and Conventions...” The ECCJ was established as an interstate Court with the primary responsibility of interpreting and applying the Revised Treaty and ECOWAS Community texts.¹

There was a paradigm shift in the mandate of the Court in 2005, following the adoption of Supplementary Protocol A/SP.1/01/05 which amended the initial Protocol on the Court. The Supplementary Protocol expanded the judicial mandate of the Court. Essentially, the ECOWAS Court of Justice by its current mandates consists of four Courts in one, which can be categorized as follows:

- a. Mandate as a Community Court, which involves the interpretation and application of ECOWAS Community texts and the giving of Advisory Opinions².
- b. Mandate as ECOWAS Public Service Court which gives the Court competence to adjudicate on any dispute between the Community and its officials³.
- c. Mandate as a Human Rights Court which gives the Court jurisdiction to determine cases of violation of Human Rights that occur in any Member State⁴. The unique feature of this jurisdiction is that there is no requirement for the exhaustion of local remedies⁵.
- d. Mandate as Arbitration Tribunal which gives the Court the power to act as Arbitrators pending the establishment of the Arbitration Tribunal under Article 16 of the Revised Treaty⁶.

The initial Protocol on the Court did not provide the method of enforcement of the judgments of the Court. This lacuna was remedied by the Supplementary Protocol which provided the method of enforcement in a new Article 24. The provision gave each Member State the

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¹ Article 9(3) of 1991 Protocol on the Court.

² Article 9(1) of Protocol A/P1/7/91 relating to the Community Court of Justice, ECOWAS.

³ Article 9(2) of Protocol A/P1/7/91 relating to the Community Court of Justice, ECOWAS.

⁴ Article 9(4) of Protocol A/P1/7/91 relating to the Community Court of Justice, ECOWAS.

⁵ Article 9(4) of Supplementary Protocol A/SP.1/01/05 relating to the Community Court of Justice, ECOWAS.

⁶ Article 9(5) of Supplementary Protocol A/SP.1/01/05 relating to the Community Court of Justice, ECOWAS.

responsibility for the enforcement of the judgments of the Court in accordance with its Rules of Civil Procedure⁷.

Although Article 24(3) of the Supplementary Protocol on the Court, provides that each Member State shall appoint a National Authority for the purpose of reception and processing of the execution, only four Member States have complied. This is therefore poses a challenge for the enforcement of the judgments of the Court. However, it is noteworthy that some countries that are yet to appoint national authorities have complied with decisions and judgments of the Court.

Notwithstanding the provision of a method of enforcement of the decisions of the Court in the Protocol as amended, the compliance rate with the judgments of the Court remains unsatisfactory. No Member State has communicated to the Court the status of decisions and judgments complied with so far. However, the Court has been able to get unofficial information from lawyers and parties involved in some cases. The statistics on compliance with the enforceable judgments of the Court which the Court has compiled from such sources, shows that about 13 Member States have complied in varying degrees with some judgments of the Court⁸. It equally shows, that although some Member States that have not determined the appropriate national authority for the enforcement of the Judgments of the Court, they have in several cases complied with the Judgments of the Court⁹. It must however be noted, that a majority of the judgments of the Court are yet to be enforced or complied with. The Statistics of the Court shows that out of 64 (Sixty Four) enforceable decisions delivered by the Court against Member States and ECOWAS Institutions, since the adoption of the Supplementary Protocol on the Court, only 35 (Thirty Five) of the said decisions have been complied with.

The Court is still facing challenges in the enforcement of its judgments. It is not in doubt that most international Courts and Tribunals have challenges in the enforcement of their judgments but some fare better than the others. The ECCJ like other international Courts, does not have any direct coercive power over non- compliant Member States. This paper will therefore review

⁷ Article 24(2) of Supplementary Protocol A/SP.1/01/05 relating to the Community Court of Justice, ECOWAS.

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Federal Republic of Nigeria	-	11 judgments
ECOWAS Commission	-	5 judgments
Republic of Liberia	-	1 judgment
Burkina Faso	-	2 judgment
Republic of the Gambia	-	3 judgments
Republic of Niger	-	3 judgments
Republic of Togo	-	5 judgments
Republic of Senegal	-	1 judgment
Republic of Mali	-	1 judgment
Republic of Ghana	-	1 judgment
Republic of Sierra Leone	-	1 judgment
West African Monetary Agency	-	1 judgment

⁹ See (2) Report on the enforcement of the decisions of the Community Court of Justice.

the enforcement mechanism of the judgments of the ECOWAS Court of Justice, highlight the challenges militating against it, do a comparative analysis of the enforcement mechanism of other regional courts and explore ways and means of improving compliance or strengthening the enforcement mechanism in accordance with international best practices.

I. OVERVIEW OF THE METHOD OF ENFORCEMENT OF THE JUDGMENT OF THE ECOWAS COURT OF JUSTICE.

Basic Principle of *Pacta Sunt Servanda*¹⁰

The basic principle governing the enforcement of judgment of international Courts is *pacta sunt servanda*, which can be construed as meaning that every treaty in force is binding upon the parties and must be performed by them in good faith. This Latin phrase, which may be literally translated as “treaties shall be complied with,” describes a significant general principle of international law—one that underlies the entire system of treaty-based relations between sovereign states. State practice over the centuries has recognized the fundamental significance of *pacta sunt servanda* as a principle or rule of international law. The good faith element of this principle suggests that states should take the necessary steps to comply with the object and purpose of the treaty. States may not invoke restrictions imposed by domestic law as good reason for not complying with their treaty obligations.

The ECOWAS Community texts that provide that the judgments of the Court are binding have their basis in the maxim “*Pacta Sunt Servanda*” as enunciated in Article 26 of the Vienna Convention on the Law of Treaties of 23 May, 1969, in respect of implementation of decisions, which provides that every treaty in force is binding on parties to the treaty and must be executed in good faith. The treaty requires that States meet their obligations in good faith.

It is therefore expected that Member States will implement the ECOWAS Revised Treaty and the Protocol on the Court which are binding on them in good faith in accordance with the principle of *pacta sunt servada*. Secondly, the Member States also have an obligation to comply with the decisions of ECCJ since they amount to their treaty obligations, in

¹⁰ See Article 26 of the Vienna Convention on the Law of Treaties of 23 May, 1969.

accordance with the framework of the Revised Treaty, Protocol on the Court and the Supplementary Act on Sanctions on Member States that Fail to Fulfill their Obligations.¹¹

Judgments are Binding Obligations

The ECOWAS Revised Treaty provides that judgments of the Court are binding on Member States, institutions of the community, individuals and corporate bodies¹². The Supplementary Act on Sanctions against Member States that Fail to Honour Their Obligations to ECOWAS also has a similar provision¹³. The initial Protocol on the Court, also provides¹⁴ that the decisions of the Court shall be final and immediately enforceable. The Protocol further provides that Member States and institutions of the Community shall take immediately all necessary measures to ensure execution of the decisions of the Court¹⁵. These provisions are founded on the principle of *pacta sunt servanda*. Although the initial Protocol on the Court did not provide the method of enforcement, the lacuna was filled by Article 24 of the Protocol on the Court as amended, which prescribed for the first time, the method of enforcement of the judgments of the Court. However, an intriguing dimension was introduced by Article 24(1) which provides that: “*Judgments of the Court that have financial implications for nationals of Member States or Member States are binding*”.

It was not clear why this distinction between judgments that have financial implications and judgments that do not have financial implication was made. Does this presuppose that judgments of the Court that do not have financial implications for nationals of Member States or Member States are not binding? This provision is unnecessary and should otherwise have been redundant in view of the provisions of Article 15 (4) of the Revised Treaty that provides that judgments of the Court shall be binding on the Member States, the institutions of the Community and on individuals and corporate bodies. Fortunately, this unnecessary distinction between judgments with or without financial implications was removed by Article 5 of Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations, which provides that:

“The Community Court of Justice shall deliver Judgments which include but not limited to financial sanctions against Member

¹¹ See Article 2(3) Supplementary Act on Sanctions (2012)

¹² Article 15 (4) of the ECOWAS Revised Treaty, 1993. Article 5 and 6 of the Supplementary Act on Sanctions, 2012

¹³ Article 2(3) *ibid*

¹⁴ Article 19(2), Protocol A/P1/7/91 on the Community Court of Justice, ECOWAS.

¹⁵ Article 22 (3) now 23 (3)

States in application of Article 24, paragraph 1 of the Protocol relating to the Community Court of Justice as amended by Article 6 of Supplementary Protocol A/SP.1/01/05 of 19th January, 2005 when it notices that they have failed to honour their obligations as stated in the Community texts”¹⁶.

Article 24: Method of Implementation of the Judgments of the Court

Under the Protocol on the Court as amended, Member States are given the responsibility of executing the Judgments of the Court in accordance with their Rules of Civil Procedure. “Execution of any decision of the Court shall be in the form of a writ of execution, which shall be submitted by the Registrar of the Court to the relevant Member State for execution according to the Rules of Civil Procedure of that Member State”¹⁷. It also provides that “upon the verification by the appointed authority of the recipient Member State that the writ is from the Court, the writ shall be enforced”¹⁸. Furthermore, that “all Member States shall determine the competent national authority for the purposes of receipt and processing of execution and notify the Court accordingly”¹⁹. “The writ of execution issued by the Court may be suspended only by a decision of the Community Court of Justice”²⁰.

Notwithstanding the above provisions, enforcement of the decisions of the Court still remains a major challenge. As stated earlier, since the adoption of the Supplementary Protocol in January 2005, only Four (4) Member States have appointed the competent national authority for the enforcement of the judgments of the Court as stipulated by Article 24 (4) of the Protocol as amended²¹.

It however appears that the provisions of Article 24 of the Protocol as amended do not go far enough as there are obvious shortcomings. According to Kamara:

“The lack of sufficient provisions in Community Instruments to ensure the enforcement of the decisions of the court and the fact that Articles 20 and 24 of the Protocol on the court as amended and Article 77 of the ECOWAS Revised Treaty, are regrettably

¹⁶ Articles 5 & 6 of the Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS.

¹⁷ Article 24 (2) Supplementary Protocol A/SP.1/01/05 (2005) amending the Protocol A/P1/7/91 relating to the Community Court of Justice, ECOWAS.

¹⁸ Article 24 (3) *idem*

¹⁹ Article 24 (4) *idem*

²⁰ Article 24 (5) *idem*

²¹ Guinea, Nigeria, Mali and Burkina Faso

insufficient to ensure that decisions of the court are enforced, as the enforcement of said decisions are still dependent on authority of Member States²²”.

In 2012 another Community text was added to the enforcement mechanism of the judgments of the Court. The **Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS** provides for political and judicial sanctions against Member States or their leaders that fail to honour their obligations to the community²³, including the judgments of the Court. Although the details of the political sanctions were provided²⁴, there were no details of the judicial sanctions. Although some see this as a drawback, others are of a different view, as it gives the Court discretion to impose whatever judicial sanctions it deems fit. For instance, the Court could follow the precedence of the European Court of Justice, which imposes lump sum or day to day sanctions until compliance.

Confronted with the problem of non-compliance with the judgments of the European Court of Justice, the EU Member States added with the Treaty of Maastricht a new provision to the EC Treaty which seeks to secure respect for ECJ judgments. The new procedure according to Article 228 of the EC Treaty is a special judicial procedure for the enforcement of judgments that provides for the imposition of penalty payments or lump sums by the ECJ on a Member State which fails to comply with an earlier judgment of the ECJ that a Member State is in breach of its obligations under Community law²⁵. For instance, the European Court of Justice ordered Sweden to make a lump sum payment of 3 Million Euro for failing to comply with a decision of the Court within the time limit for adopting the laws, regulations and administrative provision, necessary to comply with a directive. The Commission had brought a subsequent action asking the Court to order Sweden to pay a daily penalty for each day that Sweden delays in complying with the Judgment. However following the adoption by the Swedish Parliament of measures to comply with the directive, the Commission withdrew the request for a daily penalty payment but maintained its claim regarding the payment of a lump sum. The Court

²² Kamara .J (2006): The Law and practice of the ECOWAS Community Court of Justice, <http://www.carl.sl.org/home/articles/132-the-law-and-practice-of-the-ecowas-community-court-of-justice>.

²³ Article 3(1) of Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS

²⁴ Article 5 & 6 of Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS.

²⁵ Memo/05/482, Brussels, 14 December 2005, Financial Penalties for Member States who fail to comply with Judgments of the European Court of Justice: European Commission clarifies rules

held that it was necessary to order Sweden to make a lump sum payment as it had failed to fulfil its obligations under EU law²⁶.

It should be noted that the **Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations** to ECOWAS also provides that “the sanctions defined in Article 5 to 11 of the Supplementary Act shall be enforced in increasing order of severity²⁷”. Obviously the said Supplementary Act adds to the options available to the Court.

The continued non-compliance with the decisions of the Court by some Member States and attempts by others to narrow the court’s jurisdiction, constitute an existential threat to ECCJ. We however received cheering news from Femi Falana, SAN recently, in the following words:

“I am delighted to inform you that recent political developments in the region and our pressure have changed the attitude of some governments with respect to compliance with the judgments of the Court. Pls find below our progress report:

1. The current government in The Gambia has pledged to pay the damages awarded by the Court in the cases of Ebrima Menneh and Musa Saïdykhan. I have been in touch with the Attorney-General of the country on the matter.

2. The government of Sierra Leone negotiated the damages awarded to El Tayib- Bah and eventually paid him \$150,000.

3. The Attorney-General of Nigeria has arranged a meeting with us to negotiate the sum of N80 billion damages awarded to the victims of bombs and mines in the south east. I will give you a report next week on the rate of compliance with other judgments of the Court by the Government of Nigeria.

4. I am going to meet the President of Ghana in Accra after the Easter holiday to press for the payment of the \$250,000 damages awarded in favour of Mr. Oguikwe whose 15-year old son was killed in Ghana.

5. The two leading political parties in Sierra Leone are discussing with ex-VP Sam Sumana on their readiness to comply with the judgment of the ECOWAS court. The picture will become clear by next week after the rerun election ”²⁸.

II. THE ROLE OF MEMBER STATES IN THE ENFORCEMENT OF THE JUDGMENTS OF THE ECOWAS COURT OF JUSTICE AND THE CHALLENGES MILITATING AGAINST THE EFFECTIVE ENFORCEMENT OF THE JUDGMENTS OF THE COURT BY MEMBER STATES.

²⁶ <https://www.insideprivacy.com/data-security/sweden-hit-with-3m-penalty-payment-fo...27/03/2018>

²⁷ Article 13 of Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that Fail to Honour their Obligations to ECOWAS

²⁸ Email from femifalana15@gmail.com to tamaidoh@yahoo.com, dated 25th March, 2018 at 7:00am.

Article 24 of the Protocol on the Court specifies the role of Member States in the enforcement of the judgments of ECCJ. The Protocol gives Member States the responsibility to enforce the judgments of the Court in accordance with their Rules of Civil Procedure. The Court amplified the role of Member States in its declaration of the Community legal order²⁹, in *Jerry Ugokwe v. FRN*³⁰, where it made it clear that the Court relies on the national Courts of Member States for the enforcement of its decisions. In the words of the Court:

“The distinctive feature of the Community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law. And if the obligation to implement the decision of the Community Court of Justice lies with the national courts of Member States, the kind of relationship existing between the Community Court and these National Courts of Member States are not of a vertical nature between the Community and the Member States, but demands an integrated Community legal order.”

The Court reaffirmed the Community legal order in *Bakary Sarre & 28 ORS v. Republic of Mali*³¹, in the following words:

“Now, in its Judgment No ECW/CCJ/JUD/03/05 of 7 October 2005 (paragraph 32), relating to Suit No ECW/CCJ/APP/02/05, Jerry Ugokwe v. Nigeria and Christian Okeke, the Court stated that cases made against decisions of national Courts of Member States do not form part of its jurisdiction, the specific nature of the Community legal order of ECOWAS being that it sanctions a judicial monism without necessarily endorsing the primacy of the Community law; if the obligation to enforce the decisions of the Community Court of Justice is binding on the domestic Courts of the Member States, that obligation does not imply a hierarchy in the judicial order between the Community and Member States, but requires an integrated Community legal order. The Court of Justice of ECOWAS is not an appellate Court or a Court of cassation over the national Courts³²”.

We have earlier observed that a majority of the Member States have not appointed a competent national authority for the enforcement of the judgments of the Court in accordance with Article 24 of the Protocol on the Court as amended. We have equally observed that the rate of compliance with the judgments of the Court by the Member States is not very satisfactory.

²⁹ Jerry Ugokwe v Federal Republic of Nigeria ECW/CCJ/JUD/03/05 and Bakary Sarre v Republic of Mali ECW/CCJ/JUD/03/11.

³⁰ (2004 -2009) CCJELR 37

³¹ (2011) CCJELR 57

³² Paragraph 29 of the Judgment

Even the Member States that are willing to comply have legal constraints, arising from the non-domestication of ECOWAS Revised Treaty and the Protocol on the Court and the absence of enabling legal framework for the enforcement of the judgments of the Court in their countries. These and several other challenges are militating against the enforcement of the judgments of the Court by the national Courts of Member States and will be discussed in the following paragraphs.

Challenges

Non Appointment of Competent National Authorities:

The failure of eleven (11) Member States to appoint a competent national authority despite repeated demands by the Court, is a breach of their treaty obligations, which is having an adverse effect on the enforcement of the judgments of the Court by their national courts. The importance of the competent national authorities cannot be over emphasized because they are responsible for receiving, verifying and processing the Writ of Execution from the Court and for rendering returns to the Court³³. In other words, they are responsible for the enforcement of the judgments of the Court before the national courts of the Member States, in accordance with their Rules of Civil Procedure. Therefore, the competent national authorities constitute the link between the ECOWAS Court of Justice and the national courts of Member States. Failure to appoint the competent national authorities is a huge handicap.

Lack of Domestic Legislation or Legal Framework for the Enforcement of the Judgments of ECCJ by National Courts:

Another challenge the national courts of Member States may have in respect of the enforcement of the judgments of the ECOWAS Court of Justice is the absence of domestic legislation or legal framework enabling or empowering them to recognize, receive and enforce the judgments of ECCJ. The national courts do not have domestic legislation which specifically mentions the judgments of the ECOWAS Court of Justice and the specific method of enforcement on which to anchor applications for enforcement of the judgments of ECCJ. Scholars have debated this point at length. According to Enabulele:

“The need for a complete synergy between the Community Court Protocol and the laws of Community States is further stressed by the fact that Article 24 of the Protocol relies on the institutions of the Community States in line with the relevant

³³ Article 24(2), (3) & (4) of the Protocol on the Court as amended

Civil Procedure Rules for the enforcement of its judgment. In this regard the relevant constitutions of Community States must be obliged by their municipal law to receive and enforce the judgment of a non-forum Court. This underscores, the enactment of legislation permitting the recognition and enforcement of foreign judgments to give legal backing to forum Courts to recognize and enforce same”³⁴.

He further warned that;

“Unless a strong regime of enforcement mechanism anchored on municipal law, and having international consequences for violating countries is fashioned out, the Community Court, like its sister Courts in Africa, will exist only in name and structure without any effective contribution to individual well-being within the sub region. In this wise, it is important for Community States to take a cue from their European Communities (EU) and Council of Europe counterparts in respectively creating a Court that will drive the desired integration, as did the European Court of Justice (ECJ) and one provides an effective mechanism for human rights enforcement, as the European Court of Human Rights (ECEHR)³⁵”

Failure to Domesticate the Revised Treaty and the Protocol on the Court by Member States:

Another challenge militating against the enforcement of the judgments of the Court is the non-domestication of the Revised Treaty and Protocols on the Court by Member States in accordance with the Revised Treaty. Article 5(2) of the Revised Treaty provides as follows:

“Each Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty”.

Failure to domesticate the Revised Treaty and the Protocol on the Court as required by the above provision, constitutes a major challenge for the enforcement of the judgments of

³⁴ Enabulele, A O (2010): Reflections on ECOWAS Community Court Protocol and the Constitutions of Member States, (International Community Law Review) 12 (2010) 111- 138 at page 113

³⁵ Enabulele, A O (2010): Reflections on ECOWAS Community Court Protocol and the Constitutions of Member

ECCJ by national courts of Member States, especially for the dualist common law countries, since the ECOWAS community texts do not have the force of law without domestication. For such countries, international law does not confer enforceable rights on individuals within the state until the international law has been domesticated, no matter how beneficial the treaty is to the nationals³⁶. Scholars have dwelt at length on this issue. In the words of Enabulele:³⁷

“This is because it is an established principle acted upon by Courts of dualist countries, that unimplemented treaties cannot have the force of law. In Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors v. Medical and Health Workers Union of Nigeria, both the Nigerian Court of Appeal and the Supreme Court held that the International Labour Organization Convention, not having been domesticated by the National Assembly, cannot be applied in Nigeria. In Dow v. Attorney General of Botswana, the Botswana Court of Appeal held that international Human Rights instruments do not have automatic application in Botswana’s domestic law, unless incorporated by legislation. In the Swaziland’s case of Professor Dlamini v. The King, it was held that the provisions of the African Charter on Human and Peoples’ Rights, cannot be enforced by the domestic Courts unless Parliament has by legislation incorporated them into the municipal law of Swaziland. On the other hand, the Nigerian Court of Appeal and the Supreme Court had no problem enforcing the African Charter on Human and People’s Rights in Nigeria in the case of Abacha v. Fawehinmi, the said treaty having been passed into law by the National Assembly as “The African Charter on Human and People’s Rights (Ratification and Enforcement) Act.”

The negative impact of non-domestication was recently highlighted by the decision of a High Court in Accra, Ghana, in *Chude Mba v Republic of Ghana*³⁸. The High Court refused to enforce the judgment of ECCJ in the above case on the ground that the Protocol on the Court had not been incorporated into the domestic law of Ghana. According to Hon. Justice Suurbaareh

“... It is true that Protocols of ECOWAS Community Court have been ratified as can be seen from Exhibit “NAA 2” but does this alone make the orders of the Court enforceable by this Court? Since Ghana is a dualist state, after the

³⁶ (2001) AHRLR 172 (NgSC 2000)

³⁷ Enabulele, A.O : Reflections on the ECOWAS Community Court Protocol and the constitutions of Member States published in the International Community Law. Review 12 (2010) 111 – 138.

³⁸ In Suit No:HRCM/376/15 (2/02/2016). Chude Mba v Republic of Ghana.

ratification of treaties by Parliament, the position of municipal law will not be altered until they are incorporated into municipal or Ghanaian law by legislation. Without legislation making the orders of the ECOWAS Community Court binding on or enforceable by our Courts, the mere ratification of Protocols will not make them have the force of law. DATE-BAH JSC. IN THE REPUBLIC VRS HIGH COURT (COMMERCIAL DIVISION) ACCRA; (NML CAPITAL LTD & ANO – INTERESTED PARTIES); CIVIL MOTION NO J5/10/2013 delivered on the 20th day of June, 2013, held that the mere fact that a treaty has been ratified by Parliament in one of the ways provided by the Constitution 1992, does not of itself mean that it has been incorporated into Ghanaian law. In the view of the learned Judge, a treaty may come into force and regulate the rights and obligations of the State on the international plane without changing the rights and obligations under municipal law. The learned Judge went on to state that the need for legislative incorporation of treaty provisions into municipal law before domestic Courts can apply them, was not only reflective of the dualist stance of the Commonwealth Common Law Courts, but was also backed by a long line of authorities (some of which he proceeded to refer to) and concluded that this Common Law position is not altered by the directive principles of state policy and to the Executive contained in articles 40 and 73 respectively of the Constitution 1992 as they cannot be interpreted to alter the dualist stance of Ghanaian law and do not authorize Courts to enforce treaty provisions that change rights and obligations in the municipal law of Ghana without legislative backing.

From the foregoing, as it is not in doubt that Parliament has not enacted any legislation incorporating the ECOWAS Community Court Protocols into municipal law and that the ECOWAS Community Court is not stated in the schedules to LI1575, it means that its orders cannot be enforced by this Court. The application therefore fails and the same is dismissed. I make no order as to cost.”

The decision of the Ghana High Court has grave implications for the continued existence of the ECOWAS Court of Justice. It is therefore expedient that urgent measures be taken by all Member States to domesticate the ECOWAS Revised Treaty and the Protocol on the Court in accordance with the provisions of the Revised Treaty.

Non- involvement of ECOWAS Political Authorities

It has been noted that the Revised Treaty and Protocol on the Court do not provide any roles or involvement of the ECOWAS Political authorities in the implementation of the judgment of the Court like the political authorities in some regional systems. This is a handicap because political authorities are better suited to provide the necessary monitoring and supervisory roles for the implementation of the judgments of the Court. They are also better suited to provide the political will that is required for compliance or enforcement. The ECOWAS Council of Ministers ought to be involved in the enforcement of the judgments of the Court, in order for the enforcement mechanism to have the necessary bite. The mere fact of naming and shaming defaulting Member States before the Council of Ministers will spur some of them to comply. For instance there is an effective involvement of the political authorities in the implementation of the judgments of the European Court of Human Rights, the African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights which would be discussed later in this paper.

ECCJ plays no role in the enforcement of its judgments

It is also a challenge that the Revised Treaty and Protocol on the Court do not provide any role for the ECOWAS Court of Justice in monitoring and supervising the implementation of its judgments. Under the current enforcement mechanism, once the Court pronounces its judgment, it has no powers to monitor and supervise the implementation of the judgments, like some other regional courts e.g. the African Court on Human and Peoples' Rights, the European Court of Human Rights, and the Inter- American Court. However, since the **Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations** gives it power to impose judicial sanctions, it could be argued that on an application by a judgment creditor, the Court could impose whatever judicial sanctions it deems fit. A Member State that fails to comply with the judgments of the Court may in addition be liable to political sanctions³⁹ in accordance with the provisions of the above Supplementary Act.

Dilemma: Are ECCJ Judgments Foreign judgments or Community Judgments directly applicable in Member States in the Context of ECOWAS Community Law

There is a challenge arising from the uncertainty as to how the national courts of Member States should recognize and receive the judgments of ECCJ. The question is, should national courts of Member States receive and enforce the judgments of ECCJ as foreign judgments in accordance with the Rules of enforcement of foreign judgments or are the judgments directly

³⁹ Article 6, 7, 8, 9, 10, 11 & 12 of Supplementary Act on Sanctions Against Member States that Fail to Honour their Obligations

applicable in Member States as the judgments of community court that is supranational in nature? It has been contended in some quarters that the Judgments of the Court could be enforced by Member States as foreign Judgments⁴⁰. Some Member States therefore view the judgments of the Court as foreign judgments. The simple justification for this viewpoint is that they are not the judgments of the national courts but that of a non-forum court and must therefore be foreign judgments. Secondly there already exists domestic legislation for the recognition, reception and enforcement of foreign judgments, especially for common law countries in the form of Foreign Judgments Enforcement Act. In their view, the judgments of ECOWAS Court of Justice neatly fall into this pigeon hole and should therefore be enforced by the national courts of Member States as foreign judgments.

On the other hand it has been contended that in the context of ECOWAS community law, the judgments of ECCJ cannot be viewed as foreign judgments because they ought to be directly applicable in Member States, in accordance with the integrated community legal order as declared by the Court. According to Enabulele:

“It has been argued that the decisions of the ECCJ should be directly applicable in Member States because its basis is community law, which ought to be of superior weight to decisions of national courts. That the national courts are required by provisions of the 1991 Protocol on the ECCJ to execute decisions of the ECOWAS Court. It has been advocated for the decisions of the ECCJ to be enforced by the Supreme Courts of Member States in order to reinforce the fact that the judgment of the ECCJ becomes automatically part of the national law and the highest precedential value. Also, that the ECCJ ought to enforce provisions of the Revised Treaty on Member States, through its decisions”⁴¹.

The basis of this argument is that ECOWAS is a supranational authority and ECOWAS Court of Justice is a supranational Court, therefore the Regulations of ECOWAS and judgments of ECCJ are directly applicable in Member States in the context of ECOWAS community law. In the words of ECCJ in *Musa Saidu Khan V. Republic of the Gambia*⁴²:

48. “.... ECOWAS is a supra national authority created by the Member States wherein they expressly ceded some of their sovereign powers to ECOWAS to act in their common interest.

⁴⁰ See paper presented by the Chief Registrar of the Supreme Court of Ghana at the Court’s Anniversary Conference in Accra.

⁴¹ Enabulele, A O (2010): Reflections on ECOWAS Community Court Protocol and the Constitutions of Member

⁴² (2010) CCJELR 139

Therefore, in respect of those areas where the Member States have ceded part of their sovereign powers to ECOWAS, the rules made by ECOWAS supersede rules made by individual Member States if they are inconsistent. The Revised Treaty of ECOWAS was ratified by all the Member States of ECOWAS, including the Defendant/Applicant herein. This Court is the offspring of the Revised Treaty; and this Court is empowered by the Supplementary Protocol on the Court of Justice, which is part of the instruments of implementation of the Treaty and has the same legal force as the Treaty, to adjudicate on issues of human rights arising out of the Member States of ECOWAS.

49. *Therefore, it is untenable for a Member State of ECOWAS to claim that a matter is essentially within its domestic jurisdiction when it had expressly or by necessary implication granted ECOWAS powers to act solely or concurrently with national jurisdiction in respect of that matter. Defendant/Applicant herein, being bound by both the Revised Treaty and the Supplementary Protocol on the Court of Justice which granted jurisdiction over human rights causes are matters essentially within their domestic jurisdiction and for which reason this Court ought not to interfere with them.*

50. *Article 2 of the United Nations Charter, which seeks to prevent interference in the domestic affairs of sovereign states is not applicable here. Article 2 of that Charter applies to matters that are essentially domestic in nature and over which the state in question has not acquired any international obligation in respect thereof. When a sovereign state freely assumes international obligations and is being held accountable in respect of those obligations, that state cannot renounce those obligations under the pretext that the matter in question is one that falls essentially within its domestic jurisdiction. Defendant/Applicant, being a Member State of ECOWAS, is bound by the obligations that it has assumed under the Revised Treaty and the Protocols thereof. Consequently, Article 2 of the United Nations Charter does not ensure to the benefit of Defendant/Applicant in this case⁴³.*

Member States guard their sovereignties jealously but it must be pointed out that in agreeing to establish a supranational authority like ECOWAS, they must necessarily cede part of their sovereignty to ECOWAS to act on their behalf in areas of common interest. Furthermore, the

⁴³ (2010) CCJELR 139 (Paragraphs 48, 49 and 50 of the Ruling of the Court of 30th June 2009 in *Musa Saïdykan V. The Republic of the Gambia*, ECW/CCJ/APP/11/07)

new legal regime of ECOWAS⁴⁴ envisages the direct application of Regulations made by the community in the Member States. The need for Member States to recognize that they have ceded part of their sovereignty in the areas of common interest and therefore subsume their municipal law in areas of common competences to the overriding competence of ECOWAS was emphasized by Ebobrah in the following words:

*“The amalgamation of diverse sovereignties into ECOWAS with shared and exclusive competences cannot be achieved without huge cost to national competences which have either been ceded to, or have to be shared with ECOWAS. By the integrative nature of its provisions, the Revised Treaty stands upon an undertaking that Member States would align to, and subsume their municipal law in areas of coincident competences to the overriding competence of ECOWAS. It is by no means possible for a subject to be regulated by two different systems of law when each claims superiority. This is even as ECOWAS consists of 15 sovereignties whose national interests and policies do not always coincide, so that it is not an option to allow each to take unilateral policies or actions in the area of competence of ECOWAS. Such would only amount to inventing centrifugal forces that would pull the **organization** in diverse directions”⁴⁵.*

III. COMPARATIVE ANALYSIS OF THE METHODS OF THE ENFORCEMENT OF THE JUDGEMENTS OF REGIONAL COURTS AND THE NEED FOR THE INVOLMENT OF THE ECOWAS COUNCIL OF MINISTERS IN THE ENFORCEMENT MECHANISM.

Enforcement of the decisions of international courts is a systemic problem in the International human rights system. Due to the fact that some human rights treaties provide for only rudimentary enforcement procedures, they experience challenges in the enforcement of their judgments. This could be attributed to lack of adequate legal and institutional framework and good faith that are necessary for the implementation of the judgments. Every Regional system has a method of enforcement of its judgments that is peculiar to it and some have a better rate of compliance than others. In order to benefit from international best practices, and learn from the experience of others, it is desirable to conduct a comparative analysis of the different methods of enforcement of the judgments of some regional courts.

⁴⁴ New Article 9 of the Revised Treaty Supplementary Protocol A/SP.1/06/06

⁴⁵ Ebobrah. S. T, *Enforcement of Judgments of the ECOWAS Court of Justice: Matters Arising.*

Currently there are three major regional systems. These are: the African human rights system, the Inter-American system, and the European system. The key features of the methods of enforcement of their judgments are discussed hereunder.

- **The African Court on Human and Peoples' Rights:**

The African Court on Human and Peoples' Rights is a continental Court established by African countries to ensure the protection of human and peoples' rights in Africa. The Court reinforces and compliments the African Commission on Human and Peoples' Rights. Articles 29, 30, and 31 of the Protocol on the Court provide the method of enforcement of the judgments of the Court. The Protocol provides that "*Parties to a case should be notified of the judgments of the Court and the said judgment is to be further transmitted to Member States of the OAU and the Commission*"⁴⁶. The Protocol further provides for the "*Council of Ministers to be notified of the judgment and monitor its execution on behalf of the Assembly*"⁴⁷. States parties to the Protocol also undertook "*to comply with the judgment in any case to which they are parties within the time stipulated by the Court and they are to guarantee the execution of same*"⁴⁸.

Also, "*the Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgment*"⁴⁹. In the same vein, the Rules of the African Court on Human and Peoples Rights provide that "*the judgment of the Court shall be binding on the parties*"⁵⁰ and that "*the Executive Council shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly*"⁵¹. Furthermore, the Protocol contains similar provisions on the binding nature of judgments similar to those in the Protocol on ECCJ. It clearly provides that "*the decision of the Court shall be binding on the parties and that subject to the provisions of paragraph 3, Article 41 of the present Statute, the judgment of the Court is final*"⁵².

Also, *the parties must comply with the judgment made by the Court in any dispute to which they are parties. This compliance is expected to be within the time stipulated by the Court and shall guarantee its execution*"⁵³. "*Where a party has failed to comply with the judgment, the*

⁴⁶ Article 29(1) of the Protocol on the establishment of the African Court on Human and Peoples' Rights.

⁴⁷ Article 29 (2) of the Protocol on the establishment of the African Court on Human and Peoples' Rights.

⁴⁸ Article 30 of the Protocol on the establishment of the African Court on Human and Peoples' Rights.

⁴⁹ Article 31 of the Protocol on the establishment of the African Court on Human and Peoples' Rights.

⁵⁰ Rule 61(5), Rules of the African Court on Human and Peoples' Rights.

⁵¹ Rule 64(2), Rules of the African Court on Human and Peoples' Rights.

⁵² Article 46(1) of the Protocol on Statute of the African Court on Human and Peoples' Rights

⁵³ Article 46(3) of the Protocol on Statute of the African Court on Human and Peoples' Rights

*Court shall refer the matter to the Assembly, which shall decide upon measures to be taken to give effect to that judgment*⁵⁴. *“The Assembly may impose sanctions by virtue of paragraph 2 of Article 23 of the Constitutive Act*⁵⁵”

The various provisions above are clear on the method of enforcement of the Court’s decisions. It provides for *“the Court to refer matters to the Assembly where parties fail to comply with judgments and decisions of the Court. The Assembly in turn, is empowered to decide upon measures to be taken to give effect to that judgment”*⁵⁶.

The ECCJ does not have a similar provision in its Protocol that allows it notify and transmit judgments and decisions to Member States and the Commission or to monitor the implementation of the judgments. Furthermore, the Council of Ministers of ECOWAS are not empowered to monitor the enforcement of the Court’s judgments, unlike that of the African Court, where both the Council of Ministers and Executive Council, monitor the execution of judgment on behalf of the Assembly. Nothing empowers the ECCJ to refer defaulters that fail to comply with its judgments to the Commission, the Council of Ministers or the Authority of Heads of States and Government. The African Court system shows active political involvement in the implementation mechanism and therefore rests within the political realm.

- **The Inter-American Human Rights Court**

Under the Inter-American Human Rights system, the Commission is vested with the power to request state report from Member States regarding their human rights situation. The Commission is vested with broad powers in relation to country reports. Article 65 of the American Convention establishes the obligation of the Court to submit an Annual Report to the General Assembly of the Organization of the American States (OAS) concerning the work of the Court and this report has to specify the cases in which a State has not complied with the Court’s judgments⁵⁷. The Inter-American Convention also provides that to each regular session of the General Assembly of the Organization of American States the Court is to submit, for the Assembly's consideration, a report on its work during the previous year. The report is to

⁵⁴ Article 46(4) of the Protocol on Statute of the African Court on Human and Peoples’ Rights

⁵⁵ Article 46(5) of the Protocol on Statute of the African Court on Human and Peoples’ Rights

⁵⁶ Article 46 (1), (2), (3),(4) and (5) **PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS**

⁵⁷ Article 65, American Convention on Human Rights.

specify, in particular, the cases in which a state has not complied with its judgments and make recommendations⁵⁸.

The Court considered that in order to be able to inform the OAS General Assembly, it was necessary for the Court itself to know the degree of compliance with its decisions. The Inter-American Court has read this provision as allowing it to issue *ad hoc* judgments assessing whether a state has complied with the remedial measures imposed upon it by the Court. Thus, the Inter-American Court has taken upon its shoulders the need to further guide states on compliance strategies.

The procedure for monitoring compliance with the judgments and other decisions of the Court requires the submission of reports by the state and observations to those reports by the victims or their legal representatives. In turn, the Commission presents observations to the state's reports and to the observations of the victims or their representatives. Interestingly, the Court may require from other sources of information, relevant data regarding the case in order to evaluate compliance. To that end, the Court has been authorized to request the expert opinions or reports that it considers appropriate. In case of a finding of non-enforcement, additional, more detailed obligations may be imposed upon the state in order to ensure compliance⁵⁹.

The ECCJ is not vested with similar powers by its Protocol to submit a report to the Council of Ministers or the Authority of Heads of State and Government on its work during the previous year and the cases in which a State has not complied with its judgments. Although, the ECCJ submits its Annual Report to the ECOWAS Commission for inclusion in the President of the Commission's Annual Report, it does not include the status of implementation of its judgments.

- **The European Court of Human Rights**

The European system is set up under the auspices of the Council of Europe. The Principal Convention of the system is the European Convention on Human Rights and Fundamental Freedoms which entered into force in 1953. The method of enforcement of the decisions of the ECCJ is remarkably different from the method of execution of judgment of the

⁵⁸ **Article 65 of the American Convention** (Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969).

⁵⁹ Article 69 (2) of the Rules of Procedure of the Inter-American Court and **The Inter-American System of Human Rights: A Research Guide** By Cecilia Cristina Naddeo.

http://www.nyulawglobal.org/globalex/Inter_American_Human_Rights.html

European Court on Human Rights which is more result oriented. Before the establishment of the current system, the European system had both a Commission and a Court.

The Committee of Ministers is a body of the Council of Europe entrusted with the tasks of supervising the implementation of the decisions of the European Court of Human rights. The Committee of Ministers has developed its own rules for exercising its task of supervising the implementation of the decisions of the court of human rights. Monitoring and ensuring execution of judgments of the European Court on Human Rights (ECHR) is done through one of the most advanced treaty- based systems in the field of human rights⁶⁰.

Two basic provisions govern Article 46 of the ECHR, which provides for the supervision of the ECHR Judgments, also Article 39 of the ECHR, provides for the supervision of the terms of friendly settlements. Article 46 entrusts the task of monitoring the states parties' implementation of the Court's Judgments to the Committee of Ministers (CM). The European system is generally recognized as having the highest level of compliance with decisions on individual complaints, in particular with regard to monetary compensation.

The judgment of the Court is transmitted to the Committee of Ministers, which supervises its execution. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it could refer the matter to the Court for a ruling on the question of interpretation. Where the Committee of Ministers considers that a party refuses to abide by a judgment in a case to which it is a party, it may, after serving formal notice on that party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken⁶¹. ECtHR Committee of Ministers has an Execution Department staffed by lawyers.

Unlike the European System, where the Convention provides for the Committee of Ministers to monitor compliance with the judgments of the European Court of Human Rights, the ECOWAS Court of Justice Protocol does not have any provision similar to that.

⁶⁰ Shelton. D (2013): The Oxford handbook of International Human Rights Law, (Oxford University Press)

⁶¹ Article 46, European **Convention for the Protection of Human Rights and Fundamental Freedoms** Rome, 4.XI.1950

The role of the ECOWAS Council of Ministers in the enforcement mechanism of the ECOWAS Court's decisions is yet to be defined like in the case of the European Court of Human Rights.

IV. RECOMMENDATIONS/MEASURES FOR IMPROVING THE ENFORCEMENT MECHANISM OF THE JUDGMENTS OF ECOWAS COURT OF JUSTICE

There is a need to review the enforcement mechanism of the judgments of the ECOWAS Court of Justice and to adopt desirable measures from other Regional Courts in order to strengthen the enforcement mechanism. In the light of the above, the following recommendations are made to improve the enforcement mechanism:

1. Domestication of the Revised Treaty, Protocols on the Court and other ECOWAS texts by Member States (incorporation into the domestic laws of Member States) in accordance with Article 5(2) of the Revised Treaty.
2. Enactment of legislation by Member States for the recognition and enforcement of the judgments of ECOWAS Court of Justice.
3. Involvement of the ECOWAS Commission and political actors in ECOWAS, like the Council of Ministers and Authority of Heads of States and Government in the enforcement mechanism of the ECOWAS Court of Justice.
4. A Committee of Ministers should be constituted to monitor and supervise the enforcement of the judgments and decisions of the Court like in the European Court system enforcement mechanism.
5. The Court should be empowered to send its own Annual Report to the ECOWAS Council of Ministers or the Authority of Heads of State and Government on the status of compliance of its judgments like in the Inter-American Court of Human Rights enforcement mechanism.
6. Upon delivery of a judgment, a copy should be sent to the President of ECOWAS Commission and all the Member States, notifying them of the decision of the Court in order to ensure that steps are taken towards enforcing same.
7. A Unit should be established at the ECOWAS Commission for the purpose of monitoring the enforcement of Judgments of the Court. The Unit should be given the mandate to follow-up, investigate and verify the level of compliance with the decisions of the Court.

8. The Court could be empowered, to include specific time-limits or general guidelines for compliance with its decisions and judgments. After the expiration of such time or on the initiative of the winner, the winning party could reapply unilaterally for a declaration of non-compliance.
9. The Court should also be empowered to impose judicial sanctions, day to day or lump sum for non-compliance.
10. The ECCJ should also be empowered to monitor the execution of its judgments.
11. **There is the need for** necessary amendments to the constitutive texts of ECCJ to strengthen the mechanism on enforcement of the judgments of the Court.

CONCLUSION

The ECCJ enjoys the respect of ECOWAS Member States as its decisions are not summarily dismissed by any Member State. Despite the non-compliance with the decisions of the ECCJ by some Member States, non-state actors still have confidence in the Court. However, the continued non-compliance with the Court's decisions by Member States may give rise to loss of confidence by the public. The key selling points of the Court are its independence, boldness and impartiality. In the administration of justice, there is a corollary between the speedy dispensation of justice by a Court, its independence, impartiality, boldness and effectiveness and public trust and confidence. In the West African sub-region, the Community Court of Justice, ECOWAS has gained credibility for its bold judicial pronouncements. There is therefore a need to strengthen the enforcement mechanism of the Court in order not to render the Court a toothless bull dog.

The Court, like other international tribunals relies on the cooperation of States to comply with its decisions in good faith. The Court can only provide effective legal remedies when its judgment are complied with by Member States in accordance with the principle of Pacta Sunt Servanda. The judgments of the Court are binding and Member States have an obligation to comply.