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ARTICLE

Explaining the Comparatively Less Robust Human Rights Impact of the ECOWAS Court on Legislative and Judicial Decision-making, Process, and Action in Nigeria

Expliquer l'impact comparativement moins robuste sur les droits de la personne de la Cour de la CEDEAO sur la prise de décision, le processus et l'action législatifs et judiciaires au Nigeria

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Abstract

This article outlines and tackles two inter-related puzzles regarding the comparatively much less robust human rights impact that the ECOWAS Court (in effect, West Africa's international human rights court) has had on the generally more democratic legislative/judicial branch of decision-making and action in Nigeria *vis-à-vis* the generally more authoritarian executive branch within Nigeria, the country that is the source of most of the cases filed before the court. The article then discusses and analyzes the examples and extent of the court's human rights impact on legislative/judicial branch decision-making and action in that key country. This is followed by the development of a set of analytical, multi-factorial, explanations for the two inter-connected puzzles that animate the enquiry in this article. In the end, the article argues that several factors have combined to produce the comparatively much less robust human rights impact that the ECOWAS Court has had on domestic legislative and judicial decision-making, process, and action in Nigeria, through restricting the extent to

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which the latter could mobilize more robustly the court's human rights-relevant processes and rulings.

Keywords: International courts; international human rights courts; legislative decision-making; regional courts; judicial decision-making; civil society actors; ECOWAS

Résumé

Cet article expose et aborde deux énigmes interdépendantes concernant l'impact comparativement beaucoup moins fort en matière de droits de la personne que la Cour de la CEDEAO (fonctionnellement, la cour internationale des droits de la personne de l'Afrique de l'Ouest) a eu sur la branche législative/judiciaire généralement plus démocratique de la prise de décision et de l'action au Nigeria par rapport à la branche exécutive généralement plus autoritaire au Nigeria, le pays qui est à l'origine de la plupart des affaires déposées devant la Cour. L'article examine et analyse ensuite les exemples et l'étendue de l'impact des droits de la personne de la Cour sur la prise de décision et l'action du pouvoir législatif/judiciaire dans ce pays clé. Il développe ensuite une série d'explications analytiques et multifactorielles pour les deux énigmes interconnectées qui animent l'enquête de cet article. En fin de compte, l'article soutient que plusieurs facteurs se sont combinés pour produire l'impact comparativement beaucoup moins fort de la Cour de la CEDEAO en matière de droits de la personne sur la prise de décision, le processus et l'action législative et judiciaire au Nigeria, en limitant la mesure dans laquelle ces derniers pouvaient mobiliser plus vigoureusement les processus et les décisions de la Cour en matière de droits de la personne.

Mots-clés: Tribunaux internationaux; tribunaux internationaux des droits de la personne; tribunaux régionaux; prise de décision judiciaire; acteurs de la société civile; CEDEAO.

1. Introduction

It is now well understood that, although the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) is primarily a regional integration court, it has for quite some time now functioned, in effect, albeit only in part, as West Africa's international human rights court.[1] While studies of this relatively young, but important, sub-regional judicial institution are no longer quite as rare as they once were,[2] significant gaps remain in our scholarly understanding of

[1] For example, see James T Gathii, ed, *The Performance of Africa's International Courts: Using Litigation for Political, Legal and Social Change* (Oxford: Oxford University Press, 2020); Karen J Alter et al, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" (2013) 107 Am J Intl L 737.

[2] For a few examples, see Gathii, *supra* note 1; Alter et al, *supra* note 1; Solomon Ebobrah, "The ECOWAS Community Court of Justice: A Dual Mandate with Skewed Authority" in Karen J Alter, Laurence R Helfer & Mikael R Madsen, eds, *International Court Authority* (Oxford: Oxford University Press, 2018) 82 [Ebobrah, "ECOWAS Community Court of Justice"]; Solomon Ebobrah, "Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice" (2010) 54 J Afr L 1 at 54; Horace Adjolohoun, "The ECOWAS Court as a Human Rights Promoter? Assessing Five Years' Impact of the Koraou Slavery Judgement" (2013) 31 Netherlands Q L Rev 368; Horace Adjolohoun, "Status of Human Rights Judgments of the ECOWAS Court: Implications on Human Rights and Democracy in the Region (7 August 2012)," cited in Alter et al, *supra* note 1, at 767, n 219; Obiora C Okafor & Okechukwu J Effoduh, "The ECOWAS Court as a (Promising) Resource for Pro-Poor Activist Forces: Sovereign Hurdles, Brainy Relays, and 'Flipped Strategic Social

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the extent of its domestic impact within the states over which it has territorial/personal jurisdiction. Our broader, multi-year, socio-legal, study set out to close some of these gaps by investigating the human rights impact that this regional court has had over most of its existence within Nigeria, which is by far the most important country over which it exercises jurisdiction.[3] Among other things, this broader investigation found that the ECOWAS Court has had far more influence on the executive branch of government in this key West African country than on either its legislative or judicial institutions and processes.[4] Indeed, this wider investigation revealed that, its influence on civil society actors aside, the court's human rights impact beyond the sphere of executive branch decision-making and action in this key jurisdiction has been comparatively less robust.[5]

These findings beg the question why the relative distribution of the ECOWAS Court's domestic human rights impact across the three arms of Nigeria's government has not leaned much more in the direction of that country's legislative and judicial decision-making, processes, and action? Given that the Nigerian polity has been, at best, only quasi-democratic (and, therefore, semi-authoritarian) during almost all the period under study; that its federal executive branch has, as a result, effectively exercised excessively greater political and socio-economic power *vis-à-vis* the other two branches of the federal government than one would expect in a meaningfully democratic state;[6] and that (as is explained later) the Nigerian federal legislative and

Constructivism'" in Gathii, *supra* note 1, 106 at 106; Olabisi D Akinkugbe, "Towards and Analysis of the Mega-Political Jurisprudence of the ECOWAS Community Court of Justice" in Gathii, *supra* note 1, 149; Maame E Addadzi-Koom, "Of the Women's Rights Jurisprudence of the ECOWAS Court: The Role of the Maputo Protocol and the Due Diligence Standard" (2020) 28 Fem Leg Stud 155; Kehinde Ibrahim, "The Puzzling Paradox Presented within the African Supranational Judicial Institutions: The ECOWAS Court of Justice" (2020) 28 African J Intl & Comparative L 86; Richard F Oppong, "The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment" (2017) 25 African J Intl & Comparative L 127; Okechukwu Effoduh, "The ECOWAS Court, Activist Forces and the Pursuit of Socioeconomic and Environmental Justice in Nigeria" (LLM thesis, York University, 2017); Rahina Zarma, "Regional Economic Community Courts and the Advancement of Environmental Protection and Socio-Economic Justice in Africa: Three Case Studies" (PhD dissertation, York University, 2021).

[3]The reasons for the choice of Nigeria as our case study are offered later in this introductory section.

[4]For details on the sub-study that recently set this baseline, see Obiora C Okafor et al, "On the Modest Impact of West Africa's International Human Rights Court on the Executive Branch of Government in Nigeria" (2022) 35 Harv Hum Rts J 501 [Okafor et al, "Modest Impact"]. For another related article, see Obiora C Okafor et al, "The ECOWAS Court and Civil Society Activists in Nigeria: An Anatomy and Analysis of a Robust and Mutually Beneficial Symbiosis" (2022) 14 African J Legal Studies 1.

[5]Okafor et al, "Modest Impact," *supra* note 4.

[6]While underlining the trite fact that the minimum requirement for a democracy to exist extends beyond the mere periodic conduct of elections (which does happen in Nigeria), some key indicators that show that Nigeria has, at best, been a quasi-democracy during almost all of the period under study are discussed later on in this article, including elsewhere in this introductory section. However, some of these indicators include credible reports that almost every one of the presidential polls conducted in Nigeria during the period under study was rigged in favour of the then ruling party (see, for example, *European Union Election Observation Mission — Nigeria — Final Report – 2019* [on file with author], and Hakeem Onapajo & Dele Babalola, "Nigeria's 2019 General Elections: A Shattered Hope? (2020) 109:4 *The Round Table* 363); the rampant harassment, arrest, and detention of journalists for publishing reports about illegal or unethical government conduct (see e.g. Abdullahi Jimoh, "Under Nigeria's Tinubu, Journalists Are as Unsafe as Ever," *Mail and Guardian*, 4 June 2024, online: <mg.co.za/africa/2024-06-04-under-nigerias-tinubu-journalists-are-as-unsafe-as-ever/>, reporting that the Buhari government alone arrested and detained at least 189 journalists during its term between 2011 and 2019); routine disobedience of court orders (see e.g. "Major Court Orders

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judicial branches have tended to exhibit many more democratic features and behaviour than their executive counterpart and would seem to be a more natural ally of a regional human rights court, this situation is significantly puzzling.

Indeed, two interesting and interconnected puzzles are involved. The first puzzle is in regard to why the ECOWAS Court would have had much more impact on a Nigerian federal executive branch of this semi-authoritarian character than it has had on the decision-making, processes, and action of a Nigerian federal judiciary that, for almost all of the same period, has tended to be more activist than passivist, more pro-human rights than pro-state repression, and more independent than submissive.[7] Nigeria's federal judiciary has had a long and rich history of forming virtual alliances with civil society actors (CSAs) and regional human rights bodies in order to resist as best they could the rampant incidence of domestic executive branch repression and abuse in their country.[8] In contrast, Nigeria's executive branch has more or less exhibited a strong tendency, before and during the period under study, to dominate all aspects of state and society, accompanied by an attendant penchant for committing or condoning serious and/or gross violations of human rights and displaying a marked contempt for the rule of law.[9] What is more, although scholars, such as Alexandra Huneeus, have troubled the generalizability of such claims,[10] some scholars have found that certain international courts have tended to have more impact on domestic judiciaries than on other branches of domestic governments.[11] Given these realities, findings, and theories, it would have been reasonable to expect the kind of domestic judiciary that has just been described to, among other things, ally much more visibly and robustly with, and rely much more appreciably on, the ECOWAS Court's regional-level processes and rulings, in aid of its own evident (if somewhat undulating) resistance to executive branch malfeasance?[12] At the very

Buhari Administration Disobeyed in Eight Years" (19 May 2023), online: *International Centre for Investigative Reporting* <www.icirnigeria.org/major-court-orders-buhari-administration-disobeyed-in-his-eight-years/>, reporting a record of brazen and near-routine disobedience of such orders); and the unconstitutional and illegal suspension and "forcing-out" of a sitting chief justice of Nigeria (see e.g. *Onnoghen* case, *infra* note 12). See also Aderonke Majekodunmi & Felix O Awosika, "Godfatherism and Political Conflicts in Nigeria: The Fourth Republic in Perspective" (2013) 2 Intl L J Management & Social Science Research 70; Adeniyi S Basiru, "Democracy Deficit and the Deepening Crisis of Corruption in Post-Authoritarian Nigeria: Navigating the Nexus" (2018) 14 Taiwan Journal of Democracy 121 at 140 (referring to the continuation of authoritarianism in Nigeria and much of the African continent within, and as result of a context in, which the head of state is widely regarded and treated [far too deferentially and often unconstitutionally] as "the father of the nation").

[7]See Obiora C Okafor, *The African Human Rights System, Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007) [Okafor, *African Human Rights System*]; Obiora C Okafor, "Modest Harvests: On the Significant (but Limited) Impact of Human Rights NGOs on Legislative and Executive Behaviour in Nigeria" (2004) 48 J Afr L 23 at 48.

[8]Okafor, *African Human Rights System*, *supra* note 7.

[9]For example, see Benjamin O Eneasato & Banko H Okibe, "Trajectory Democracy, Rule of Law and National Development in Nigeria: An Overview of the Muhammadu Buhari Administration (2015–2019)" (2020) 6 International Digital Organization for Scientific Research J Current Issues in Arts & the Humanities 15.

[10]See Alexandra Huneeus, "Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights" (2011) 44 Cornell Intl LJ 493.

[11]See Okafor, *African Human Rights System*, *supra* note 7.

[12]For example, see the jurisprudential resistance posed by the Court of Appeal of Nigeria to the government's praxis of removing judges unconstitutionally, as represented by its declaration that the removal of the then sitting chief justice of Nigeria through the obtaining of an *ex parte* order from the Code of Conduct

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least, one would have expected the ECOWAS Court to have had more impact on such a domestic judiciary than on the type of executive branch that has just been profiled. That this has been far from the case is, therefore, significantly puzzling.

It is also just as puzzling that the ECOWAS Court seems to have been able to impact Nigeria's semi-authoritarian federal executive branch of government much more than it has been able to influence either the country's much more democratically oriented federal legislature or the full gamut of legislative decision-making, processes, and action.[13] This is especially so given that, during almost all of the period under study, Nigeria's federal legislature also tended to be bold, independent, and significantly more pro-human rights than the executive branch.[14] This puzzle is also deepened by the fact that, given this contrasting reality, it would appear to have been in the federal legislature's interest to rely as much as possible on the ECOWAS Court's regional-level processes and rulings, in aid of its own evident resistance in many cases to the federal executive branch's tendency to over-reach its political authority *vis-à-vis* the other branches of government and commit/condone human rights violations against all-too-many Nigerians?[15] Thus, it would have been reasonable to expect that, under pressure from Nigeria's quasi-authoritarian executive branch, this much more democratic-tending legislature would have sought, among other things, to ally and associate itself much more robustly with the ECOWAS Court's regional-level processes and rulings and deploy these supranational resources much more frequently and robustly to augment its own popular legitimacy among local CSAs and the general population. This would have helped to strengthen its relative socio-political position, authority, and power *vis-à-vis* the semi-authoritarian/quasi-democratic executive branch with which it has had to contend.[16] We found only minimal evidence, however, of this type of orientation or behaviour on the part of this domestic legislature.

As we show later, neither of these two closely related puzzles is adequately explained by the mere fact that, of the three branches of the federal government, it is only the executive branch that conducts foreign relations, tends to be directly addressed by the ECOWAS Court, and, thus, interacts directly with that court.

Tribunal was unconstitutional. See *Justice Walter Samuel Nkanu Onnoghen v Federal Republic of Nigeria*, Judgment No CA/A/44C/2019 (10 May 2019), (2019) LPELR-47689 (CA) [*Onnoghen*]. Following the executive branch's illegal suspension from office of the chief justice, purportedly in compliance with this *ex parte* order and successful pressure on him to resign or face prosecution, the National Judicial Council (which is vested with the authority to regulate the judiciary and discipline judges, at least in the first instance, and which was bypassed by the executive branch's apparent cloak and dagger tactics in resorting to securing such an *ex parte* order), the removal was widely (though not uniformly) condemned by the Nigerian bar as illegal and illegitimate. See Olabisi Akinkugbe, "The Politics of Regulating and Disciplining Judges in Nigeria" in Richard Devlin & Sheila Wildeman, eds, *Disciplining Judges: Contemporary Challenges and Controversies* (Cheltenham, UK: Edward Elgar, 2021) 254 at 254. The decision of the Court of Appeal in the *Onnoghen* case settled the question beyond all reasonable doubt.

[13]For example, see Kemi Busari "Onnoghen: Nigeria Now under Dictatorship: Saraki," *Premium Times* (26 January 2019), online: <www.premiumtimesng.com/news/top-news/308108-onnoghen-nigeria-now-under-dictatorship-saraki.html>.

[14]For example, see Kemi Busari "Buhari Can't Be Impeached, Lawmaker Warns Saraki, Other Colleagues," *Premium Times* (5 June 2018), online: <www.premiumtimesng.com/news/top-news/271260-buhari-cant-be-impeached-lawmaker-warns-saraki-other-colleagues.html>.

[15]See Okafor, *African Human Rights System*, *supra* note 7. See also Busari, *supra* note 14.

[16]See Busari, *supra* note 14.

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Rather, what we argue is that a multifactorial explanation is suggested. Hence, these two closely related puzzles call for closer and more complex scholarly investigation and illumination. And they seem all the more interesting when viewed against some of the findings of an earlier study of the domestic impact that the African human rights system (a related regional institution) has had on Nigeria's executive, judicial, and legislative branches of government.[17] Among other things, this other study had found that the African human rights system had exerted significantly more influence on the Nigerian judiciary than on its executive and legislative counterparts.[18] However, as valid and interesting as it would be to compare the African human rights system's pattern of influence in Nigeria to that of the ECOWAS Court, that is not the focus of the current enquiry. Its focus remains on why the ECOWAS Court has had a less robust degree of impact on the judiciary and legislature in Nigeria than it has had on that country's executive branch over the same period.

At the outset, it is important to note that, as is articulated more fully elsewhere,[19] although the notion of impact is the subject of a set of complex theoretical discussions by scholars that is too vast to be dwelt on in this short piece,[20] the specific conception of "impact" that frames and drives our analyses in this article is one that accommodates both the traditional notion of "direct compliance" and what Obiora Okafor has referred to in his earlier work as "correspondence that lies beyond the compliance frame."[21] This approach tends to broadly align with ideas developed separately by other scholars such as Karen Alter, James Gathii, and Martha Finnemore/Kathryn Sikkink.[22] The kind of correspondence that Okafor refers to would include phenomena such as the utilization in various ways of the ECOWAS Court's processes or rulings, by legislators and judges, even when these actors are clearly not attempting to comply directly with any particular ruling that has been directed at them by that regional court.[23] In this connection, it should also be noted that, given the nature of the framework that governs the ECOWAS Court's formal relationships to Nigeria's domestic legislature(s) and judiciary(s) — one that is not a classically hierarchical one

[17]See Okafor, *African Human Rights System*, *supra* note 7 at 91–154.

[18]*Ibid.*

[19]*Ibid.* at 59–61.

[20]See e.g., more recently, Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximizing Impact* (Oxford: Hart Publishing, 2018) at 91–102 (examining the different ways in which litigation can, and does, contribute to change, whether legal, political, institutional, social, or cultural); Par Engstrom, "Introduction: Rethinking the Impact of the Inter-American Human Rights System" in Par Engstrom, ed, *The Inter-American Human Rights System: Impact beyond Compliance* (Cham, Switzerland: Palgrave Macmillan, 2019) at 1 (emphasizing the need to look beyond the rule of compliance); César Rodriguez-Garavito, "Beyond Enforcement: Assessing and Enhancing Judicial Impact" in Malcolm Langford, César Rodriguez-Garavito & Julieta Rossi, eds, *Social Rights Judgements and the Politics of Compliance: Making It Stick* (Cambridge: Cambridge University Press, 2017) 75 (describing four ways that the relationship between the enforcement and impact of (international) judicial decisions presents itself in the specific economic/social rights sub-area).

[21]Okafor, *African Human Rights System*, *supra* note 7 at 284–85.

[22]See Karen Alter, *The New Terrain of International Law: Courts, Politics and Rights* (Princeton, NJ: Princeton University Press, 2014) at 19; James T Gathii, "Variation in the Use of Subregional Integration Courts between Business and Human Rights Actors: The Case of the East African Court of Justice" (2016) 79 Law & Contemp Probs 37 at 38; Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 Intl Org 887 at 895.

[23]See Okafor, *African Human Rights System*," *supra* note 7 at 91–154.

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(at least in the court's view)[24] — it is logical to expect to observe less direct compliance with its rulings by these branches of government and more of the kind of "correspondence" flagged above.

The study on which this article is based utilized a mixed methodological approach/sensitivity and various methods of data collection that were thus entailed. First, at the ECOWAS Court level, after an extensive academic literature review and electronic searches and analyses of relevant newspaper and television reports, we obtained and analyzed all the relevant and reported ECOWAS Court decisions issued between 2004 and 2020. We reviewed each decision in the light of our two intimately related research puzzle(s) and our conceptual framework for assessing "impact." Specific questions related to these puzzles also guided this analysis. For example, was the Nigerian legislature or judiciary directly or indirectly addressed in any of the ECOWAS Court's rulings, and could either branch of government have been so addressed but was not? We also interviewed a purposively selected sample of the then sitting judges of the ECOWAS Court and a similarly chosen sample of that court's senior staff.

On the domestic level, after a review of the relevant academic and non-academic literature, as described below, a range of other texts were collected and reviewed, and semi-structured interviews conducted. Regarding the legislature, since Nigeria is a large, three-level, federal country with hundreds of federal, state, and local legislative assemblies, we had to purposively select a manageable sample of these bodies. Our representative sample was composed of both chambers of Nigeria's federal legislature, the National Assembly. These two chambers are known as the Senate (its upper house) and the House of Representatives (its lower house). We considered that, due to its proximity to the seat of the ECOWAS Court in Abuja and its situation as an arm of the federal level of government to which that regional court's filings and rulings are almost always addressed, the National Assembly was significantly more likely to be aware of the ECOWAS Court's decisions than its provincial counterparts. We therefore focused our attention on examining the content of the relevant legislative bills considered, and the legislation passed, by the National Assembly during the period under study.

In addition, we searched and analyzed the content of the records of proceedings (the Hansards) of both houses of this federal legislature. We also interviewed purposive samples in each case of federal legislators from both chambers of the National Assembly and senior legislative aides/staff.[25] Such interviews were successfully conducted with sixteen appropriately positioned persons, including three legislators who sit on the relevant committees of both houses of the National Assembly (such as the committees on human rights, justice, and the environment), five senior legislative aides, and eight committee clerks and other senior staff of the National Assembly.[26] Many more senior legislative aides/staff (professional staff) were interviewed than parliamentarians (politicians) because they were, in the specific Nigerian context, more likely than the latter to be knowledgeable about

[24]See e.g. *Jerry Ugokwe v Federal Republic of Nigeria*, Judgment No ECW/CCJ/JUD/03/05 (7 October 2005) at para 32 [*Ugokwe*].

[25]See Interviewees JDA1LEG. Our approved ethics protocol prevents us from identifying the names of those interviewed, the exact committees to which they belong, or who they serve as legislative aides/staff.

[26]Again, our approved ethics protocol prevents us from identifying the names of those interviewed, the exact committees to which they belong, or who they serve as legislative aides/staff.

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the kinds of information we sought and also far more likely to devote adequate time to attending to our questions.

Regarding our data collection on the ECOWAS Court's impact on the judiciary in Nigeria, we focused on the federal judiciary for similar reasons as already outlined. We searched the three main law-reporting databases that report Nigerian cases (almost entirely from the federal judiciary): the *Nigerian Weekly Law Reports* (using a manual search) and both the *Law Pavilion Electronic Reports* and *NigeriaLII* (using electronic searches). We then carefully analyzed the relevant case(s) as reported in these three overlapping databases. To supplement this exhaustive search and analysis of the federal case law, and help control for any possible gaps (though unlikely) due to any unreported but relevant cases, we also interviewed a relatively small, but data-driven, purposive sample of judges from Nigeria's Federal High Court, which is the main judicial forum of first instance to which all lawsuits against any branch or agency of the federal government must be brought by law.[27] To further test our methodological approach of focusing on the federal judiciary (to the exclusion of the state judiciaries) as our sample component of the Nigerian judicial system, we also interviewed a similarly constituted sample of judges of one of the major state high courts in the country to see if that state judiciary had engaged in any way with the processes and rulings of the ECOWAS Court.[28] This test justified our approach.

It should also be noted that the choice of Nigeria as the key case study jurisdiction in which to map and observe a significant component of the story of the ECOWAS Court's impact on domestic legislatures and judiciaries within the West African region is justified on several grounds. For one, about half of all West Africans are Nigerian,[29] and, therefore, any impact that the court has had on that country would be very significant, even on a West Africa-wide basis (albeit not automatically generalizable). Also, given that Nigeria is, by a huge margin, West Africa's most powerful socio-political and economic player, the ECOWAS Court's ability to exert influence within that country would also be similarly significant on a region-wide basis.[30] What is more, Nigeria's remarkably dynamic community of CSAs have been responsible for bringing the largest chunk (by far) of the total number of cases with which the ECOWAS Court has so far dealt.[31] For example, as of January 2022, 168 cases out of 484 filed against ECOWAS member states, or about 35 percent, originated from Nigeria. Right after Nigeria was Mali, with forty-eight complaints. This was followed by Togo with forty-four complaints, and Senegal with thirty-three complaints.[32] This large number of cases filed against Nigeria could be viewed as attributable, at least in part, to Nigeria's disproportionate share of the West African

[27]See Interviewees JDA1JUD.

[28]*Ibid.*

[29]See the "Nigeria-at-a-Glance," online: *World Bank*, <www.worldbank.org/en/country/nigeria#:~:text=A%20key%20regional%20player%20in,of%20youth%20in%20the%20world>.

[30]*Ibid*; Prinesha Naidoo, "Nigeria Tops South Africa as the Continent's Biggest Economy," *Bloomberg News* (3 March 2020), online: <www.bloomberg.com/news/articles/2020-03-03/nigeria-now-tops-south-africa-as-the-continent-s-biggest-economy>.

[31]See Interviewee 16 (a judge from the Community Court of Justice of the Economic Community of West African States [ECOWAS Court]); Interviewee 20 (an ECOWAS Court official).

[32]These figures are based on a review of the data published by the ECOWAS Court on its website as of 8 September 2020 and subsequent information gathered by the authors. See "Community Court of Justice," online: <www.courtecowas.org/>.

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population. It could also be countered that the location of the ECOWAS Court in Abuja, Nigeria's capital, accounts in large measure for this reality. However, since the size of a country's population or the location of the court at issue cannot account, either on their own or together, for the number of cases brought against that country before an international court, these factors cannot suffice as complete explanations for this reality. Overall, the point that is being made is that a key measure of the ECOWAS Court's domestic impact within the countries in the region over which it has jurisdiction must be its impact within Nigeria and that the focus on Nigeria here is therefore justified.

Having made this point, it should still be pointed out, however, that an important limitation of the key case study approach that is adopted in this article is that Nigeria is, even still, just one of the fifteen states that are subject to the ECOWAS Court's territorial and personal jurisdiction. One case study, it must be said, does not a theory make. Yet, important as it is, for all the reasons that have already been articulated, this acknowledged limitation is clearly not a fatal one for the analyses developed in this article. Our modest and limited ambition here is that the points made, and the explanations provided by this key case study, will, beyond illuminating the Nigerian experience in the current regard, provide guideposts and inspiration for similar studies of the ECOWAS Court's impact within the other West African countries that are subject to its jurisdiction.

On another note, it should also be stated that the temporal focus of the article on the period between 2004 and 2020 is justified, albeit in part, by the fact that it was in the year 2004 that the ECOWAS Court took up its very first case, the so-called *Afolabi* case.[33] It was this case that, in the first place, set off the chain of events that led to the explicit conferment of human rights jurisdiction on an ECOWAS Court that was, hitherto, a largely dormant regional economic integration court.[34] And the year 2020 was simply a logical and convenient cut-off date for the study on which this article is based.

In the light of its goals, the article is organized into five main sections, including this introductory discussion. Section 2 is devoted to our analysis of the extent and quality of the impact that the ECOWAS Court has had on legislative decision-making and action in our case study of Nigeria. In Section 3, the quantum and quality of the impact of that court on judicial reasoning and action in Nigeria are examined. Section 4 is focused on the development of a set of analytical explanations for the puzzling reality of the appreciably less robust nature of the ECOWAS Court's legislative and judicial impact within Nigeria, as compared to the extent and quality of its influence on that country's executive branch. In the main, the explanations we offer are developed through analytical discussions of the key factors that have promoted or militated against the court's domestic impact on legislative/judicial decision-making and action in Nigeria. Section 5 provides a short conclusion.

2. Impact on legislative decision-making, process, and action in Nigeria

A. Compliance

Our research did not find much evidence of direct compliance with the rulings of the ECOWAS Court by either chamber of Nigeria's federal legislature (the National

[33]See *Afolabi v Federal Republic of Nigeria*, Judgment No ECW/CCJ/JUD/01/04 (27 April 2004).
[34]See Alter et al, *supra* note 1 at 749–53.

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Assembly), the sample legislative body on which this article focuses. This seems somewhat understandable given that ECOWAS Court rulings that directly order a government to take, or refrain from, any legislative action are relatively few and far between. We discuss the statistical data that supports this claim in Section 4 of the article. Against this background, it is remarkable that the Nigerian government (and, in particular, its legislative branch) directly complied with one of the earliest reported rulings made against it by the ECOWAS Court, one that ordered it to take certain action with regard to the composition of its lower federal legislative chamber.[35] In the *Jerry Ugokwe* case, a highly consequential electoral matter that generated a lot of tension between the ECOWAS Court and the Nigerian government,[36] the Speaker of the House of Representatives of Nigeria complied with the court's interim ruling in favour of the plaintiff, an order that had the effect of temporarily preventing the plaintiff's political opponent from being seated as a member of the legislative body.[37]

A significant impact on legislative action was recorded in this matter because it was within the exclusive remit of the Speaker of the House (constrained only by the rule of law) to make the determination to seat, or refuse to seat, in this chamber of the federal legislature anyone who claimed to have been declared elected by the electoral commission and/or the highest court with jurisdiction over the matter.[38] The Speaker of the House could have rejected the Attorney-General's recommendation that he comply with the ECOWAS Court's interim ruling, but he did not do so. This impact on the legislature was highly significant because of the very high stakes involved for the contending political factions in Nigeria and the great friction that the ECOWAS Court's interim ruling had produced between it and the government.[39]

B. Correspondence beyond compliance

We did not also find much evidence of the generation of a robust-enough level of correspondence between the ECOWAS Court's rulings and legislative decision-making, process, and action in Nigeria.[40] Thus, the sense among some former judges of this regional court that their rulings have not yet had much of an impact on either the legislature itself, or on the full gamut of legislative decision-making, process, and action in Nigeria, appears to be, more or less, justified.[41] What the available body of evidence suggests is that the extent of the generation of correspondence between the ECOWAS Court's decisions and legislative decision-making, process, and action in Nigeria has tended more towards the minimal than the optimal during the period under study. This body of evidence is analyzed below.

[35]See *Ugokwe*, *supra* note 24.

[36]See Interviewee 20. See also Alter et al, *supra* note 1 at 759.

[37]See Interviewee 20.

[38]See *Constitution of the Federal Republic of Nigeria 1999*, section 52(1).

[39]See Interviewee 20; Alter et al, *supra* note 1 at 759.

[40]It should be emphasized here that, in the Nigerian system at least, legislative decision-making, process, and action is not confined to the legislature per se. For example, many federal government bills are initiated and prepared by the Federal Ministry of Justice.

[41]See e.g. Interviewee 17. See also Femi Falana, "Twenty Years of ECOWAS Court of Justice: Achievements, Challenges and Prospects" (paper presented at the International Conference hosted by the ECOWAS Court of Justice at Lome, Togo on the Theme: Achievements, Challenges and Prospects, 22–24 October 2021) [on file with authors].

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i. The preparation and content of government bills

(a) *Socio-Economic Rights and Accountability Project* cases The *Socio-Economic Rights and Accountability Project* (*SERAP*) cases involved a local CSA — the Socio-Economic Rights and Accountability Project (SERAP) — who was suing Nigeria before the ECOWAS Court for failing to provide or protect rights relating, in the first case, to education and, in the second, to environmental protection. With respect to basic education,[42] SERAP challenged Nigeria's Universal Basic Education Commission (UBEC), claiming a breach of certain provisions of the *African Charter on Human and Peoples' Rights* (*ACHPR*) — most notably, Article 17 on the right to education.[43] SERAP estimated that, as a direct consequence of corruption, more than five million more children in Nigeria at the time lacked access to primary education. The ECOWAS Court held that

> every Nigerian child is entitled to free and compulsory basic education. What the first defendant [Nigeria] said was that the right to education was not justiciable in Nigeria, but the court … in this case, decided it was justiciable under the ACHPR. The applicant is saying that following the diversion of funds, there is insufficient money available to the basic education sector. We have earlier referred to the fact that embezzlement or theft of part of the funds allocated to the basic education sector will have a negative impact; this is normal since shortage of funds will disable the sector from performing as envisaged by those who approved the budget. Thus, whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the first defendant [Nigeria] should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.[44]

The ECOWAS Court thus dismissed the defence of non-justiciability of the right to (primary) education and affirmed its bindingness on Nigeria as a party to the *ACHPR*. In the end, the ECOWAS Court held Nigeria accountable for failing to provide free basic education to school-age children in the country, finding that every Nigerian child is entitled to free and compulsory basic education.

In the second *SERAP* case relating to Nigeria's failure to protect the environment from oil pollution,[45] SERAP sued the Nigerian government and seven oil companies operating in its Niger Delta region at the ECOWAS Court. In its originating application to the court, SERAP alleged the incidence of oils spills in the region that had led to the devastation of the environment, affecting hundreds of thousands of people. SERAP sought a declaration that the peoples of the Niger-Delta region of Nigeria are, among others, entitled to environmental protection and that the complicity of the Nigerian government in the devastation of their environment and violation of their right to a clean and healthy environment, as guaranteed under the

[42] *SERAP v Federal Republic of Nigeria*, Judgment No ECW/CCJ/JUD/07/10 (30 November 2010) [*SERAP*].

[43] *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986).

[44] *SERAP*, *supra* note 42 at para 28.

[45] *SERAP v President*, Judgment No ECW/CCJ/APP/08/09 (10 December 2010) [*SERAP* Niger Delta case].

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ACHPR (because of its failure, for example, to monitor the human impact of oil exploration in the area), is a violation of international law, especially of the *ACHPR*. SERAP also sought an order from the court mandating an effective clean-up to the environmental pollution of the Niger Delta region and monetary compensation of US $1 billion to the victims of such rights violations in the Niger Delta. Nigeria challenged this case on the grounds of jurisdiction, *locus standi*, and argued that the case was statute barred. All three objections made by Nigeria were rejected by the court. The ECOWAS Court held Nigeria accountable for failing to effectively regulate the rights-violating activities of oil companies in its Niger Delta region and ordered it to take all measures to restore the environment, prevent future damage, and hold the perpetrators accountable.[46]

In appreciating the extent of the impact of these ECOWAS decisions, which occurred largely by way of correspondence, a good place to begin is with the public acknowledgement of this reality by a high government official. At the special session held by the ECOWAS Court to mark the commencement of its 2015–16 legal year, the solicitor-general of Nigeria (the country's highest-ranking career federal law official), publicly and remarkably acknowledged that, beyond the development of human rights norms, the ECOWAS Court has also "prompted legislative responses" from the government he represented.[47] He specifically noted that, as a result of certain cases instituted at the ECOWAS Court by SERAP, the federal government of Nigeria (and other stakeholders) had become aware of certain gaps in Nigerian law that needed to be closed. He also stated that this augmentation of the government's awareness of such legislative gaps had inspired a degree of mobilization within the government to work for the enactment of better laws that will protect citizens from human rights violations committed by either persons, companies, or governments.[48]

Speaking further on "the steps taken by [the] government to enforce the decisions of the court," the solicitor-general alluded to the preparation of draft government bills by the Federal Ministry of Justice that he served in as the deputy leader and the submission of important legislative proposals to Nigeria's federal legislature that were aimed at addressing the environmental and socio-economic concerns raised in the ECOWAS Court's rulings in the *SERAP* cases.[49] This is an incontrovertible, if generally stated, acknowledgement, made by the top civil servant in charge of such executive-side legislative decision-making, processes, and action, of the significant impact that these rulings by the ECOWAS Court (mainly the *SERAP* environmental rights case and the *SERAP* education rights case)[50] have had on the Federal Ministry of Justice's key role in legislative action within Nigeria's constitutional order, which is the preparation and proposal to the federal legislature of the government bills. However, it appears from our own independent analysis that it was the *SERAP* environmental

[46]*Ibid.*

[47]See Dayo Akpata, "From the Office of the Attorney General of the Federation and Ministry of Justice on the 2015/2016 Legal Year of the Community Court of Justice of the Economic Community of West African States" (22 October 2015) [on file with authors]. This speech is also cited in Effoduh, *supra* note 2 at 83, n 83 (and accompanying text).

[48]*Ibid.*

[49]*Ibid* at 2.

[50]See, respectively, *SERAP v Federal Republic of Nigeria*, Judgment No ECW/CCJ/JUD/18/12 (14 December 2012); *SERAP*, *supra* note 42.

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rights case that has produced the most appreciable influence on legislative process in Nigeria, at least to the extent that we could ascertain.

The indication that the *SERAP* environmental rights case has had a significant (though modest) impact on legislative decision-making, process, and action in Nigeria, through its influence on the preparation and content of government bills, can be gleaned from the Nigerian federal legislature's passage in 2015 of the *National Biosafety Management Agency Act*.[51] Among other things, this Act established an agency to provide the regulatory framework to adequately safeguard human health and the environment from the potential adverse effects of modern biotechnology, while harnessing the potentials of modern biotechnology and its derivatives for the benefit of Nigerians.[52] In the early stages of the legislative process, the then minister of the environment had cited, amongst other documents, the *amicus curiae* brief submitted by Amnesty International in the *SERAP* environmental rights case, and the ECOWAS Court's ruling in this case, to justify — in part — the introduction of the government bill for the enactment of this Act. She also cited these documents to justify the inclusion of the Niger Delta region (the pollution of which was the main issue in the *SERAP* environmental rights case) as one of the priority areas that this Act would focus on so as to better manage the biodiversity of Nigeria.[53] This connection was strongly made because, as is now trite knowledge, oil and gas exploration in that region has had deleterious effects on the ecosystem, including on the local biodiversity.[54]

(b) The *Cybercrime Act* case That the significant (though quite modest) impact of the ECOWAS Court on legislative decision-making, process, and action connected to the preparation of government bills in Nigeria extends beyond the instances discussed in the last sub-section is illustrated by the influence (however limited) that its July 2020 ruling in the so-called *Cybercrime Act* case has exerted in this context.[55] In this case, a CSA known as the Laws and Rights Awareness Initiatives sued Nigeria at the ECOWAS Court, alleging that Articles 1 and 19 of the *ACHPR* had been violated by Nigeria due to its enactment and implementation of section 24 of the 2015 *Cybercrime (Prohibition and Prevention, etc) Act*.[56] Among other things, section 24 makes it a crime to send a message via a computer system that is grossly offensive or pornographic or of an indecent, obscene, or menacing character. The plaintiff CSA contended that section 24 of that Act "limits freedom of expression on the internet or

[51]*National Biosafety Management Agency Act* (2015), online: <nbma.gov.ng/nbma-act/>.

[52]*Ibid.* This Act relates primarily to the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 29 January 2000, 2226 UNTS 208 (entered into force 11 September 2003) (which was ratified by Nigeria in 2003).

[53]AJ Mohammed, "Presentation of the Federal Republic of Nigeria: National Biodiversity Strategy and Action Plan 2016 – 2020," *Hestories* (December 2015), online: <www.hestories.info/federal-republic-of-nigeria-national-biodiversity-strategy-and.html>. This speech was also cited in Effoduh, *supra* note 2, at 85, n 289 (and accompanying text).

[54]*Ibid.*

[55]See *Incorporated Trustees of Laws and Rights Awareness Initiatives v Nigeria*, Judgment No ECW/CCJ/JUD/16/20 (10 July 2020) [*Cybercrime Act* case]. See also Innocent Odoh, "ECOWAS Court Orders Nigeria to Amend Its Law on Cybercrime," *Business Day* (11 July 2020), online: <https://businessday.ng/security/article/ecowas-court-orders-nigeria-to-amend-its-law-on-cybercrime/>. The plaintiffs had sued in 2018, but the ruling was issued in 2020.

[56]*Cybercrime (Prohibition and Prevention, etc) Act*, 2015, online: <www.nfiu.gov.ng/images/Downloads/downloads/cybercrime.pdf> [*Cybercrime Act*].

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the use of any computer device and imposes fines … and makes provision for penal sanction ranging from three (3) to ten (10) years in prison."[57] Its main argument for the alleged unconstitutionality of this Act was that it was "not drafted with sufficient precision to allow an individual to predict whether his [or her] behaviour would constitute an offense under the provision."[58] It alleged, for example, that the key word "offensive" that was used in the Act is not defined.[59] The plaintiff CSA also alleged that Nigeria had deployed the impugned Act to intimidate it, many of its members, and other persons in Nigeria.[60] The ECOWAS Court agreed with these arguments, held in its favour, and ordered "the defendant State [Nigeria] to repeal or amend section 24 of the *Cybercrime Act* 2015."[61]

Given the considerable length of the discussion in this sub-section, it is important that the outlines or sketch of our overarching argument on the influence exerted by the ruling at issue here be offered at the outset. This argument proceeds as follows. The ECOWAS Court's ruling at issue here was primarily generated by, and has contributed significantly to, a broader CSA-driven pressure campaign to persuade and/or cajole the Nigerian government to reorient or alter in pro-human rights ways its legislative decision-making, processes, and actions in regard to the *Cybercrime Act*. This broader campaign has been mildly successful in achieving aspects of this goal. Given its nature as just one component of this much broader campaign, the litigation at the ECOWAS Court, and the favourable ruling that was generated at that forum in the result, could not, on its own, have produced this mild success. It was the broader campaign as a whole, with the ECOWAS Court's ruling as an irreducible minimum component, that produced the relevant level of impact.[62] That broader campaign, it is argued, has clearly helped change the Nigerian government's mind from its touted belief in the adequacy of the *Cybercrimes Act* from a human rights perspective (at least at the time of its passage into law) towards a clearer and publicly declared understanding of its appreciable inadequacies in that regard. The campaign has certainly helped convince key elements with the two branches of the Nigerian government responsible for some aspect or the other of legislative decision-making, process, and action about the need to reform the impugned Act. The campaign's pressure tactics and strategy did indeed help trigger the commencement of a slow, but ultimately successful, legislative reform process in the relation to the impugned Act.

And, thus, to fully understand the ways in which the ECOWAS Court's ruling at issue here has aided in significant measure the generation of a modest measure of correspondence between its own content and orientation (on the one hand) and domestic legislative decision-making, process, and action relevant to the preparation of government bills in Nigeria (on the other hand), it is important to first appreciate in detail the ways in which the CSA-driven international litigation that produced this

[57] *Cybercrime Act*, *supra* note 56 at 3.
[58] *Ibid* at 6.
[59] *Ibid.*
[60] *Ibid* at 3–4.
[61] *Ibid* at 42.
[62] Earlier work recognizing the ways in which such judicial/legal wars or even battles in Nigeria, and other parts of the African continent, often constitute only one part of broader political struggles include James T Gathii, "Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy" (2019) 24 Duke J Comp & Intl L 249 at 296; James T Gathii, "Introduction: The Performance of Africa's International Courts" in Gathii, *supra* note 1, 1; Okafor, *African Human Rights System*, *supra* note 7.

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regional court ruling was itself only one of a number of lawsuits that formed a wider litigation war at multiple levels of domestic/regional litigation, which was in its totality also a key component of the broader political struggle discussed in the preceding paragraphs. To begin with, it should be appreciated that the ruling of the ECOWAS Court at issue sprung directly from certain end-means calculations made by the CSA alliance that drove that case, which concerned the increasingly unfavourable dynamics at the time of their domestic judicial campaign. It was issued after the Nigerian courts had already issued two separate lines of rulings (each at first instance and on appeal) in cases filed by CSAs challenging the constitutionality of the *Cybercrime Act*. The nature and orientation of these two lines of domestic court rulings will now be discussed, before highlighting their own collective situatedness as an integral part of the broader political campaign against the impugned Act. Following this discussion, the significant contributions made by the ECOWAS Court's ruling both to this litigation war against the impugned Act and the broader political pressure campaign of which this litigation formed a part, will be teased out.

The first line of the domestic court rulings at issue commenced with a decision handed down by a Federal High Court in December 2017 in *Solomon Okedara v Attorney General of the Federation*.[63] The main argument made by the applicant in this case, Solomon Okedara (a human rights strategic litigation lawyer and co-founder of the Digital Lawyers Rights Initiative),[64] was that section 24 of the Act at issue was unconstitutional for being vague, overbroad, and ambiguous; constituted a threat to his enjoyment of the right to freedom of expression as protected by section 39 of Nigeria's Constitution of 1999; and was not a permissible restriction of his fundamental human rights under section 45 of that governing basic law. Dismissing the case, the court held that

> Section 24 of the *Cybercrime Act* does not in any way conflict with … the Constitution of the Federal Republic of Nigeria. The offences as contained in … [it] is [sic] *quite clear and defined* and penalty prescribed in the law creating same … Moreso, Section 39 [of freedom of expression] must be read in conjunction with Section 45 [the "saving clause" of the Constitution's *Bill of Rights*]. … Taken together with other sections of the *Cybercrime Act*, it is in the interest of defence, public safety, public order, public morality and public health … it is in the best interest[s] of the generality of the public. … The applicant has to come to terms with the realities of life in the 21st Century and the use of cyber space to commit offences. *Indeed [,] cybercrime itself has not or has never had a single acceptable definition.*[65]

This Federal High Court judge's key point was that the impugned Act is, as such, reasonably justifiable in a democratic society, as required by section 45 of the Nigerian Constitution. Later in this ruling, the court made bold to re-emphasize that, as a collection of activities "[c]ybercrime is incapable of direct definition" and "is better

[63]See *Solomon Okedara v Attorney General of the Federation* (Federal High Court of Nigeria), Suit No FHC/L/CS/937/2017 (7 December 2017) [unreported] [*Okedara*].

[64]"Okedara v. Attorney General," online: *Global Freedom of Expression, Columbia University* <globalfreedomofexpression.columbia.edu/cases/okedara-v-attorney-general/>.

[65]See *Okedara*, *supra* note 63 at 34–35 [emphasis added].

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described than defined."[66] The judge then concluded that, as it thinks that section 24 "is not generic: it is not nebulous or imprecise," the suit must be dismissed.

The second domestic ruling in this *Okedera* line of cases was made on appeal from this first instance decision. In the similarly entitled *Solomon Okedara v Attorney General of the Federation*, a three-judge panel of the Court of Appeal of Nigeria likewise found that the impugned Act was clear and unambiguous.[67] In its own words, the court stated:

> The language of the law [the Act at issue] is explicit and admits of no recourse to undue technicalities, *the words are plain and ordinary* … the legislation has the capacity to convey to the defendant in reasonably substantial details what he is [or they are] coming to meet in Court … the offence is clearly defined … therefore the provisions of section 24 … are not in conflict with the provisions … of the Constitution of the Federal Republic of Nigeria 1999 (as amended).[68]

It then held that since, in its view, the Act was also reasonably justifiable in at least one of the ways outlined in section 45 of the Constitution, it did not violate that basic law.[69] In the result, this appellate court upheld the reasoning and ruling of the court of first instance.[70]

The first ruling in the second line of rulings issued by the Nigerian courts on the constitutionality or otherwise of the impugned Act, was made in January 2017 by a Federal High Court judge in *Incorporated Trustees of Paradigm Initiative for Information Technology Development & 2 Ors v Attorney General of the Federation & 2 Ors.*[71] The second ruling within this *Paradigm Initiative* line of cases was issued in June 2018 by the Court of Appeal of Nigeria in this same matter.[72] The arguments made by the co-applicants/appellants in these cases (which were all CSAs) were the same as those made by the applicant/appellant in the *Okedara* line of cases. The legal reasoning and orders of the judges in all the judgments in this *Paradigm Initiative* line of cases were also very similar to the legal logics adopted, and orders made, in the earlier *Okedara* line of cases. There is, therefore, no need for the discussion of the details of the arguments and orders in this second line of cases to detain us here. It should be noted, however, that the Court of Appeal's ruling in this *Paradigm Initiative* line of cases has been appealed to the Supreme Court of Nigeria through a notice of appeal filed on 31 July 2018.[73] This is in effect also an appeal of the substantive logics

[66] *Ibid* at 37.

[67] See *Solomon Okedara v Attorney General of the Federation* (Court of Appeal of Nigeria), Suit No CA/L/174/18 (28 February 2019) [unreported].

[68] *Ibid* at 28 (emphasis added).

[69] *Ibid.*

[70] *Ibid.*

[71] See the *Incorporated Trustees of Paradigm Initiative for Information Technology Development, the EIE Project Ltd/GTE and the Incorporated Trustees of Media Rights Agenda v Attorney General of the Federation, the National Assembly of Nigeria and the Inspector General of Police*, Suit No FHC/L/CS/692/16 (20 January 2017) [unreported].

[72] See *Incorporated Trustees of Paradigm Initiative for Information Technology Development, the EIE Project Ltd/GTE and the Incorporated Trustees of Media Rights Agenda v Attorney General of the Federation, the National Assembly of Nigeria and the Inspector General of Police*, Suit No CA/L/556/2017 (1 June 2018) [unreported].

[73] See the *Incorporated Trustees of Paradigm Initiative for Informational Technology Development & 2 Ors v A.G Fed & 2 Ors*, Appeal No SC/1251/18 (Supreme Court of Nigeria). See also Paradigm Initiative "Legal

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and decisions of the courts in the *Okedara* line of cases. The Supreme Court has not yet issued its ruling in the matter.

Regarding the litigation component of the broader struggle waged by CSAs against the *Cybercrime Act*, it should also be emphasized that, even as a sub-strategy, it was also multi-pronged and complex in its internal character. Even before the filing in November 2018 of the international lawsuit that led to the ruling of the ECOWAS Court ordering Nigeria to repeal or amend its *Cybercrime Act*, all the domestic court cases discussed above had already been filed and argued before various circuits of Nigeria's Federal High Court and Court of Appeal. At that point, three of those suits/appeals had already been determined and dismissed by those domestic courts. Only the Court of Appeal's ruling in the *Okedara* case had not been issued by then. Even then, that ruling was issued shortly after the filing of the cybercrimes suit at the ECOWAS Court (only three months later). The main point of emphasis here being that the filing of the ECOWAS Court's suit was a deeply integral part of a multi-pronged and complex litigation war, involving intricate ends-mean calculations and a relatively high level of coordination between the involved CSAs in their struggle against the impugned Act (and not some solitary international legal battle). Connected to this point is that, as the previously discussed facts also reveal, this relatively integrated litigation war also proceeded at various jurisdictional levels, traversing the domestic and regional spheres. As we have seen, the CSAs who drove these court cases utilized three levels of the federal segment of Nigeria's domestic judicial system: the Federal High Court, the Court of Appeal, and the Supreme Court. These CSAs also utilized the ECOWAS Court's regional judicial process. In the latter case, they also did so near-simultaneously with their domestic-level manoeuvre to launch a further appeal to the Supreme Court of Nigeria. The ECOWAS Court's suit was filed and concluded, even before the Supreme Court had heard or adjudicated the matter.

In all its internal complexity and intensity, however, this joint domestic/regional litigation war was still just one key component of the broader socio-political struggle and strategy deployed by the relevant CSAs in pursuit of their goals of securing a pro-human rights repeal or amendment of the *Cybercrime Act.* This is evidenced, if only in part, by the fact that the CSAs who drove this broader campaign also waged it near simultaneously in the public political space and within/against the federal legislature. For example, as far back as October 2017, in the midst of a loud public campaign by CSAs, and well before the ECOWAS Court issued its ruling on the Act at issue here, the Senate Committee on Information and Communication Technology and Cybercrime of the federal legislature had held a press conference in which it announced its conviction (due in part to public/activist discussion and pressure on the matter) that the *Cybercrimes Act*, the provisions of which its chair felt able to publicly describe as "very scanty," was in need of reform.[74]

Battle over Cybercrimes Act Moves to the Supreme Court," *Paradigmhq* (2 August 2018), online: <https://paradigmhq.org/legal-battle-over-cybercrimes-act-moves-to-the-supreme-court/>; Ugo Onwuaso, "Battle over Cybercrimes Goes to Supreme Court," *The Guardian* (3 August 2018), online: <guardian.ng/business-services/battle-over-cybercrimes-goes-to-supreme-court/>.

[74]See Kemi Busari, "Nigeria's Cybercrime Act Needs Review: Senate Committee," *Premium Times* (31 October 2017), online: <www.premiumtimesng.com/news/more-news/247851-nigerias-cybercrime-act-needs-review-senate-committee.html?tztc=1>.

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It also announced that it had organized a conference to discuss this review of the Act and receive further input from various stakeholders, CSAs included.[75] In the words of the chair of this committee (a senior member of the ruling party), "[w]e don't have any solid law (on cybercrime) in this country today."[76] According to him, as the responsible committee of one of the two houses of Nigeria's federal legislature, it had decided to organize this conference following the passage at first reading and forwarding to it for consideration of a bill to amend the impugned Act. This committee's goal for the conference was to hear from all stakeholders before the second reading of the bill in the Senate.[77] This input, he stated, would enrich their legislative decision-making, process, and action.[78] Unfortunately, this amendment bill did not become law before the tenure of that National Assembly ended in 2019.

It should also be noted that the committee made this announcement after the *Paradigm Initiative* and the *Okedara* cases had been initiated at first instance in May 2016 and June 2017, respectively. This was also after the issuance in January 2017 of the ruling at first instance in the *Paradigm Initiative* case. However, the announcement was made shortly before the December 2017 ruling at first instance in the *Okedara* case. The immediate point here is to illustrate the close entanglements and imbrication of this aspect of the federal legislative process regarding the impugned Act with the various relevant court processes and illustrate, in part, how the CSA groups who raised public awareness about what they argued were the "dangers" posed by the vagueness of some of the provisions of the *Cybercrimes Act*, also fruitfully pressured the Senate around the same time about the matter, while near simultaneously litigating over it in various courts. Just like the law courts, and the public space, Nigeria's federal legislature was just one front on which these CSAs waged their broader struggle against the Act.

Although the indication by a committee of the Nigerian Senate that it was convinced of the need to reform the Act was announced prior to the ECOWAS Court's judgment in this case being delivered, it should be remembered that the point being made at this point is simply that the litigation conducted at the ECOWAS Court by these CSAs was just one aspect of a broader socio-legal and political strategy of piling pressure from all directions on various arms of the government in Nigeria to repeal or amend the impugned Act. Along these lines, as far back as June 2019, in the midst of this broader pressure campaign for the repeal or amendment of the impugned Act and the domestic/regional litigation that aided it — and well before the ECOWAS Court's ruling ordering its repeal or amendment but after all the four domestic court rulings that upheld that Act's constitutionality had already been issued — a senior official of Nigeria's Federal Ministry of Justice (where government bills are initiated), who works day to day on matters relating to the Act at issue, still felt able to publicly declare to a group that was mostly comprised of CSAs that "[t]he *Cybercrimes Act* is not perfect … we want to engage on the Act. We are interested in engaging with all stakeholders in the Justice sector. Whatever is not useful we can seek amendment on this [sic]. From the point of [its] passage [into law] we as the operators knew that there were things that need to change. *We are presently collating*

[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*

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memoranda on amendment of the Act. But amendment takes time and costs money."[79]

This statement was made at a "Media Interactive Session" on the "constitutionality and legality of the *Cybercrimes Act* in Nigeria, organized by SERAP and heavily attended by other CSAs, including some of the applicants in the *Okedara* and *Paradigm Initiative* cases already discussed (such as Media Rights Agenda and Enough Is Enough Nigeria).[80] It was also attended by officials of the National Human Rights Commission of Nigeria (also key to human rights law reform in the country) and some other relevant executive branch agencies.[81] It is instructive that, even after at least four domestic courts had upheld the Act as constitutionally valid, this senior justice ministry official with responsibility for the operation of the *Cybercrime Act* still attended this CSA-led forum that was highly critical of the Act, agreed with the CSAs that the Act still required reform, and stated that the government was initiating a legislative reform process to generate a government bill to that effect.

Put together, these facts function to further confirm that the litigation at the ECOWAS Court over the *Cybercrime Act*'s international human rights validity was not a stand-alone strategy that caused the government to initiate the reform of the Act but, rather, formed a part of a broader socio-legal and political strategy of continually pressuring the various arms of the government of Nigeria (including the unit of the Justice Ministry responsible for initiating draft government bills on the regulation of cybercrime) to alter their logics of appropriateness and conceptions of interest in ways that appeared to the relevant CSAs to be more pro-human rights. The nature, timing, and context of the relevant Justice Ministry official's cited responsiveness to the need to reform the Act, even before the ECOWAS Court had issued its ruling on this Act, demonstrates the significant amount of pressure being piled on those who managed the executive branch's legislative reform process to alter their sense of the appropriateness and validity of the relevant provisions of the Act at issue.

The foregoing discussion also shows that this broader CSA-driven pressure campaign was at least modestly productive in making these important "law reform initiators" significantly more amenable to making the impugned Act more human rights friendly than they had been when they drafted and pushed through the enactment of the Act, vigorously argued in its favour in the court of public opinion, and robustly defended its conformity with Nigeria's *Constitutional Bill of Rights* before four domestic trial and appellate courts. That this softening of the government's resistance to the legislative reform that CSAs have insisted upon as necessary has been maintained, and even bolstered, is confirmed by a more recent comment made by a senior official within the same unit of the Justice Ministry. In his own words, he shared:

> There has been no repeal or amendment of the Act, including Section 24. Since the passage of the Cybercrimes Act, there have been a number of criticisms of the Act and its provisions. *Some of the identified lacunae will be addressed through a holistic amendment.* There will be a wholesale revision of the Act

[79]See Margaret Mwantok & Paul Adunwoke, "FG Promises to Amend Cybercrime Act," *The Guardian* (12 June 2019), online: <guardian.ng/news/nigeria/fg-promises-to-amend-cybercrime-act/> [emphasis added].

[80]*Ibid.*

[81]*Ibid.*

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> which is yet to take place not just to deal with Section 24 but also other areas which have problems. There have been two suits challenging Section 24 even in the Nigerian courts [and appeals therefrom] which have ruled that Section 24 of the Cybercrimes Act doesn't violate the Constitution of the Federal Republic of Nigeria 1999 guaranteeing freedom of expression. The judgment of the ECOWAS Court is still being examined by the Government of Nigeria versus the position of Nigerian courts and the Constitution of Nigeria. A decision will be made but not yet. Prior to ECOWAS Court decision, there have been various attempts to examine its [the Act's] sufficiency and there was a decision for a wholesale revision of the Act. The review process was on the burner before the ECOWAS decision, but the Government will of course examine the ECOWAS judgment.[82]

While this was neither clear evidence that those who are in charge of the initial process through which government bills are passed in Nigeria intended to comply directly with the ECOWAS Court's ruling on the Act, or even that there would be robust correspondence between its dictates and the then envisaged revised and amended version of the *Cybercrimes Act*, what it clearly shows is that the ECOWAS Court's decision (and the domestic court rulings) was at this point already playing a significant, though modest, role in the legislative decision-making and process of those in the Nigerian government's Federal Ministry of Justice and Office of the Attorney-General of the Federation who usually initiate government bills for eventual passage by the federal legislature. It is certainly one important factor that they considered. The statement of the government official that was quoted also shows that this ruling's value was to augment and maintain the pre-existing and mildly successful, but then weakening, CSA-driven pressure to repeal or reform the Act. This augmentation factor is extremely important in this case because the relevant CSAs had lost all their four domestic court challenges against the constitutionality of the impugned Act, weakening the legitimacy of their arguments and position appreciably *vis-à-vis* the Nigerian government. As the only judicial ruling in their favour (at least to date), the ECOWAS Court's decision did bolster considerably the legitimacy of their arguments and position, thus strengthening their hand against the government and serving as an important resource for their efforts to delegitimize the government's position and maintain the intensity of their broader pressure campaign.

In the end, more recently (outside the period under study but still noteworthy for current purposes), the Federal Ministry of Justice did help draft an amendment bill to modify the 2015 *Cybercrime Act*, and the National Assembly did pass that bill, which is now law, having received the necessary presidential assent in February 2024. For the most part, the new Act, known as the 2024 *Cybercrimes (Prohibition, Prevention, etc) Amendment Act*, amended the widely criticized section 24 of the 2015 Act by excising the old section 24(a) from that statute.[83] The amended section 24 now reads: "[A]ny person who knowingly or intentionally sends a message or other matter by means of computer systems or network that is pornographic or he knows to be false, for the purpose of causing a breakdown of law and order, posing a threat to life or causing such messages to be sent." Thus, among other things, the new section 24

[82]See Interviewee 111T [emphasis added].
[83]*Cybercrime Act*, *supra* note 56.

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omits the key word "offensive," which had been the main focus of the advocacy campaign conducted by CSAs against the old Act.

Lauding this recent development, the coalition of non-governmental organizations (NGOs),including *Paradigm Initiative*, which had fought for years to ensure that the 2015 *Cybercrime Act* was amended by the legislature to make it more human rights friendly, declared that "this amendment among others marks a crucial step forward in protecting freedom of expression in Nigeria,"[84] though they still "underscore[d] the ongoing imperative for [even more] comprehensive reform to address the evolving challenges individuals and organisations face in expressing their views online."[85] Importantly for present purposes, this coalition also made sure to acknowledge that "the Economic Community of West African States (ECOWAS) Court further declared Section 24 of Nigeria's *Cybercrime Act* vague, arbitrary, and unlawful."[86]

More significantly, it should be noted that the word deleted by Nigeria's federal legislature from the content of section 24 of the 2015 *Cybercrime Act* — that is, "offensive" — was explicitly required by the ECOWAS Court to be so excised, either through the repeal of the entire Act or via the amendment of certain provisions. This indicates as direct a form of correspondence as is possible with the ECOWAS Court decision — the only court decision that ever required, or still requires, this outcome. In any case, this amendment certainly gave effect to the ECOWAS Court's ruling. Overall, and to be clear, the argument being made here is not so much that the government complied directly with the ECOWAS Court's ruling and with that ruling only. Rather, it is that the CSAs that drove this regional-level litigation have significantly (even decisively) relied on and utilized this ruling and other resources (domestic litigation, public pressure, legislative lobbying, and so on) to build a broader socio-legal and political campaign that has been modestly successful in generating a measure of correspondence between this ruling and aspects of legislative decision-making, process, and action in Nigeria, leading to a long sought amendment of a key oppressive law.

ii. The introduction and content of a private member's bill

While a few of the respondents we interviewed were not at all aware whether or not any rulings of the ECOWAS Court have been featured in legislative discussions, debates, and processes, the majority of the respondents firmly indicated that the federal legislature — the National Assembly — does not officially take into account the decisions/rulings of that regional human rights court.[87] A few of the respondents were even under the impression (incorrect in our view) that it is the executive's exclusive function to ensure compliance with international treaties or decisions/rulings of the ECOWAS Court and that, as such, there ought to be little reference to the ECOWAS Court's decisions in parliamentary debates.[88] Some also added that the

[84]"Coalition Lauds Cybercrimes Act Amendment and Urges FG to Further Safeguard Freedom of Expression," *Paradigm Initiative* (19 March 2024), online: <paradigmhq.org/press-release-coalition-lauds-cybercrimes-act-amendment-and-urges-fg-to-further-safeguard-freedom-of-expression/>.

[85]*Ibid.*

[86]*Ibid.*

[87]See Interviewees JDA1LEG.

[88]*Ibid.*

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National Assembly is not obliged to make reference to the ECOWAS Court's rulings.[89]

Yet we did find one instance (a rather minimal measure as it were) in which at least one legislator did appear to take account of the ECOWAS Court's decisions. Addressing the Nigerian House of Representatives on 6 July 2017, a member of that legislative house who had sponsored a bill to amend Nigeria's *Environmental Impact Assessment Act*[90] stated that "[o]nce we make this amendment to the *Environment [al] Impact Assessment Act*, I don't think we will have any more law suits against the government regarding the Niger Delta."[91] Although he did not explicitly state whether or not the law suits he referred to were entirely domestic cases or included the ECOWAS Court's cases, or both, he also said that the Nigerian government "is tired of being dragged to court over the same issue of the Niger Delta."[92] As the ECOWAS Court's decision in the *SERAP* environmental rights case is one of the most notable cases on the topic, domestic or regional, it is reasonable to presume he ought to have had that case in mind, among others. More importantly, when specifically asked about this topic, he did not reject this notion.[93] It is conceded that, nevertheless, this evidence remains somewhat weak. The point is that it supports a strong logical inference.

(a) General conclusions on the generation of correspondence between the ECOWAS Court's rulings and the legislative process/action in Nigeria The available evidence discussed in this sub-section indicates that some measure of correspondence (however modest and sub-optimal) was generated during the period under study between a handful of the ECOWAS Court's rulings (on the one hand) and legislative decision-making, process, and/or action in Nigeria (on the other hand). This correspondence also turned out to be significant. The evidence canvassed also indicates that the processes through which these occurrences of correspondence were generated were, more or less, similar to the ways in which correspondence with that court's rulings were produced regarding executive branch decision-making and action.[94] For one, in all of these matters, local CSAs (including human rights NGOs like SERAP, Paradigm Initiative, Media Rights Agenda, Enough Is Enough Nigeria, and the Law and Rights Awareness Initiative and human rights lawyers/activists such as Solomon Okedara) largely drove the observed campaigns and processes, including the various lawsuits at both the domestic courts and the ECOWAS Court. They worked together in a partly virtual, and, at times, physical, alliance among themselves to advance specific, pro-human-rights legislative visions. They worked in tandem (in actual and virtual alliances) to orient legislative decision-making, process, and/or action towards these visions.

Similarly, as intense publicity and mass outrage was key to the effectiveness of these CSA alliances in mounting pressure for the targeted legislative reforms on the

[89] *Ibid.*

[90] Cap E12, Laws of the Federation of Nigeria (2004).

[91] Nigerian Television Authority Live, "National Assembly House of Reps Plenary," *Youtube* (6 July 2017), 01:47.05, online: <www.youtube.com/watch?v=xUH5pOq8Gw0>.

[92] *Ibid.*

[93] This was in a participant's observation of a discussion between the said legislator with a senior leader of his political party in the National Assembly on 16 March 2021.

[94] See Okafor et al, "Modest Impact," *supra* note 4.

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government, they sought and included many journalists in their ranks, helping to widely publicize their campaigns for law reform. For example, journalists were part of the dialogue during which the relevant senior official of the Justice Ministry conceded that the *Cybercrime Act* needed reform, and the declaration was widely publicized.[95] Similarly, SERAP also publicized its legislatively impactful environmental rights campaign widely,[96] which is the reason that, as Alter and colleagues have found, these and many other rulings by the ECOWAS Court "grab headlines."[97]

In a broader sense, the virtual aspect of this alliance also included a remarkably amenable and consistently pro-human rights ECOWAS Court bench. Thus, the court and the pro-human rights CSAs that largely drove the relevant litigation at and beyond the court and the broader pressure campaign of which it was a part, in ways that generated the modest levels of correspondence discussed in this section, shared the common purpose of reigning in governments that enacted and implemented laws that could or did violate human rights. In this way, the CSAs and the court did share a common cause.

As was also the case with the process of generating correspondence between the court's rulings and executive action in Nigeria, these CSA allies acted as the "brainy relays" or "intelligent transmission lines" that brokered and transmitted, often deeply, the human rights values expressed in the relevant ECOWAS Court's rulings into Nigeria's domestic legislative decision-making, process, and/or action and eventually co-created the significant, though quite limited, impact that the court has had on the latter.[98] Just as importantly, the multifaceted, multi-pronged, multi-level, and broader pressure campaign utilized by these CSAs to exert the mild (though significant) influence that was observed did reinforce the voice of those who were victimized by the deployment of the impugned domestic laws (and related policies or actions). It also strengthened the hand of pro-reform voices within the government's internal (bill-originating) legislative processes.

In the end, the relevant rulings by the ECOWAS Court were deployed, in certain cases, to help strengthen the current law reform process. These rulings provided additional normative resources and arms to the CSAs who drove the campaign to reform the relevant laws, adding to the quantum and significance of their admittedly quite modest impact on legislative decision-making, process, and/or action in Nigeria. Largely as a result of the work of these CSAs, significant (though modest) alterations were produced in the logics of appropriateness and conceptions of interest held by many of those who had initiated or managed the legislative process in Nigeria. This conclusion tends to align with the correspondence theory on the impact of international human rights institutions. It also dovetails closely with the three related theories outlined in Section 1 of this article — namely, those separately proposed by scholars such as Karen Alter, James Gathii, Martha Finnemore, and Kathryn Sikkink.

[95]See Mwantok & Adunwoke, *supra* note 79.

[96]The Socio-Economic Rights and Accountability Project's (SERAP) long-standing environmental rights campaign has enjoyed huge publicity in the media, which is too numerous to document here. For an allegorical example, see "How to End Niger Delta Crisis: SERAP," *PM News* (12 June 2016), online: <www.pmnewsnigeria.com/2016/06/12/how-to-end-niger-delta-crisis-serap/>.

[97]See Alter et al, *supra* note 1 at 765.

[98]We borrow the key terms used here from Okafor, *African Human Rights System*, *supra* note 7 at 94–95.

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3. Impact on judicial decision-making, process, and action in Nigeria

A. Compliance

Since the ECOWAS Court itself has ruled, for good or for ill, that it does not occupy a higher position in a vertical hierarchy over the Nigerian judiciary and does not sit on appeal over its decisions,[99] there cannot then be any question of direct compliance with its decisions by any Nigerian court. And, as far as we know, no evidence of such direct compliance exists. In addition, the ECOWAS Court does not appear to have ever communicated its orders directly to the national courts. This is not at all surprising given the well-established and well-known international law practice followed by the executive branches of states that conduct foreign relations on their behalf.[100]

B. Correspondence beyond compliance

Some evidence does exist, however, within this same Nigerian judicial context of the generation of "correspondence that lies beyond the compliance framework." A relatively small quantum of correspondence has been produced between the ECOWAS Court's rulings (on the one hand) and judicial decision-making, process, and action in Nigeria (on the other hand). This evidence appears to support, to an extent, the view of one former judge of the court that "*normally*, we do not have influence on national courts."[101]

It should be noted that the validity of both this jurist's conclusion and our generally (though not totally) supportive findings, based as they are on reported cases, might be limited somewhat by the fact that most law reports in Nigeria focus heavily (though not always exclusively) on appellate court judgments and pay much less attention to the decisions of the lower courts (such as the federal and state high courts). This caveat is especially noteworthy given that two of the only three significant domestic court matters we found in which significant reference was made to a ruling by the ECOWAS Court were at the Federal High Court level. Nevertheless, the reality is that the obviously very small impact that the ECOWAS Court has so far had on the appellate courts, in and of itself, exemplifies our argument here that its impact on judicial reasoning and action in Nigeria has been rather minimal when it could have been more robust, given the literature cited in the introduction to this article. In common law systems (such as Nigeria's), which are governed by the doctrine of *stare decisis* or the bindingness of higher court precedents or decisions on the lower courts, the appellate courts exert a controlling and disproportionate impact on judicial reasoning and action. Thus, in those systems, a failure to make a marked impact on the higher courts is almost by definition also a failure to make such an impact on the judicial system. In any case, at least one of the law reports we studied contained some lower court decisions. And, what is more, as we stated in Section 1, our search for evidence of the impact of the ECOWAS Court on judicial decision-making, process, and action in Nigeria was not restricted to these law reports, with their limited reach and grasp. The small quantity of relevant evidence that we found is canvassed and analyzed in what remains of this section.

[99]This is an admissibility rule that the court has largely maintained since its ruling in *Ugokwe*, *supra* note 24.
[100]See Huneeus, *supra* note 10 at 511.
[101]See Interviewee 19 [emphasis added].

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i. The SERAP education rights case

In 2017, the Federal High Court of Nigeria (Abuja Division) issued a key (though not entirely inaugural) decision in the case of *LEDAP & Anor v Federal Ministry of Education & Anor*.[102] Pursuant to an originating summons dated 27 October 2015 but filed on 3 December 2015, the plaintiff, a local CSA known as the Legal Defence and Assistance Project (LEDAP), sought five reliefs at the Federal High Court of Nigeria (Abuja Division), including an order directing the first defendant (the federal minister of education in Nigeria) to withdraw forthwith all tuition fees and any other payments made by pupils in primary and junior secondary schools in Nigeria. According to LEDAP, this would bring the conduct and policies of the first defendant in this regard in line with Section 2(1) of Nigeria's 2004 *Compulsory, Free, Universal Basic Education Act*.[103] The Federal High Court declared that every Nigerian child has the constitutional right to free and compulsory primary education. In the end, the Federal High Court declared that every Nigerian child has the constitutional right to free and compulsory primary education and free junior secondary education. The court reasoned that, although the right to education as provided under Nigeria's Constitution seemed non-justiciable on its face, a close reading of the wording of that provision, alongside other relevant ones, revealed that this is in fact not the case. This is because, as is clearly allowed under the Constitution, a seemingly non-justiciable right can be rendered justiciable through the enactment of statutes with that intent or effect.[104] As such, discrete components of that right (namely, the right to universal, free, and compulsory primary education and the right to free junior secondary education) had become justiciable upon the enactment of the 2004 *Compulsory, Free Universal Basic Education Act*.

This decision was very similar in focus, content, tenor, and outcome to the ECOWAS Court's judgment in the *SERAP* education rights case.[105] This was no mere coincidence. In fact, the ruling of the domestic court in the *LEDAP* case supplies significant evidence of correspondence between a ECOWAS Court's ruling and the decision of a Nigerian court — one that was produced because of the kind of CSA-brokered and transmitted trans-judicial communication discussed in Section 2. First, a comparative analysis of the two judgments and other relevant materials shows that, on the main question of the justiciability or otherwise of the right to education in Nigeria, the counsel to the CSA plaintiff in the domestic court case (that is, *LEDAP*) made very similar arguments to

[102] *LEDAP & Anor v Federal Ministry of Education & Anor*, Suit No FHC/ABJ/CS/978/15 (1 March 2017), online: <https://www.nigerialii.org/ng/judgment/high-court/2017/2.html> [*LEDAP*].

[103] *Compulsory, Free, Universal Basic Education Act*, 2004, online: <education.gov.ng/wp-content/uploads/2022/04/Compendium-Of-Education-Sector-Laws-In-Nigeria-Third-Edition-Vol.1.pdf>.

[104] For the avoidance of doubt, the non-justiciability of the socio-economic rights under the Nigerian Constitution was previously challenged in case in *Gbemre v Shell Petroleum Development Company Nigeria Limited and 2 Others*, Suit No FHC/B/CS/153/05 (14 November 2005), where the applicants claimed that by virtue of Articles 4 (right to life), 16 (right to health) and 24 (right to a generally satisfactory environment) of the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*, 1983, Cap A9, Laws of the Federation of Nigeria 2004 [*African Charter Act*], they have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state of physical and mental health as well as right to a general satisfactory environment favourable to their development. The Federal High Court in Benin City granted the reliefs claimed by the applicants based on these provisions in addition to the right to life and human dignity as guaranteed by section 33 and 34 of the Nigerian Constitution respectively.

[105] See *SERAP v President of Nigeria & Universal Basic Education Commission (UBEC)*, Judgment No ECW/CCJ/JUD/07/10 (30 November 2010).

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those made years before at the ECOWAS Court in the *SERAP* educational rights case by counsel to the CSA plaintiff in that case (that is, SERAP). Second, aside from the corruption issue that was raised there, the declaratory reliefs sought from the Nigerian court by LEDAP were also nearly identical to those sought earlier by SERAP at the ECOWAS Court. Third, in arguing its case before the Nigerian court, LEDAP explicitly relied on both Nigeria's *African Charter on Human and Peoples' Rights (Ratification and Enforcement Act)*[106] and the ECOWAS Court's interpretation in the *SERAP* education rights case of the relevant provisions of the *ACHPR* and explicitly cited the ECOWAS Court's ruling. Indeed, the originating summons filed by LEDAP to commence the suit in the Nigerian court partly stated as follows:

> Although section 18 of the Constitution falls under the non-justiciable fundamental objectives and directive principles of state policy, it has however become justiciable or enforceable by the combined effect of that section and Sections 2 and 3 of the Compulsory, Free Universal Basic Education Act, 2004. *The justiciability of this right to education is also supported by the cases of SERAP v UBEC & Anor. ECW/CCJ/JUD/07/10*, Olafisoye v. FRN (2004) 4 NWLR (Pt. 864) 580 and *A - G, Ondo State v. A - G.*, Federation (2002) 9 NWLR (Pt. 772) 222.[107]

Thus, this Nigerian case provides some evidence of the production in the context of the ECOWAS Court of a version of what Okafor has referred to elsewhere as the "*ACHPR* phenomenon."[108] This is because the ECOWAS Court's ruling contributed significantly (even if mildly) to robustly reinforcing the justiciability of the right to basic education in Nigeria. The key points here are the demonstration of the *ACHPR* phenomenon and the specific ways in which the ECOWAS Court's impact was achieved (and not necessarily the domestic court's recognition of the justiciability of the basic right to education). The ECOWAS Court's ruling at issue was explicitly deployed by counsel or LEDAP to strengthen the logic, and, perhaps more importantly, the legitimacy, of the legal reasoning that the domestic court in this case found convincing and eventually adopted in its ruling. While this Nigerian court did not explicitly rely on the ECOWAS Court's ruling at issue, it did rely heavily on the arguments made by counsel to LEDAP, which were partly based on, and legitimized by, the regional court's decision.

Here, one CSA and its counsel (a noted senior activist and lawyer) functioned as the brainy relays that made creative ends/means calculations to leverage on the success at the ECOWAS Court that had been enjoyed by their allies (that is, SERAP) in order to enjoy an enhanced chance of persuading a domestic court to essentially transmit the contents of the ECOWAS Court's ruling in the *SERAP* education rights case into the body of Nigeria's domestic jurisprudence. Remarkably, this case was heard and determined by J.T. Tsoho, a federal judge who has a reputation for holding the government to account for its human rights infractions, whose decisions have attracted public interest, and who is considered by many to be a pro-human rights "activist" judge.[109] Thus, the "good seed" sowed by LEDAP and its allies, relying

[106] *African Charter Act*, *supra* note 104.

[107] See *LEDAP*, *supra* note 102, Factum of the Plaintiff, 23 March 2015 [on file with authors; emphasis added].

[108] See Okafor, *African Human Rights System*, *supra* note 7 at 59–61.

[109] For example, see "Now That Free Education Is Justiciable," *Vanguard* (9 March 2017), online: <www.vanguardngr.com/2017/03/now-free-education-justiciable/>.

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significantly on a ruling by the ECOWAS Court, either fell on, or was somehow implanted in, the "fertile soil" of Justice Tsoho's court. Together, the human rights groups that filed, supported, or inspired this domestic case and the judge who determined it were part of the network of activist forces that is active in Nigeria and that functions — at the very least — in a kind of virtual alliance.

As usual, this human rights struggle was neither waged exclusively at the ECOWAS Court nor confined to the litigation sphere. As is usual with such struggles to exert influence on state and society in Nigeria, this campaign involved the deployment of intense media coverage.[110] Clearly, these legal and media tactics were components of a mildly successful broader political strategy to put increasing pressure on the Nigerian judiciary and the other branches of the Nigerian government to take steps to guarantee, and ensure the realization of, the right to education in Nigeria. The modest process of normative alteration that occurred in the result was, and remains, very important mainly because of the uncertainties that persist regarding the place of the ECOWAS Court's rulings within the dualist scheme that Nigeria operates in the implementation of international law[111] and the fact that the ECOWAS Court's judgments have not yet become routinely registered and enforced in Nigeria as part of its domestic laws.

ii. The Dasuki *case*

The judgment of the ECOWAS Court in *Colonel Mohammed Sambo Dasuki (rtd) v Federal Republic of Nigeria* (also known as the *Dasuki* case),[112] has also had a significant impact on the reasoning and orders made in at least one decision of Nigeria's second highest court, the Court of Appeal of Nigeria. Following the decision of the ECOWAS Court in this matter, the Court of Appeal weighed in on at least two occasions on the question of the enforcement of Sambo Dasuki's human rights.[113] Only one of these two cases is of concern here. In the unanimous judgment of a three-judge panel in *Colonel Sambo Dasuki v Director-General State Security*,[114] the appellate court held that Nigeria's Department of State Security acted outside their constitutional powers in detaining Dasuki without trial for a prolonged period, despite successive court orders to release him on bail, and ordered that agency to pay five million naira (US $14,000 approximately) to him

[110]A host of media reports in Nigeria have since focused on the realization of the right to education. For example, see Joseph Onyekwere, "Court Declares Free Compulsory Education Enforceable Right," *The Guardian* (2 March 2017), online: <guardian.ng/news/court-declares-free-compulsory-education-enforceable-right/>; Tope Alabi, "Court Declares Free Basic Education an Enforceable Right," *Information Nigeria* (3 March 2017), online: <www.informationng.com/2017/03/court-declares-free-basic-education-enforceable-right.html>.

[111]See Interviewees 17 and 19 (former judges of the ECOWAS Court).

[112]*Colonel Mohammed Sambo Dasuki (rtd) v Federal Republic of Nigeria*, Judgment No ECW/CCJ/JUD/23/16 (4 October 2016) [*Dasuki* case].

[113]See "Review: Dasuki's Long Road to Freedom," *Premium Times* (26 December 2019), online: <www.premiumtimesng.com/news/headlines/369962-review-sambo-dasukis-long-road-to-freedom.html>.

[114]See *Colonel Sambo Dasuki v Director-General State Security*, Suit No CA/A/806/2018 (13 June 2019), LPELR-48113 (CA), per Justices Tinuade Akomolafe-Wilson, Peter O. Ige, and Emmanuel A. Agim [*Dasuki*]. See also Soonest Nathaniel, "Appeal Court Orders Dasuki Release from DSS Custody," *Channels TV* (14 July 2019), online: <www.channelstv.com/2019/07/14/appeal-court-orders-dasuki-release-from-dss-custody/>.

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as compensation for its "brazen and brutal" breaches of his fundamental human rights. In the lead judgment of Justice Tinuade Akomolafe-Wilson, which also admitted Dasuki to bail on less strenuous conditions than had been imposed by the lower court in this matter, the Court of Appeal, noted that it was "conscious of the fact that the lower court heavily deprecated the act of the 1st and 2nd respondents for the unlawful continued detention of the appellant especially where three courts, *including the ECOWAS court*, had impugned their action of the violation of the appellant right."[115]

Just as remarkably, the ECOWAS Court's ruling in the *Dasuki* case also had a significant impact on the ruling of at least one lower court in this same matter. It did impact the ruling of Justice Ijeoma Ojukwu of Nigeria's Federal High Court in an earlier bail application that had been made to her by Dasuki.[116] By this federal judge's own admission, made after her bail ruling in the matter, it should be kept in mind that, although

> the Judiciary rarely makes reference to ECOWAS Courts rulings/decisions … I did make reference in July 2018 to the [earlier] decision of the … ECOWAS Court while ruling on the case of the former National Security Adviser, Colonel Sambo Dasuki (retd) … Dasuki was granted bail by the [domestic] courts but was not allowed [by the executive branch] to enjoy bail. The ECOWAS Court had also ordered his release and imposed a fine … for his unlawful detention, yet the government did not comply with the verdict. In ruling on the suit filed by Dasuki on this breach of his fundamental right to liberty, I made reference to and relied in part on the fact that the ECOWAS on October 4, 2016, had ordered the release of Dasuki from custody; a judgment which the DSS [Department of State Security] had not obeyed.[117]

This claim is indeed correct. In the ruling at issue, Ojukwu J had stated that:

> Sometimes [sic] in 2016, the applicant was compelled to approach the ECOWAS Court for the enforcement of his fundamental human right in Suit No. ECW/CCJ/APP/0116 and I know that the…ECOWAS Court agreed with the applicant that his fundamental human right to liberty had been infringed by the respondents. Hence they directed his release in the judgment delivered on 4th October 2016 annexed herewith and marked Exhibit H.
>
> Despite the fact [that] Nigeria is a member of the ECOWAS Community and a signatory to the existing [P]rotocols setting up the Court, *the Federal Government of Nigeria, deliberately avoided compliance with the said Judgment*, which indicted it for violating the Applicant's Fundamental Human Rights to liberty.[118]

It is significant that, although Ojukwu J could have reached her decision in this case without any reliance on the ECOWAS Court's earlier ruling in the case, she

[115]See *Dasuki*, *supra* note 114 at 36 [emphasis added].
[116]See *Dasuki*, *supra* note 114.
[117]See Interviewees JDA2JUD.
[118]See *Dasuki*, *supra* note 114 at paras 28, 29.

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deliberately chose to make explicit reference to, and rely to some extent on, it. The fact that the ECOWAS Court had found a violation of Dasuki's liberty rights, and what Ojukwu J refers to as the Nigerian government's deliberate avoidance of compliance with the ECOWAS Court's ruling, very clearly weighed appreciably and significantly on her mind and influenced her judicial reasoning in this case. This testifies rather eloquently to the modest, but still quite significant, function of this specific ECOWAS decision as an additional and helpful justificatory resource in the hands of at least one federal judge in Nigeria.

The fact that this and all the relevant judicial rulings in the *Dasuki* line of cases, and the desired eventual outcome (his release), were obtained as part of a broader and long-standing political pressure campaign to free Dasuki and others like him from unduly long unlawful detention has already been discussed. So too the realization that they were generated, to an extent, by CSAs (for e.g. lawyers, activists and journalists) who were part of an actual and virtual alliance; who acted as the brainy relays between the ECOWAS Court's ruling and the Nigerian domestic legal order; and who made the consequential ends-means calculations to deploy the relevant ECOWAS Court's ruling as leverage to put additional pressure on the judiciary (and, through it, the executive branch of the Nigerian government as well).

C. General conclusions on the generation of correspondence between judicial thought/action in Nigeria and the ECOWAS Court's rulings

The evidence discussed in this sub-section indicates that, here again, in relation to the Nigerian judiciary, a very small measure of correspondence (lying beyond the compliance optic) was generated, during the period under study, between at least three rulings of the ECOWAS Court and judicial thought/action in Nigeria (and, clearly, in a much a much smaller way regarding that regional court's impact on the executive branch of government in that country).[119] There was also little appreciable departure in this judicial context from the ways in which such correspondence was generated between the rulings of the ECOWAS Court and legislative decision-making, process, and action in Nigeria, discussed in the last section. Here again, creative and targeted actions largely designed and taken by local CSAs at both the ECOWAS and domestic levels enabled and allowed the relevant Nigerian courts to build arguments and issue decisions/rulings that aligned with the pro-human rights visions and goals of the involved CSAs. These CSAs acted as the brainy relays that significantly transmitted the ECOWAS Court's normative energy and values into the processes, reasoning, and orders of a few Nigerian courts — with marked, if modest, results in these cases. While there was in no case direct compliance with one of the ECOWAS Court's rulings, a limited measure of correspondence with a handful of its decisions was generated within the Nigerian judiciary.

Thus, the ineluctable conclusion here again is that analyses of the available evidence tend to support the key claims of the correspondence theory concerning the ways in which international human rights institutions (courts included) can and do exert influence within the states over which they exercise jurisdiction. As noted in the last section, the insights thus produced also dovetail with the work of scholars such as Alter, Gathii, and Finnemore and Sikkink.

[119]See Okafor et al, "Modest Impact," *supra* note 4.

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4. Explaining the ECOWAS Court's relatively less robust impact on legislative and judicial decision-making, process, and action in Nigeria

As has been demonstrated by the analyses in Sections 2 and 3, while the ECOWAS Court has had some impact on legislative and judicial decision-making, process, and action in Nigeria, its quantum and spread have been rather minimal. And, in our carefully considered estimation, this impact has also been appreciably less robust than even the modest influence (mapped and analyzed elsewhere) that the court has exerted on the executive branch of government in the same country.[120] Why has the court's impact on the various branches of the Nigerian government been distributed in this rather skewed way and, especially, not been in favour of the legislature and judiciary in this country?[121]

Several factors have worked together to minimize the impact that the ECOWAS Court has so far had on legislative and judicial decision-making, process, and action in Nigeria (both in absolute terms and relative to its impact on the decision-making and actions of the executive branch). These same factors have combined to produce the (contextually) puzzling situation in which the court has had more impact on the semi-authoritarian executive branch in that country than on its comparatively much more pro-human rights judicial and legislative branches of government. These factors are analyzed in the sub-sections that follow.

A. Significant awareness and knowledge deficit

As is widely recognized among knowledgeable observers of the ECOWAS Court's work (many of its former judges included), the court is not yet nearly as well-known as it could and ought to be, even among lawyers and judges in the West African region and, what more the general public.[122] First, it is a well-known fact that, as is also the case in many parts of the world, the vast majority of Nigerian lawyers have never received training of any kind in international law.[123] While all Nigerian law schools do offer at least one course in international law, typically, only a small segment of students elect to take that course.[124] Similarly, only a very small number of Nigerian lawyers have ever been specifically trained in ECOWAS law.[125] For until very recently, just one law school in Nigeria taught a course in ECOWAS law.[126] This number recently increased to two.[127] While self-teaching and continuing

[120] *Ibid.*

[121] Huneeus's work, of course, does provide some general insight into this question, albeit from the angle of the Inter-American Court on Human Rights' domestic influence, and we draw on some of these in this section of the article. See Huneeus, *supra* note 10.

[122] For example, see Interviewees 1, 4, 5, 8, 10, 12 14, 21, 23 24–27, 40X, 64X.

[123] See Omotese Eva (Legal Adviser of the Ministry of Foreign Affairs of Nigeria) and Yusuf Danmadami (Senior Legal Officer of the ECOWAS Court), presentations to the Webinar of the International Law Association (Nigeria Branch), reprinted in "COVID-19: Highly Skilled International Lawyers Are Crucial to Effective Pandemic Responses," *Law and Society Magazine* (22 August 2020), online: <lawandsocietymagazine.com/covid-19-highly-skilled-international-lawyers-are-crucial-to-effective-pandemic-responses-says-prof-obiora-okafor/>.

[124] *Ibid.*

[125] *Ibid.*

[126] *Ibid.*

[127] *Ibid.*

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professional education, to an extent, has helped to close this gap in international/ECOWAS law training in Nigeria, it has not sufficed to eliminate the deficit, as might be reasonably expected.[128] For example, as senior officials of the National Judicial Institute (which is responsible for the continuing education of judges) have confirmed, this institute's curriculum does not typically include training on the legal framework, rulings, or processes of the ECOWAS Court.[129] And, so, the fact remains that, to this day, training on, awareness about, and knowledge of the ECOWAS Court remains generally quite poor among lawyers and judges in Nigeria as well as in the rest of the population. What is more, almost all respondents interviewed by us either noted or agreed that the ECOWAS Court was not front and centre enough in the minds of lawyers, judges, and activists in Nigeria, let alone the public, and that its media profile in the country needs to be augmented.[130]

Similarly, the ECOWAS Court is also not yet as sufficiently well-known among Nigeria's legislators as it could and ought to be. This much was made clear by a top official of the National Assembly involved in the training of federal legislators. This official even went as far as stating that

> [t]he fact that the National Institute of Legislative Studies (NILS) [as that body was then known], set up to train and support legislators in preparing Bills does not have sufficient effectiveness has also contributed to the legislative process not taking such things like ECOWAS Court decisions into consideration. … I don't sense much impact of the court's decisions [*sic*] on the legislative debate in the National Assembly.[131]

Overall, the point being made here is that awareness/knowledge deficits among lawyers, judges, and legislators (due in part to training gaps) have limited quite appreciably the capacity of either the Nigerian judiciary or legislature to utilize or mobilize the ECOWAS Court's processes and jurisprudence in their work (including as conceptual resources that could strengthen their human rights-related arguments, improve the legislation they pass or rulings they make, or bolster their institutional legitimacy and authority). One must be aware of the existence of a resource in order for one to deploy it.

B. The ECOWAS Court does not tend to address its orders directly to domestic legislatures or judiciaries or call for consequential legislative or judicial action to be taken

One of the most important factors that have produced the comparatively less robust degree of influence that the ECOWAS Court has exerted on legislative and judicial decision-making, process, and action in Nigeria is that, as we saw in Sections 2 and 3, the ECOWAS Court rarely addresses national legislatures or courts directly and squarely in the formulation of the orders that it makes in its rulings. Closely related to this point is the fact that, as we have also seen, rarely does the ECOWAS Court call for legislative or judicial action to be taken by the states addressed by its rulings. Further

[128] *Ibid.*

[129] See Interviewees JDA1JUD.

[130] For example, see Interviewees 2, 10, 14, 24, 26, 27, JDA1LEG, JDA1JUD, JDA2JUD.

[131] See Interviewee 64X.

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evidence of this reluctance of the court to address national legislatures or courts directly is embedded in the self-critical declaration of one former judge of the ECOWAS Court: "Last year, the court took a decision against a member state because it had inheritance laws that did not treat women fairly. We will not enjoin the country to change the law, but it should still do this. The Inter-American Court of Justice goes further and even asks the country to change the legislation or even restart a trial."[132]

Not surprisingly, as is also evident from the discussion in previous sections, this tendency on the part of the ECOWAS Court has certainly manifested in relation to our Nigerian case study. For example, our empirical analysis of the set of 125 cases that had been reported on the court's website as of 8 September 2020 suggests that it was only in four of these cases (that is, a paltry 3.2 percent) that it had specifically ordered the defendant state to change a law or regulatory text. The court later reported one other ruling in the *Cybercrime Act* case, where it issued a direct order to Nigeria to repeal or amend the impugned legislation.[133] This raised the total number of such rulings to five — that is, 4 percent of the total. Yet this analysis also indicated that, based on the reasoning in the relevant rulings, the ECOWAS Court had unassailable grounds to issue such a direct order to a state in an additional thirty-two (or 25.6 percent) of these cases but failed to do so. This indicates a very low tendency to issue such orders on the part of the court. We should also add that, quite understandably, given the nature of the established international legal practice on the matter, we did not find any order within this sample that was addressed to a domestic court or that directly required such a court to take any step.

Overall, the point that is being made here is that a combination of this, admittedly conventional, tendency not to address national legislatures and courts directly, and its less usual practice of not requiring the relevant states to take specific legislative or judicial steps, has contributed to a significant extent to the ECOWAS Court's comparatively less robust impact on the judicial and legislative branches of government in Nigeria. It is easier for a national legislature — those who manage law reform — or the courts to minimize scrutiny from external observers (especially civil society campaigners) regarding the extent of the compliance or correspondence of their legislative/judicial texts, policies, and practices with the relevant ruling of the ECOWAS Court if the specific legislative change that is required has not been directly identified and ordered in the relevant ruling. Perhaps, more importantly, not directly addressing its orders to national legislatures and courts, or not identifying and specifying the specific changes in legislative/judicial texts that are required, also reduces even further the already existing low level of awareness that the members of those national legislatures and judiciaries tend to have of the activities of the ECOWAS Court.[134] And it is only reasonable to expect that the lower this awareness level is, the less bountiful the harvests will be in terms of legislative or judicial steps taken to comply or correspond with the rulings of the ECOWAS Court.

This tendency, however, appears to be changing, albeit quite slowly. At the very least, the ECOWAS Court appears to have realized the need for more direct engagement with, and more explicit specification of, the legislative changes required to give effect to its rulings. For example, in justifying its direct order to Nigeria in the

[132]See Interviewee 19.

[133]See *Cybercrime Act*, *supra* note 56.

[134]A discussion of the generally low level of awareness of the ECOWAS Court is offered later in this article.

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Cybercrime Act case to repeal or change a specific piece of legislation, the court stated that, in exercising its jurisdiction to consider human rights violations by ECOWAS member states, "it has powers to go into [the] root of the violation, i.e. those laws which the applicants are contesting to [e]stablish whether or not they are contrary to the provisions of international laws."[135]

The ECOWAS Court is on solid ground here. For even the African Commission on Human and Peoples' Rights, which can only issue formally non-binding decisions, has from time to time called on states that have been found to have violated human rights in part because of the enactment or implementation of certain legislation to make consequential changes to the impugned laws. For example, as far back as 1998, it concluded a matter against Nigeria by calling for legislative change, stating that it "requests that the Government of Nigeria take the necessary steps to bring its law into conformity with the Charter."[136] Much more recently, the African Court of Human and Peoples' Rights also felt able to state, and in an advisory opinion for that matter, that

> [g]iven the Court's findings in this Advisory Opinion, the Court holds that Article 1 of the Charter, Article 1 of the Children's Rights Charter and Article 1 of the Women's Rights Protocol *obligates* all State Parties to, inter alia, either amend or repeal their vagrancy-laws and by-laws to bring them in conformity with these instruments. This would be in line with the obligation to take all necessary measures including the adoption of legislative or other measures in order to give full effect to the Charter, the Children's Rights Charter and the Women's Rights Protocol.[137]

While it did not order the relevant states to amend or repeal such laws, as this was an advisory opinion and not a contentious matter, it directly addressed the need for legislative reform by these states.

In conclusion, it should also be noted that the orientation of the foregoing discussion strongly supports Huneeus's important insight on the need to disaggregate the state when studying compliance (and correspondence) with the orders of international courts.[138] As she has put it, there is no unitary or monolithic "political will" of a singular state actor that can explain non-compliance (or non-correspondence).[139]

C. The Executive Branch's virtual monopoly over the conduct of foreign affairs makes it the primary addressee of the court's orders and distances the latter from the other branches of government, thus augmenting awareness gaps about its work within the legislature and judiciary

Another factor that has helped minimize the ECOWAS Court's impact on the legislature and judiciary in Nigeria is the fact that the near monopoly over the

[135]See *Cybercrime Act*, *supra* note 56 at 19, para 67.

[136]*See Media Rights Agenda & Ors v Nigeria*, Communication No 105/93 & Others (31 October 1998).

[137]See *Request for an Advisory Opinion by the Pan African Lawyers Union on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa*, Case No 001/2018 (4 December 2020) at 40, para 153 [emphasis added].

[138]See Huneeus, *supra* note 10 at 511.

[139]*Ibid.*

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conduct of foreign affairs that is held by the executive branch has made it the primary addressee of that court's orders and created a physical and conceptual distance between the ECOWAS Court and the other domestic branches of government. This situation has, in turn, augmented the awareness gap within those domestic institutions concerning the existence and work of these courts. It is trite in international law and affairs that it is the executive branch of government that primarily and almost exclusively conducts foreign relations on behalf of states, including before international courts.[140] As Huneeus has put it in relation to the Inter-American Court of Human Rights, "more than any other branch, the executive is aware of the Court's ruling and its demands, and the executive is the one that has to answer and appear before the Court when it requests an update on compliance."[141] This is no different in the ECOWAS sub-region. In effect, then, the ECOWAS Court, like many international courts, has tended to focus on addressing the executive branch as representative of the state that is the subject of the litigation before it. For example, as we have seen in Section 2, even in the *Jerry Ugokwe* case, where there was a kind of direct compliance by both the executive branch and the legislative arm, the Attorney-General (an executive branch official) had to write to the leader of the relevant chamber of Nigeria's federal legislature to intimate it of the ECOWAS Court's special interim order and request that it comply.[142] This is the usual practice in such cases. And while this tendency to address only the executive branch in its rulings is waning, it has not as yet receded enough at the ECOWAS Court.

The physical and conceptual distance between the ECOWAS Court and the legislature/judiciary that has been created and maintained by this reality has tended to augment the significant awareness gap that already exists among domestic legislators and judges regarding the work, and even the very existence, of the ECOWAS Court. If these legislative and judicial actors or their representatives, like executive branch officials, were addressed by, or had to participate more directly in, the ECOWAS Court's hearings (for example, through sending counsel there to hold "watching briefs"), their level of awareness of the court's work would be exponentially higher. And this would likely have led to a greater level of awareness on their part of the various ways in which they could utilize the ECOWAS Court's processes and jurisprudence in their own quotidian work, especially in aid of the legal and socio-political struggles they tend to wage against Nigeria's semi-authoritarian executive branch.[143] The enhancement of the level of awareness within the legislature/judiciary in this regard would have most likely led to greater harvests in the extent to which they are in fact able to mobilize the court in an effective way. The flip side of this coin would have been a concomitant augmentation of the ECOWAS Court's impact on the work of these branches of government.

D. Regime-type matters (both positively and negatively)

Another factor that has mattered significantly in shaping the extent of the impact that the ECOWAS Court has had on the legislative/judicial decision-making and action in

[140] *Ibid* at 513.
[141] *Ibid.*
[142] See *Ugokwe*, *supra* note 24.
[143] See the example discussed in section 1 of this article.

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Nigeria is the specific character of Nigeria's political regime type. As has been noted already, to the extent that a choate democracy exists at all anywhere in the world, Nigeria is certainly not one. Its political regime type is at best semi-democratic, which also means that it is semi-authoritarian. Within this quasi-democratic order, the executive branch exercises, *de facto*, a vastly disproportionate amount of raw political power (not necessarily constitutionally) and tends to predominate over the other branches of government to an extent that is not contemplated under the Constitution. Through a combination of abuse of the federal executive branch's control over all the security and law enforcement agencies, bribery, patronage in the context of widespread poverty, divide and conquer tactics, and control over the ruling party's candidate-selection apparatus,[144] presidents of the country (in whom the executive authority of the country is vested), while certainly not monarchs or bare knuckle dictators, are still extremely powerful as they tend, in practice, to grab and exercise far more power *vis-à-vis* the judiciary and the legislature than they are formally entitled to under the Nigerian Constitution.[145]

Against this background, it is easy to understand that a federal legislature like Nigeria's that has been in part labouring under the executive branch's semi-authoritarian thumb would be significantly inhibited in the frequency and intensity with which it issues any condemnations of the executive branch for disobeying or failing to immediately implement the ECOWAS Court's rulings. They would also not tend to feel as free as they would have, were they to have been operating within a more choate democracy, to openly discuss and implement the content of such often "controversial" rulings of the ECOWAS Court against the government. This is not to suggest that they have not done so at all but, rather, to argue that the semi-authoritarian political environment that they have had to operate under has significantly limited the extent to which they could do so and that this explains, albeit only in part, the relatively less than robust extent of the impact that the ECOWAS Court has had on the federal legislature.

Yet it should be acknowledged that the semi-democratic flip-side or other half of Nigeria's political regime type has contributed positively — if still minimally — to the generation of the very few instances that we found of the impact of the ECOWAS Court on legislative decision-making and action in the country. Without this semi-democratic component of the country's regime type, it would have been more difficult for even this minimal quantity of impact to have occurred. Similarly, the significantly inchoate nature of Nigeria's democracy has also meant that, even following the demise of the military regime and the onset of civilian rule in 1999, the judiciary has continued to struggle, with only partial success, to fend off the constant attempts by the executive branch to place it under its feet. Early in its tenure, the current Buhari-led government was condemned widely for late night invasions of the homes of federal judges by armed operatives of the Department of State Security, allegedly on an operation to root out corruption but, more likely than not, on a mission to (further) intimidate the judiciary.[146] The most brazen and perhaps most

[144]For example, see Eneasato & Okibe, *supra* note 9; Majekodunmi & Awosika, *supra* note 6; Basiru, *supra* note 6.

[145]See, for example, the saga of the illegal removal from office of the then Chief Justice Walter Onnoghen, discussed in section 1 of this article.

[146]See Senator Iroegbu & Ernest Chinwo, "DSS Operatives Invade Judges' Homes on Abuja, Rivers and Gombe," *Thisday Live* (8 October 2016), online: <www.thisdaylive.com/index.php/2016/10/08/dss-operatives-invade-judges-homes-in-abuja-rivers-gombe/>.

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highly atrocious of these incessant attempts by the executive branch to subjugate a hitherto modestly independent Nigerian judiciary was undertaken as recently as 2018 when the then chief justice of Nigeria was illegally and forcibly removed on the eve of a presidential election, the results of which was likely to come before the courts over which he presided.[147]

This removal was orchestrated by a supposedly democratic president through a process that, as the judiciary itself has now ruled, remains at best completely unknown to law and without as much as attempting to follow the constitutionally laid down process.[148] Yet the judiciary has not totally succumbed to this brazen executive onslaught against it. For example, many of the judges continue to assert their independence and rule on a routine basis against the executive branch.[149] Nevertheless, the analytical point here is that some judges, fearful of executive branch's retaliation and intimidation or corrupted by various elements within that branch, would be more reluctant than they would were they to operate in a more democratic clime to identify more openly with the ECOWAS Court's decisions that condemn the executive's human rights violations — for example, by using them in their own rulings.

On the positive side, the fact that, as semi-authoritarian as it certainly is, Nigeria's regime type is, nevertheless, still semi-democratic, has meant that many judges have enjoyed a measure of political space to continue to rule on a quotidian basis against the government, with little or no serious retaliation being visibly levied against them (at least in the short term).[150] This could not but have served as one significant source of encouragement to the tiny number of them that have applied, as we have seen, in some way or another a ruling of the ECOWAS Court against the executive.

E. Judicial "nationalism"

Perhaps the most important of the various factors that has helped produce the minimal impact that the ECOWAS Court has had on the judiciary in Nigeria is the latter's partial, but nevertheless robust, history of asserting its independence *vis-à-vis* foreign judicial institutions, including regional and other international judicial bodies.[151] Writing about the aspects of the relationship between the Inter-American Court of Human Rights and the states that are subject to its jurisdiction, Huneeus notes that "[domestic court] judges may feel more threatened by the [Inter-American Human Rights] Court than do other state actors. Executives, too, resist and resent the intrusion from abroad when a ruling comes down, but for

[147]See *Onnoghen*, *supra* note 12. See also Felix Omohomhion, "Appeal Court Upturns Onnoghen's Suspension, Says It's Illegal," *Businessday* (10 May 2019), online: <businessday.ng/lead-story/article/appeal-court-upturns-onnoghens-suspension-says-its-illegal/>.

[148]*Ibid.*

[149]For instance, see the now famous anti-ruling party dissent of Nweze JSC in the application to reverse the Supreme Court of Nigeria's judgment in the Imo State Governorship Electoral case. See Halima Yahaya, "Our Ruling on Imo Governorship Will Haunt Nigeria for Long Time: Supreme Court Justice," *Premium Times* (4 March 2020), online: <www.premiumtimesng.com/news/headlines/380133-our-ruling-on-imo-governorship-will-haunt-nigeria-for-long-time-supreme-court-justice.html>.

[150]*Ibid.*

[151]Ebobrah alludes to this tendency in his work. See Ebobrah, "ECOWAS Community Court of Justice," *supra* note 2 at 91–95.

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judges, each Court ruling is a direct incursion into their legal terrain."[152] Huneeus is, of course, correct about this. At the very least, Solomon Ebobrah's work testifies to this.[153]

However, in the specific case of Nigeria, there is more to the resistance and resentment of local judges to intrusion from abroad than the mere fact of the ECOWAS Court's ruling squarely encroaching on their jurisdictional sphere. There, despite the (admittedly waning) historical penchant of the courts to cite foreign (especially English and American) domestic case law, an additional strain of judicial "nationalism" has also been long present within the Nigerian judiciary. Soon after Nigeria's formal political independence from Britain, Justice Udo Udoma (an influential judge of the Supreme Court of Nigeria) issued a strong warning in one of his rulings to the effect that "[t]his country is no longer tied to the apron strings of imperial England. Indeed, such *an attitude of independent thinking* … can only be to the good. It is an assertion of independence which should contribute towards the broad development and growth of our independent corpus of jurisprudence."[154]

Udoma J's strong emphasis in this statement on the need for Nigeria's judiciary to be independent from foreign courts and his use of this concept of independence three times in four lines are quite telling. And this attitude did not wane significantly with the passage of time. For, twenty years later, in the celebrated case of *Attorney-General of Bendel State v Attorney-General of the Federation*, the highly influential Justice Kayode Eso, writing for the majority of the Supreme Court of Nigeria, firmly declared that "[g]one should be those days if ever they were, when the decisions of other courts in any common law country are to be accepted in this country as precedents in the like of the Delphic Oracle."[155] In the very same case, another very influential supreme court judge made a similar point in as emphatic a manner when he warned that, "[j]ust as Australian courts apply Australian law and American courts apply American law, be they state or federal, Nigerian courts are enjoined to by the Nigerian Constitution to follow Nigerian law."[156] While the tendency within the Nigerian judiciary to this kind of judicial "nationalism" has not been total, it has nevertheless remained significant even to this day.

It appears to have also influenced, at least in part, the way in which Nigerian courts — under the precedent-based guidance of the Supreme Court — have tended to treat both the relationship between Nigerian law and international treaties and between them and regional (as opposed to foreign domestic) courts. As one of us has long revealed,[157] in the more recent case of *Abacha v Fawehinmi*,[158] which was decided soon after the end of military rule and the revival of civilian rule in Nigeria in 1999, the majority of the Supreme Court of Nigeria manifested (on the balance) a similar

[152]See Huneeus, *supra* note 10 at 514.

[153]See Ebobrah, "ECOWAS Community Court of Justice," *supra* note 2 at 91–95.

[154]*Holman Bros (Nig) Ltd v Kigo Brothers (Nig) Ltd*, (1980) 8–11 SC 44, LOR (05/09/1980) SC at para "P," online: *Lawyers Online Report* <cases.lawyersonline.ng/holman-bros-nig-ltd-v-kigo-nig-ltd/> [emphasis added].

[155]See *Attorney-General of Bendel State v Attorney-General of the Federation*, (1981) 10 SC 115 at 187–88.

[156]*Ibid*, Obaseki JSC (the full judgment is available at "*Attorney-General of Bendel State v. Attorney-General of the Federation & 22 Ors (SC. 17/1981)*," online: *NigeriaLII, Supreme Court Judgments* <nigerialii.org/ng/judgment/supreme-court/1981/4>.

[157]See Okafor, *African Human Rights System*, *supra* note 7 at 110–14.

[158]See *Abacha v Fawehinmi*, (2000) 13 NWLR (Part 660) 228.

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kind of judicial nationalism, while allowing some room for international law to play a role internally within the Nigerian legal order. In so doing, they overruled in part, or at least modified, a line of jurisprudence that, in some cases, had gone as far as holding that the international human rights obligations assumed by Nigeria and the decisions of the regional and global bodies interpreting them, supersede all domestic legislation and the decisions of the Nigerian courts that apply them.[159]

Against this background, the point overall is that this tendency within the Nigerian judiciary to assert its independence and favour the superiority of domestic laws and judicial decisions over those coming "from abroad" has functioned to limit quite significantly (as it turns out) its desire and ability as an institutional actor to develop a significant record of reliance upon on, and citation of, otherwise relevant rulings of the ECOWAS Court. And this, we argue, explains in part why we found so few Nigerian cases that do so.

5. Conclusions

In conclusion, this article began by outlining two inter-related puzzles regarding the comparatively much less robust impact that West Africa's international human rights court (the ECOWAS Court) has had on legislative/judicial branch decision-making and action *vis-à-vis* the executive branch within Nigeria, our case study jurisdiction. The article then discussed and analyzed the examples and extent of this impact on legislative/judicial branch decision-making and action. This was followed by the development of a set of analytical, multi-factorial, explanations for the two inter-connected puzzles that animated the enquiry in this article. The article has argued that several factors have combined to produce the comparatively much less robust impact that the ECOWAS Court has had on the legislature and judiciary in Nigeria. The significant awareness gap that exists within these branches regarding the ECOWAS Court's existence, processes, and rulings; the fact that the executive branch's virtual monopoly over the conduct of foreign affairs makes it the primary addressee of the court's orders and has distanced it from the other branches of government, thus augmenting awareness gaps about its work within the legislature and judiciary; the fact that it does not tend to address the legislature/judiciary directly in its rulings or call for consequential changes to be made by these branches of government; the limits imposed by Nigeria's semi-authoritarian regime type over the period under study and opportunities presented by its semi-democratic flip-side; and the somewhat understandable judicial nationalism that is alive and well within the Nigerian judiciary, have all worked in tandem to restrict the extent to which legislative and judicial decision-making and action in Nigeria could mobilize more robustly the ECOWAS Court's existence, processes, and rulings.

The materials and findings discussed in this article have broader implications for our understanding of the place and impact of international courts within states that are subject to their jurisdiction. First, they trouble the generalizability of earlier findings, including in regard to the African human rights system, that international human rights bodies tend to have more impact on domestic judiciaries than on the other branches of domestic governments. Second, they offer some support to Huneeus's findings, particularly in the context of the inter-American human rights system, that, although

[159]See Okafor, *African Human Rights System*, *supra* note 7 at 113.

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domestic executive branches also resist and resent the intrusion from international courts represented by rulings of the latter, for domestic judiciaries, each international court decision is an even more direct incursion into what they understand as their legal terrain. Third, they also lend strong support to Huneeus's important insight on the imperative need to disaggregate the state when studying compliance (and correspondence) with the orders of international courts, there being no unitary or monolithic "political will" of a singular state actor that can explain non-compliance or non-correspondence. Lastly, the discussion in this article has also exemplified the necessity for our study and understanding of the impact of international courts within states that are subject to their jurisdiction to move well beyond, while retaining, the compliance frame, extending to what one of us has referred to as correspondence. This will require nothing less than a recalibration of the conceptual lenses that we use on these courts.

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