On the Modest Impact of West Africa's International Human Rights Court on the Executive Branch of Government in Nigeria

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ABSTRACT

Some scholars have criticized international courts in Africa as ineffective given their limited success in compelling or cajoling state behavior. Others have since argued that there are additional ways in which these courts have mattered to state and society in Africa. This Article applies the "correspondence theory" on the domestic impact of international human rights institutions. This Article analyzes evidence of the broader ways, compliance included, in which West Africa's international human rights court, the Economic Community of West African States' Community Court of Justice (the "ECOWAS Court"), has had a significant, if sub-optimal, impact on executive branch decision-making and action within Nigeria, the country where most ECOWAS cases originate. The Article further explains the reasons for the sub-optimal nature of the ECOWAS Court's impact in Nigeria and concludes by offering a prolegomenon to a theory on the domestic impact of this regional court.

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> "The existence of an international legal remedy empowers those actors who have international law on their side, *increasing their out of court political leverage*. [International courts] then alter political outcomes by giving symbolic, legal and political resources to compliance constituencies, ever-changing groups of actors that for a variety of reasons may prefer policies that cohere with international law."
>
> – Karen Alter[1]

> "Ultimately, human rights litigation in the [East African Court of Justice] *is part of a broader strategy of political mobilization* that is giving voice to actors who did not have such legal recourse to advance their claims in the past. This mobilization is particularly important because discredited political institutions—parties, legislatures, and executives—are not regarded as avenues for addressing the concerns of ordinary citizens in their own national jurisdictions at the moment."
>
> – James Gathii[2]

> "[The ECOWAS Court] enjoys the grudging respect of ECOWAS member states and is not summarily dismissed by even the most recalcitrant states."
>
> – Solomon Ebobrah[3]

Introduction

The main purposes of this Article are three-fold. The first is to examine the Economic Community of West African States' Community Court of Justice (the "ECOWAS Court")—famously described as the "International Human Rights Court for West Africa"[4]—and the extent of its domestic impact on executive decision-making and action in Nigeria. The second is to analyze how this admittedly limited impact exemplifies or complicates the correspondence theory on the domestic impact of international human rights institutions, which is itself built on a theoretical foundation of strategic social constructivism. The third is to examine the extent to which this theoretical discussion can preface, and form the basis for, the development

1. Karen J. Alter, The New Terrain of International Law: Courts, Politics and Rights 19 (2014) (emphasis added).

2. James T. Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 Duke J. Comp. & Int'l L. 249, 296 (2019).

3. Solomon Ebobrah, *The ECOWAS Community Court of Justice: A Dual Mandate with Skewed Authority*, *in* International Court Authority 82, 94 (Karen J. Alter, Laurence R. Helfer & Mikael R. Madsen, eds., 2018).

4. Karen J. Alter et. al., *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 Am. J. Int'l L. 737 (2013).

of a more specific theory on the ECOWAS Court's domestic impact on executive decision-making and action. An analysis of the court's possible domestic impact on the legislature, judiciary, and civil society groups within ECOWAS region states, though related, is not part of the inquiry here, and forms the subject of the Authors' forthcoming work.[5]

The impact of international human rights institutions is usually studied in terms of the extent of state compliance with the institutions' decisions.[6] Here, the definition of compliance with an international human rights institution's decisions, drawn from the work of Helfer and Slaughter, is the institution's success at convincing or cajoling domestic government, both directly and through pressure from private litigants, to use the government's power on the institution's behalf to ensure that its decision is implemented.[7] As Helfer has noted, this question of compliance is not to be conflated with the issue of the effectiveness or impact of these bodies, since "[i]nternational rules [or rulings] with high compliance rates may be entirely ineffective, whereas those with low compliance rates may be quite effective if they engender some modification of state behaviour."[8]

Still, the mapping of domestic compliance with the decisions of international human rights institutions (including courts) is an important—if partial and incomplete—approach.[9] Indeed, the ECOWAS Court's judges and the human rights lawyers and activists who utilize it frequently decry the significant obstacles posed by non-compliance with the court's decisions.[10] Though the decisions of the ECOWAS Court are clearly final and binding,[11] and Member States are required to take all necessary measures to ensure compliance with the judgments of the court,[12] the court contends with a significant degree of non-compliance with its decisions.[13]

5. *See, e.g.*, Richard F. Oppong, *The Higher Court of Ghana Declines to Enforce an ECOWAS Court Judgment*, 25 Afr. J. Int'l & Comp. L. 127 (2017) (detailing questions on the court's impact on the judiciary in the ECOWAS region); Kehinde Ibrahim, *The Puzzling Paradox Presented within the African Supranational Judicial Institutions: The ECOWAS Court of Justice*, 28 Afr. J. Int'l & Comp. L. 86 (2020) (discussing the court's supranational character).

6. Obiora C. Okafor, The African Human Rights System, Activist Forces And International Institutions 40–62 (2007). *See also* Laurence R. Helfer, *The Effectiveness of International Adjudicators*, *in* Oxford Handbook Of Int'l Adjudication 464, 466–67 (Cesare P.R. Romano et al., eds., 2013); Solomon T. Ebobrah, *International Human Rights Courts*, *in* Oxford Handbook Of International Adjudication 225 (Cesare P.R. Romano et al., eds., 2013).

7. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L. J. 273, 290 (1997).

8. Helfer, *supra* note 7, at 467. *See also* Okafor, *supra* note 6, at 33–40; Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 Eur. J. Int'l Rel. 33, 52 (2008).

9. As Huneeus has correctly declared, "[T]he importance of state compliance cannot be denied." *See* Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 Cornell Int'l. L. J. 493, 505 (2011).

10. *See, e.g.*, Interviewees 17, 18, *in* Appendix B.

11. Revised Treaty of the Economic Community of West African States (ECOWAS), art. 15(4), Jul. 24, 1993, 2373 U.N.T.S. 233.

12. *Id.* art. 22(3).

13. Tony Anene-Maidoh, *Enforcement of the Judgments of the ECOWAS Court of Justice* 3 (Apr. 18–21, 2018), https://ir.nilds.gov.ng/bitstream/handle/123456789/387/ENFORCEMENT%20OF%20JUDG-

Yet, as Huneeus, Alter, and others have also recognized, decisions of courts may, in the absence of state compliance, still be able to change the behavior of states.[14] It is with this broader and thus enhanced lens (one which falls broadly within the spectrum of analytical optics that Helfer has correctly described as "under-analyzed"),[15] that this Article analyzes the ECOWAS Court's impact on the executive branch of the government of Nigeria, a key ECOWAS member state. The aim of this Article is to be able to analyze the domestic impact of the court using compliance as a measure—assessed by compliance with the court's rulings—while also capturing the broader range of the court's impact using theoretical frameworks like correspondence theory. This analysis will not, however, focus on the now trite fact that states have not complied with many of the court's decisions,[16] as the main purpose of this Article is to demonstrate and theorize the ways in which a significant measure of its impact lies outside the comprehension of the compliance frame.

This Article employs an interdisciplinary approach. It draws upon legal, international relations, and other relevant literature on the domestic impact of international courts. The Article is also grounded in years of in-depth field research in Nigeria, the country in which the court and the Nigerian lawyers and activists who use it the most are also based. This field work included the identification and review of the ECOWAS Court's rulings and other relevant documents, as well as the semi-structured interviewing of "purposively selected" samples of dozens of key informants from the ranks of activists, lawyers, ECOWAS Court judges, and government officials in Nigeria. A well-established sample selection method in the social sciences, purposive sampling intentionally targets the persons who are most likely to possess the required information.[17] Though the university-mandated research ethics protocol that governed the study on which this Article relies restricts disclosure of most of the details about these interviews, including the dates on which they occurred, the following information should suffice for present purposes. The Authors of this Article interviewed a purposive sample consisting of five of the seven judges of the ECOWAS Court, and a similarly selected sample of two of the court's most senior legal staff. The Authors also interviewed ten government officials (including top officials at Nigeria's Federal Ministry of Justice and the National Human Rights Commission), and twenty-six human rights lawyers and activists. It should also be noted that all the evidence collected through these purposive interviews

MENTS%20OF%20THE%20ECOWAS%20COURT%20OF%20JUSTICE.pdf?sequence=1 [https://perma.cc/Z9VD-VETN].

14. *See* Huneeus, *supra* note 9, at 505. *See also* Gathii, *supra* note 2, at 287–96; ALTER, *supra* note 1, at 19; Helfer, *supra* note 7, at 464–82.

15. Helfer, *supra* note 7, at 464–82.

16. *See, e.g.*, ALTER, *supra* note 1; Ebobrah, *supra* note 3; Ibrahim, *supra* note 5.

17. Mary Hibberts et al., *Common Survey Sampling Techniques*, *in* HANDBOOK OF SURVEY METHODOLOGY FOR THE SOCIAL SCIENCES. 67 (Lior Gideon ed., 2012).

was checked and triangulated either against other interviewees or the documentary evidence.

The Article's focus on Nigeria as a case study is justified by the demographic composition of the ECOWAS Court's reach—about half of all West Africans are Nigerian.[18] Moreover, its economy is the largest in West Africa by a substantial margin, and it is also the largest economy in Africa in terms of nominal GDP.[19] Nigeria is also the West African sub-region's strongest socio-political player,[20] and its robust civil society groups have brought cases constituting the bulk of the ECOWAS Court's docket.[21] For all of these reasons, any domestic impact the court has had in Nigeria would be significant (though not determinative) as one measure of the court's overall influence. An important, though non-fatal, limitation of this case study approach is that Nigeria still represents only one of the fifteen ECOWAS Member States that are subject to the court's jurisdiction *rationes personae* and *loci*.[22] This Article covers the period between 2004, the year the ECOWAS Court took up its very first case,[23] and 2019.

The Article is divided into five main parts. Part I provides a brief background on the ECOWAS Court. Part II outlines the "correspondence theory" on the influence of international human rights institutions and assesses the evidence of the ECOWAS Court's domestic impact in Nigeria. Part III analyzes the broader range of ways in which the ECOWAS Court has had a significant, if sub-optimal, impact on executive branch decision-making and action. Part IV is devoted to explaining the reasons for the sub-optimal nature of the ECOWAS Court's domestic impact on the executive branch in Nigeria. Finally, the Article concludes with a theory explaining the ECOWAS Court's domestic impact.

18. *See* The World Bank, The World Bank in Nigeria (Oct. 11, 2021), https://www.worldbank.org/en/country/nigeria/overview [https://perma.cc/4NAE-29NY#1].

19. Prinesha Naidoo, *Nigeria Tops South Africa as the Continent's Biggest Economy*, Bloomberg News (Mar. 3, 2020), https://www.bloomberg.com/news/articles/2020-03-03/nigeria-now-tops-south-africa-as-the-continent-s-biggest-economy [https://perma.cc/8A8D-KCDP].

20. Udoka N. Owie & Izevbuwa K. Ikhimiukor, *To Have and to Hold?: Assessing Nigeria's Human Rights Praxis through its Relationship with the ECOWAS Community Court of Justice*, *in* Governance in Nigeria Post-1999: Revisiting the Democratic 'New Dawn' of the Fourth Republic 263, 266–68 (Romola Adeola & Ademola O. Jegede eds., 2019); Jean Bossuyt, *The Political Economy of Regional Integration in Africa: The Economic Community of West African States (ECOWAS)* vi, Eur. Ctr. for Dev. Pol'y Mgmt. (Jan. 2016), https://ecdpm.org/wp-content/uploads/ECDPM-2016-Political-Economy-Regional-Integration-Africa-ECOWAS-Report.pdf [https://perma.cc/M6A8-7LR6].

21. Interviewees 16, 20, *in* Appendix B.

22. *See* Econ. Comty. of W. Afr. States, Member States (last visited Mar. 11, 2022), https://ecowas.int/member-states/ [https://perma.cc/A5KD-TYXY]. *See also* Econ. Comty. of W. Afr. States, Mandate and Jurisdiction (last visited Mar. 11, 2022), http://www.courtecowas.org/mandate-and-jurisdiction-2/ [https://perma.cc/57VQ-U555].

23. Afolabi v. Fed. Republic of Nigeria, No. ECW/CCJ/APP/01/03, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Apr. 27, 2004), https://ihrda.uwazi.io/en/entity/6dp0llnd6hr82kc18ylbjiqkt9 [https://perma.cc/84YQ-ETWJ].

I. A Brief Background on the Court

The ECOWAS, largely a regional integration body, was established on May 28, 1975 by the Treaty of Lagos,[24] which was adopted by fifteen West African states.[25] It was established as a vehicle to raise the living standards of the peoples of the region, increase and maintain economic stability in the ECOWAS zone, foster closer relations among members, and contribute to the progress and development of the African continent as a whole.[26]

Right from its inception, ECOWAS envisioned the creation of a judicial body—the ECOWAS Tribunal—to ensure the observance of law and justice in the interpretation of the Treaty of Lagos, and the settlement of related disputes.[27] This tribunal was never established, but a 1991 Protocol, which came into force in 1996, provided for an ECOWAS Court, with the mandate to resolve disputes between Community Member States, interpret Community Rules,[28] and issue advisory opinions to the Community's States and institutions.[29] However, ECOWAS was reconstituted in 1993 and the Treaty of Lagos of 1975 was substantially revised to include certain provisions which it had neither contained nor contemplated.[30] These provisions were necessitated in part by the Community's desire to adapt to changes occurring regionally and globally to derive greater benefits therefrom, as well as the need to modify the Community's strategies with a view to accelerating economic integration within the sub-region.[31] The Revised Treaty of 1993 introduced certain fundamental principles that were to be adhered to by Member States including the "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."[32] The Revised Treaty also provided for the establishment of the ECOWAS Court, the judgments of which are to be binding on all member states, Community institutions, individuals, and corporate bodies.[33] It further provided that a related protocol would set out the modalities for the functioning of the court.[34]

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24. Treaty of Lagos, art. 2(i), May 28, 1975, 1010 U.N.T.S. 17.

25. *See* Econ. Comty. of W. Afr. States, History (last visited Mar. 5, 2022), https://ecowas.int/about-ecowas/history/ [https://perma.cc/6E89-9YNJ] (noting that the original composition of Member States at inception were Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Niger, Nigeria, Mali, Mauritania, Senegal, Sierra Leone, and Togo; and noting that Cape Verde became a member in 1978 while Mauritania withdrew its membership in 2000).

26. Treaty of Lagos, *supra* note 24, at pmbl., art. 2.

27. *Id.* art. 4(i)(d), 11(i); *see* Alter et. al., *supra* note 4, at 746.

28. Protocol A/P. I/7/91 on the Community Court of Justice, art. 9(2)–(3), Jul. 6, 1991 (entered into force Nov. 5, 1996).

29. *Id.* art. 10(1).

30. Revised Treaty of the Economic Community of West African States (ECOWAS), *supra* note 11.

31. *Id.* pmbl.

32. *Id.* art. 4(g).

33. *Id.* art.15(4).

34. *Id.* art. 6, 15(2).

This protocol—the Supplementary Protocol of 2005—granted individuals and corporate bodies access to the ECOWAS Court in proceedings relating to claims that Community officials had acted in violation of their rights. The Protocol also granted individuals the right to seek relief for violations of their human rights.[35] This was a significant repurposing of the court's jurisdiction, expanding it to include the cases of human rights violations occurring in any member state.[36] The court also has unique design features, including a body of applicable human rights laws that is not predicated upon, and as such not limited by, any specific human rights instrument(s), as well as the absence of a requirement that prospective litigants first exhaust local remedies in their home countries. This has prompted the court to describe its jurisdiction as an "opportunity to define and delimit the scope and legal parameters of its human rights mandate in its own image."[37] The ECOWAS Court has now become a veritable international court, with a broad mandate to adjudicate human rights violations in West Africa.[38]

The court would have continued to exist only on paper if Olusegun Obasanjo, the then-President of Nigeria, had not kick-started the process of its actual physical establishment.[39] Upon assuming office in 2000, Obasanjo provided the court with the political support and funding that it needed to begin to function.[40] As per the 1993 Treaty, 1991 Protocol, and subsequently established procedures, the court was to consist of seven independent judges of high moral character. These judges were to be selected and formally appointed by the Assembly of Heads of States, after an independent and transparent process involving being shortlisted based on certain parameters, interviewed, and recommended by the nascent ECOWAS Judicial Council, which is constituted by the chief justices of the domestic courts of all the fifteen ECOWAS Member States.[41] However, the size of the ECOWAS Court's bench was subsequently reduced from seven to five.[42]

35. *Id.* art. 4 amending art. 10 of the Protocol A/P. I/7/91 on the Community Court of Justice, *supra* note 28.

36. *See* Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 on the Community Court of Justice, Jan. 19, 2005 (granting the ECOWAS Court jurisdiction over human rights cases).

37. Alter et al., *supra* note 4, at 754 (quoting Anene-Maidoh, *supra* note 13).

38. Ebobrah, *supra* note 6. *See also* Alter et al., *supra* note 4.

39. Alter et al., *supra* note 4, at 747–48.

40. *Id.*

41. *See* Protocol A/P. I/7/91 on the Community Court of Justice, art. 3(4), *supra* note 28 (introduced by Supplementary Protocol No. A/SP.2/06/06, Jun. 14, 2006).

42. *ECOWAS Assembly Decision A/Dec.2/5/17*, 51st Summit, June 2017; Alex Enuma, *West Africa: ECOWAS Leadership has Powers to Reduce Number of Judges on Bench, Court Tells Falana*, All Afr. (Dec. 12, 2019), https://allafrica.com/stories/201912130040.html [https://perma.cc/8R4Y-FN36]; Econ. Comty. of W. Afr. States, Member States, Comm. Ct. of Just., https://ecowas.int/institutions/community-court-of-justice/ [https://perma.cc/3WBR-X8A7] (last visited Mar. 5, 2022).

In April 2004, the ECOWAS Court heard and disposed of its first case, the landmark *Afolabi v. Nigeria* case,[43] that led to the conferment of human rights jurisdiction on the court. The court originally declined jurisdiction because of its lack of authority to hear matters brought before it by individuals. This prompted a sustained and successful campaign from a range of actors that eventually persuaded both ECOWAS bureaucrats and Members States' government leaders and officials to afford individuals and organizations direct access to the court in human rights cases.[44]

II. An Outline of Correspondence Theory

Correspondence theory on the influence of international human rights institutions within states ("correspondence theory") was developed by Okafor, one of the Authors of this Article, in his 2007 book examining the domestic impact of the African human rights system.[45] According to this constructivist model, such domestic impact is better captured through, and assessed against, the broader measure of "correspondence,"[46] which extends beyond the narrower lens of direct state compliance.[47] This theory was developed in reaction to the tendency to focus exclusively on state compliance in the assessment of the impact of international human rights institutions.[48] Such correspondence is almost always produced in the context of the significant deployment by local agents of international human rights institutions on the domestic level.[49]

A. Reaching Beyond State Compliance

Although the mapping and analysis of state compliance remains the predominant way of assessing the impact of international courts,[50] some scholars have challenged the exclusive reliance on this approach and have theorized or demonstrated numerous ways in which such courts have had, and can have, significant impact beyond compelling or cajoling direct state compliance.[51] These scholars have recognized and shown that an exclusive focus on state compliance cannot capture the full range of ways in which an

43. Afolabi v. Fed. Republic of Nigeria, No. ECW/CCJ/APP/01/03, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Apr. 27, 2004), https://ihrda.uwazi.io/en/entity/6dp0llnd6hr82kc18ylbjiqkt9 [https://perma.cc/84YQ-ETWJ].

44. Alter et al., *supra* note 4, at 756.

45. Okafor, *supra* note 6, at 277–88.

46. *Id.* at 287–88. Note that "correspondence" refers to the production of the desired kinds of thinking and action within key domestic institutions that is attributable, at least in part, to an international human rights institution.

47. *Id.* at 277–88.

48. *See* Alter, *supra* note 8, at 35.

49. Okafor, *supra* note 6, at 288.

50. *See* Huneeus, *supra* note 9, at 505.

51. *See, e.g.*, Okafor, *supra* note 6, at 1; Alter, *supra* note 1; Gathii, *supra* note 2.

international court can significantly impact state and society within a given country and help alter the orientation or character of domestic politics.[52]

Yuval Shany has warned against the tendency to equate international court impact "with compliance with court judgments, usage rates, or impact on state conduct."[53] Articulating some of the concerns with an excessive focus on the direct compliance metric, Shany writes that:

> [J]udgment-compliance rates may depend as much on the nature of the remedies issued by a court as on the actual or perceived quality of the court's structures or procedures. Thus, a low-aiming court, issuing minimalist remedies, may generate a high level of compliance but have little impact on the state of the world. In addition, judgment-compliance rates fail to capture either out-of-court settlements conducted under the court's shadow or the court's *more general compliance-inducing* effect.[54]

Laurence Helfer agrees that state compliance, though important, does not necessarily equate to, or account for, impact,[55] identifying many other ways in which an international court may exert influence. For example, Helfer's concept of "embeddedness effectiveness" evaluates the extent to which international courts anchor their judgments in domestic legal orders, enabling national actors to remedy potential treaty violations at home and avoid the need for international litigation.[56] Work by Helfer and Voeten—specifying the conditions under which international courts in Europe can increase the probability of national-level policy change across Europe—also recognizes, at least implicitly, that the "*erga omnes* effect" of an international court's ruling does not fit easily, if at all, within the narrower state compliance framework.[57]

Focusing more closely on international courts in Africa, James Gathii has correctly argued, in the context of the East African Court of Justice, that using compliance as the only metric to measure the impact of international courts "minimizes the other goals served by human rights litigation."[58] He has also shown that, at least with regard to the East African Court of Justice, the main purpose of litigation before it has not necessarily been to

52. *Id.*

53. Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 Am. J. Int'l L. 225, 227 (2012).

54. *Id.* at 227 (emphasis added) (arguing that settled cases tend to have different attributes than unsettled cases). *See also* Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. Pa. L. Rev. 171 (2008).

55. Helfer, *supra* note 7, at 466–70.

56. *Id.* at 474–76.

57. Laurence Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 Int'l Org. 77 (2014).

58. 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*, 79 L. & Contemp. Probs. 37, 38 (2016).

trigger state compliance, but to incorporate the court into a "broader strategy of political mobilization."[59]

Similarly, Karen Alter's theory of how international court decisions are translated into changed policies and practices in domestic spheres is closely embedded in the broader political context and terrain.[60] According to Alter, international courts are "equal parts legal and political actors"[61] that can "help alter state policy by using their institutional position to aid actors inside and outside of states that share the objectives inscribed into the law."[62] To Alter, international courts have domestic impact when "compliance constituencies" deploy their leverage to mount political pressure on governmental actors to comply with the decisions of these courts.[63] Compliance constituencies are composed of both "compliance partners" (actors who have the power to generate compliance without help from any other entity, such as the litigants in the case at issue) and "compliance supporters" (broader coalitions of actors whose support is needed to protect compliance partners from retaliation or to induce governmental actors to embrace the court's decision).[64]

Alter is well aware, however, that "the real effectiveness test . . . is not compliance"[65]—that is, that compliance is only one element or means of appreciating the domestic impact of international courts. Alter's argument on the ways in which international courts have had and can have domestic impact is, in this sense, still broadly consistent with the correspondence theory that is applied in this Article. Just like Alter's argument, correspondence theory focuses on how international human rights institutions can exert domestic influence, both within and beyond the state compliance optic. Thus, Okafor has argued that "an institution is not altogether ineffective merely because most actors cannot be shown to comply directly with its 'commands' most of the time."[66]

B. The Example of the ACHPR Phenomenon

To understand the comprehensiveness of the correspondence theory at capturing the domestic impact of human rights institutions, consider the African human rights system.[67] Though it is viewed by many as weak, the African Commission on Human and Peoples' Rights ("ACHPR") has had significant impact on Nigeria, South Africa, and other African countries,

59. Gathii, *supra* note 2, at 296.
60. Alter, *supra* note 1, at 20.
61. *Id.* at 23.
62. *Id.* at 20.
63. *Id.* at 19–24, 53.
64. *Id.*
65. Alter, *supra* note 8, at 52.
66. Okafor, *supra* note 6, at 33.
67. *Id.* at 277–88.

revealing what Okafor has referred to as the "ACHPR phenomenon."[68] This phenomenon troubled pre-existing theories on the effectiveness of international human rights institutions to varying extents.[69] As Okafor argued, the ACHPR phenomenon demonstrates that:

> [W]ith or without fostering direct state compliance, the African system can (under certain identifiable conditions) achieve domestic impact by affecting significantly the thinking processes and action of the key domestic institutions of certain African states, thereby fostering "*correspondence*" between the African system's norms and the thinking/behaviour of these sub-national institutions . . . [T]his possibility (. . . the "ACHPR phenomenon") is best realized when *local activist forces* [as brainy relays] . . . lead a process of trans-judicial communication that involves the creation of a *virtual human rights* network among the African system and these activist forces, as well as the deployment by these activist forces of norm and/or processes of the African system within the key domestic institutions, such as the judiciary, the legislature, and the executive, in ways that can often enable previously unavailable arguments to become available and acquire even more persuasive power; increase the success rate of these arguments; and facilitate *alterations* in the logics of appropriateness, conceptions of interest, and self-understandings that had hitherto prevailed within the relevant domestic institutions. As these activist forces tend to act as "norm entrepreneurs," tend to make detailed *ends-means calculations*, and tend to deal more in the currency of ideas, knowledge, and norms, than in more material factors, a quasi-constructivist (and therefore constructivist) explanation seems entailed.[70]

In this theoretical framework, the "activist forces" who primarily drive the generation of correspondence within the relevant states include two main sets of actors: activist judges and civil society actors ("CSAs"). The latter set of actors includes self-professed human rights NGOs, human rights lawyers, women's groups, faith-based groups, politicians, professional groups, independent journalists, and other such actors.[71]

One illustrative example of the correspondence theory in action[72] involves the celebrated Nigerian case of *Frank Ovie Kokori v. General Sani Abacha and four others (No.3)*.[73] Frank Kokori—the then-President of the Nigerian Union of Petroleum and Gas Workers ("NUPENG") and an im-

68. *Id.* at 5.
69. *Id.* at 59–61.
70. *Id.* at 3–4 (emphasis added).
71. *Id.* at 2–3.
72. *Id.* at 103–04.
73. Frank Ovie Kokori v. Gen. Sani Abacha and four others (No.3) FHCLR 413 (Nigeria, 1995).

portant leader of the popular opposition to the ruling military regime's annulment of the 1993 Presidential polls—was arrested and detained to frustrate a long lasting strike by NUPENG that was threatening to cripple the economy and force the military regime from power.[74] The military government justified his arrest and detention as a non-reviewable state security action done under the infamous State Security (Detention of Persons) Decree No. 2 of 1984.[75] This Decree contained an "ouster clause" barring any court from reviewing such detention orders.[76] Kokori brought suit before the Federal High Court (Lagos Division), seeking to enforce his fundamental rights under Articles 4, 6, and 7 of the African Charter on Human and Peoples' Rights.[77] Judge Ojutalayo, empowered by the African Charter and the African system as a whole, assumed jurisdiction over this matter, despite an atmosphere of political upheaval and risk, and the clearly worded ouster clause in the text of Decree No. 2.[78] He held that the African Charter (and decisions of the African Commission interpreting and applying it) were autonomous from, and superior to, all local laws in Nigeria, including the Decrees issued by the military regime.[79]

The African Charter, however, lacked a clear provision conferring *jurisdiction* on the Court on Human and Peoples' Rights, and the African Commission had not required the Nigerian court to assume jurisdiction over the matter. Instead, activist labor organizers and their lawyers encouraged Judge Ojutalayo to defy the harsh military junta. Through the creative deployment of an international human rights institution's norms, including ends-means calculations, these activists strengthened their logic and provided a measure of legal cover to sympathetic judges. Invoking the African system added critical value to the arguments advanced by both the CSAs and judge, enabling the judge to find that courts could assume jurisdiction over this sensitive matter in clear contravention of a military decree. Beyond demonstrating the explanatory power of quasi-constructivism, this example also illustrates the generation of "correspondence" within Nigeria with the norms and goals of the African human rights system.

C. Situating Correspondence Theory within the Broader Literature

Given the broadly "quasi-constructivist" roots of correspondence theory, its key elements also tend to dovetail with constructivist scholars' arguments.[80] In particular, correspondence theory's notion of activist forces

74. *Id.* at 413–23.
75. *Id.* at 413–14.
76. *Id.*
77. *Id.* at 413–14.
78. *Id.* at 424–25.
79. *Id.*
80. Quasi-constructivism, at least in part, is a recognition of the existence of a gap in the constructivist account of the impact of international institutions that has led several scholars to seek to rethink aspects of constructivism and propose revised and eclectic forms of that analytical framework. For exam-

functioning as the "brainy relays"[81] that generate correspondence aligns with concepts advanced by constructivist scholars, including "norm entrepreneurs,"[82] "principled issue-networks,"[83] "advocacy networks,"[84] "transnational advocacy networks,"[85] and "compliance constituencies."[86] All of these entities help spur action at every stage of the process of transforming international human rights norms and the decisions of international human rights institutions into aligned domestic understandings and practices.[87] The concept of "activist forces," however, is distinct from the above entities in two ways: it includes groups other than CSAs, and the relevant CSAs tend to be local actors, as opposed to internationally-based actors.

Correspondence theory's conception of virtual alliances between international human rights institutions and activist forces aligns with Alter's notion of international courts helping to alter state policy by using their institutional position to aid like-minded actors inside and outside of states.[88] It specifically owes its use of the notion of actors that make "detailed means-ends calculations" to work by Finnemore and Sikkink,[89] and it draws upon more general constructivist international relations theory when it analyzes how activist forces help produce alterations in the logics of appropriateness.[90]

Thus, correspondence theory builds on the broadly constructivist approach (albeit tending more toward its quasi-constructivist strain) to explain the African system's modest though significant domestic impact within certain African states. In so doing, it specifically focuses on the types of activist-driven domestic correspondence with the findings and decisions

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ple, the concept of "strategic social construction" advanced by Martha Finnemore and Kathryn Sikkink emphasizes the role of norms in the constitution of the identities and interests of actors, yet accords at least equal value to the "rational strategic interaction" of relevant actors. *See* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 Int'l Org. 887 (1998).

81. "Brainy relays" may refer to the intelligent transmission-lines between the international system and various institutions and actors within the domestic system (such as courts, the executive, and the legislature) that transmit and contribute actively to the development and strengthening of both the domestic and the international human rights systems (*see* Okafor, *supra* note 6, at 94), bridge a jurisdictional gap (*see* Okafor, *supra* note 6, at 128), ease the normative system's energy and values into the domestic legal order (*see* Okafor, *supra* note 6, at 164), mediate the impact of the African Charter on Human and People's Rights locally (*see* Okafor, *supra* note 6, at 167), or help to facilitate the percolation of the African system's norms into the domestic sphere.

82. Finnemore & Sikkink, *supra* note 80, at 893.

83. Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 Int'l Org. 411 (1993).

84. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, *in* The Power Of Human Rights: International Norms And Domestic Change 1, 5 (Thomas Risse et al., eds., 1999).

85. Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders 1 (1998).

86. Alter, *supra* note 1, at 19–24, 53.

87. Okafor, *supra* note 6, at 58; Sikkink, *supra* note 83, at 417, 438.

88. Alter, *supra* note 1, at 20.

89. Finnemore & Sikkink, *supra* note 80, at 910.

90. *See, e.g.*, Friedrich Kratochwil & John G. Ruggie, *International Organisation: A State of the Art on an Art of the State*, 40 Int'l Org. 753, 764 (1986); Sikkink, *supra* note 83, at 412, 416.

of international human rights institutions, providing insight beyond that produced by the state compliance framework.

In its development, correspondence theory did not rely much on other theories of international relations, which fall short of explaining the ACHPR phenomenon. Realist and neo-realist theories are too focused on power, and thus fail to account for the influence exerted by relatively weak international human rights institutions (such as the African human rights system) on significantly stronger states.[91] Neo-liberalism is also inadequate because it would not expect to observe effective international human rights institutions in the absence of the institutional convergence of the self-interest of a number of rational, egotistic state actors who perceive that their participation in the institution and adherence to its norms would allow all of them to move to the "Pareto frontier"—something that is clearly not the case with almost every state, and certainly not so in the African context.[92] Republican liberalist theory fails to explain international human rights institutions' influence on military or other kinds of authoritarian and dictatorial states, and it is limited to the explanation of the modest transformation of newly established or weaker democracies.[93] Traditional constructivism is generally explanatory, but in its original conception, it fails to explain how ideational, knowledge-based, and normative transformations occur, and the role of rationality in such processes.[94]

The quasi-constructivists have now filled this last gap. In stressing the power of international ideas, norms, and institutions, adopting elements of the liberal, disaggregated state model (to account for the agency of non-state actors), and deploying a measure of the rationalist approach (ends-means calculations), quasi-constructivists iterated and explained precisely how international ideas, norms, and institutions can have an impact on domestic and international politics.[95] Quasi-constructivists also tend to specify the conditions under which such ideas, norms, and institutions can transform prevalent thinking and practices within states.[96] It is also within this theoretical space that correspondence theory operates.

The broad insight offered by correspondence theory is reflected in Gathii's convincing conceptual framework on the performance of Africa's international courts, thus demonstrating the continued relevance of this quasi-constructivist approach to the study of Africa's international courts.[97]

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91. *See, e.g.*, Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Post War Europe*, 54 Int'l Org 217, 244, 248 (2000).

92. Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1 Eur. J. Int'l Rel. 157, 158–59, 184 (1995).

93. *Id.* at 170–73.

94. Okafor, *supra* note 6, at 57.

95. Risse & Sikkink, *supra* note 84.

96. Keck & Sikkink, *supra* note 85, at 16–29.

97. *See generally* James T. Gathii, *Introduction: The Performance of Africa's International Courts*, *in* The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change 1 (James T. Gathii ed., 2020).

This theoretical approach has also been followed in at least one other recent study of the domestic impact of the African Charter on Human and Peoples' Rights within seventeen sample African states.[98] In addition, a study by Murray and Long on the implementation of the findings of the ACHPR also adopts some key findings of this broad approach, although it focuses largely on compliance.[99]

It should be noted, however, that the generalizability of correspondence theory is currently limited by the fact that it is grounded in analyses of evidence relating to the African regional human rights system's domestic impact.[100] It is not grounded to any appreciable extent in the domestic influence of the sub-regional ECOWAS Court. Analyzing the available broad range of evidence relating to the ECOWAS Court's significant domestic impact also bolsters correspondence theory's claim to more general applicability.

III. Analyzing the Court's Impact on the Executive Branch in Nigeria

A. *The Impact of the Court Across West Africa*

Although the analysis of the ECOWAS Court's domestic impact in this Article focuses on Nigeria, it should be noted at the outset that the most recent available data shows that the court has an uneven record of state compliance with its human rights decisions across West Africa, let alone other kinds of correspondence.[101]

On the one hand, direct compliance of West African states with the ECOWAS Court's decisions is, at best, modest and sub-optimal.[102] Numerous court officials have remarked on this reality, especially its long-serving Chief Registrar.[103] A former vice-president of the court has named non-compliance with its decisions as one of the basic problems that confronts the court.[104] Other judges interviewed for this Article, as well as CSAs tend to reach a similar conclusion.[105] To date, only six of the fifteen ECOWAS

98. Victor O. Ayeni, *Introduction*, *in* The Impact of the African Charter and the Maputo Protocol in Selected African States 1–13 (Victor O. Ayeni ed., 2016). Although this study did not focus on the influence of international courts (but rather examined the impact of a human rights treaty regime), it falls within correspondence theory's frame and reinforces the contingent generalizability of the approach.

99. Rachel Murray & Debra Long, The Implementation of the Findings of the African Commission on Human and Peoples' Rights 87–118 (2015).

100. *See* Okafor, *supra* note 6, 220–53 (noting how relevant activist forces have generated correspondence between norms of the African human rights system and governmental action within relevant States).

101. Anene-Maidoh, *supra* note 13, at 59.

102. *See, e.g.*, Alter et al., *supra* note 4, at 766–68.

103. *Id.*; Anene-Maidoh, *supra* note 13, at 3, 8; Interviewee 3, *in* Appendix B.

104. Interviewee 17, *in* Appendix B.

105. Interviewees 5, 8, *in* Appendix B.

member states (Guinea, Nigeria, Burkina Faso, Mali, Togo, and Ghana) have designated a national implementing authority as required by ECOWAS law, indicating a lack of preparedness to comply with the ECOWAS Court's decisions.[106]

On the other hand, West African states and ECOWAS institutions have complied with a host of the ECOWAS Court's rulings since its first ruling in 2004.[107] According to the court's chief registrar, as of 2018:

> 13 [out of 15] Member States have complied in varying degrees with some judgments of the Court . . . The Statistics of the Court shows [*sic.*] that out of 64 (Sixty Four) enforceable decisions delivered by the Court against Member States and ECOWAS Institutions, since the adoption of the Supplementary Protocol on the Court [in 2005], only 35 (Thirty Five) of the said decisions have been complied with.[108]

Nevertheless, this is an approximately fifty-five percent compliance rate that, although not excellent,[109] does indicate that there has been more compliance than non-compliance with the ECOWAS Court's decisions across West Africa, a finding borne out by this Article's subsequent interviewing, research, and data analysis, as well as the findings of some previous studies.[110] As one of the court's recently retired judges has noted, "some states conform, but some do not."[111] In addition, an analysis of the available evidence shows that the same state may sometimes comply, and at other times not comply, with the court's rulings. This above-average level of compliance on the regional level accords with the heightened commitment demonstrated by West African states to the pan-African human rights system, and civil society groups' frequent use of the court, despite its resource limitations and the popular perception that it is ineffectual.[112]

There are numerous examples of West African states' compliance with ECOWAS Court decisions. Perhaps the most well-known instance of compliance is the relatively speedy and full compliance of the government of Niger with the ECOWAS Court's decision in the *Hadijatou Mani Koraou*

106. It must be noted, however, that some states that have failed to designate a national authority—such as Niger—have still complied with some of the court's decisions. *See* Anene-Maidoh, *supra* note 13, at 2; Interviewee 3, *in* Appendix B. *See also ECOWAS Court Judge Appeal Member States on Enforcement of its Judgments*, The Vanguard (Sept. 30, 2019), https://www.vanguardngr.com/2019/09/ecowas-court-judge-appeal-member-states-on-enforcement-of-its-judgments/ [https://perma.cc/488S-HWP2] (specifying an updated figure offered by the current President of the Court, Judge Edward Asante).

107. Anene-Maidoh, *supra* note 13, at 59.

108. *Id.*

109. *See* Alter et al., *supra* note 4, at 767 (noting compliance challenges with the decisions of the court).

110. *Id.* at 766–68. *See also* Horace S. Adjolohoun, *The ECOWAS Court as a Human Rights Promoter? Assessing Five Years' Impact of the Koraou Slavery Judgement*, 31 Neth. Q. L. Rev. 368 (2013).

111. Interviewee 18, *in* Appendix B.

112. Ebobrah, *supra* note 3, at 87, 95.

case.[113] More recently, the new democratically-elected Government of the Gambia has paid half of the sum that the ECOWAS Court awarded to two journalists who were unjustly detained and later killed by the former ruling military regime, though this sum came belatedly, a year and two months after the new government came to power.[114] This captures the reality that poorer states may find it difficult to comply with court orders to pay out large monetary sums to those who have successfully litigated against them, and such compliance has a profound impact within the country. One Gambian media house reported that:

> The family of Deyda Hydara which was awarded $50,000 in damages was given $25,000 while family of Chief Ebrima Manneh which was awarded $100,000 in damages was given $50,000. The third journalist, Musa Saidykhan who was supposed to be paid $200,000, is still in negotiation with the authorities over his method of payment, sources said. [The] Gambia[n] government has pledged to pay all the damages that were awarded against them at the regional court. Gambia has [sic] lost several cases to journalists at ECOWAS court during the days of Yahya Jammeh. 'It has taken a long time but we are very happy that finally Gambia government has complied with the ECOWAS court ruling,' said Emil Touray, president of the GPU [the Gambia Press Union] . . . . Other journalists who have won cases against Gambia's former dictator. . . are supposed to be paid D1,000,000 [in Gambian currency]. It is not clear when the damages awarded to the four journalists will be paid.[115]

These four Gambian journalists had also won monetary compensation awards from the ECOWAS Court in 2018, but were not paid until May 2019, when the Gambian government eventually paid about USD$25,000 to each.[116]

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113. Hadijatou Mani Karaou v. Fed. Republic of Niger, No. ECW/CCJ/APP/08/08 (Oct. 27, 2008). *See also* Alter et al., *supra* note 4, at 766; Adjolohoun, *supra* note 110.

114. *Gambia pays damages awarded to journalists by ECOWAS Court*, Kerr Fatou (May 22, 2018), https://www.kerrfatou.com/gambia-pays-damages-awarded-to-journalists-by-ecowas-court/ [https://perma.cc/T8E7-EZ2V]. *See* Saidykhan v. The Gambia, No. ECW/CCJ/JUD/08/10, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.], ¶¶ 46–47 (Dec. 16, 2010), https://ihrda.uwazi.io/ar/document/froafttgl56tn7350qszzd7vi?raw=true [https://perma.cc/ZY7Y-SV6Y]; Manneh v. The Republic of Gambia, No. ECW/CCJ/JUD/03/08, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.], ¶¶ 4341–44 (Jun. 5, 2008), https://ihrda.uwazi.io/en/document/hqdpfnt023yggnsfus74on7b9?page=1&raw=true [https://perma.cc/6629-SED8].

115. *See* Saidykhan, No. ECW/CCJ/JUD/08/10, ¶ 47; Manneh, No. ECW/CCJ/JUD/03/08, ¶¶ 41–44.

116. Fed. of Afr. Journalists v. Republic of Gambia, No. ECW/CCJ/04/18, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Feb. 14, 2018), https://ihrda.uwazi.io/en/document/w9z5b6xfwy [https://perma.cc/PH5A-ZGZ]; *Government Pays Compensation to Four Journalists Whose Rights Were Violated*, The Chronicle (May 29, 2019), https://www.chronicle.gm/government-pays-compensation-to-four-journalists-for-rights-violations/ [https://perma.cc/2WFB-9HLC].

The Government of Sierra Leone that took office in May 2018 also paid USD$150,000 of the USD$250,000 awarded by the ECOWAS Court to a wrongfully dismissed police officer, El-Tayyib-Bah.[117] In another case, following the ECOWAS Court's decision in 2019 that Sierra Leone's ban on the attendance of pregnant girls in its schools violated their rights to education and breached various African Charter and treaty provisions, the Government of Sierra Leone lifted the impugned ban in March 2020.[118]

Burkina Faso also complied with the ECOWAS Court's decision in the *CDP* case.[119] In that case, political and other opposition elements—who were banned from participating in transitional elections because the ruling military-backed regime perceived them as being supportive of the ousted President—sued their government at the ECOWAS Court. The court overturned the ban, and ordered the government to allow the opposition elements to participate in the forthcoming elections. The ruling regime of Burkina Faso complied with this order.[120]

The impact of the ECOWAS Court within these other states does not fall within the scope of this Article's case study, but the discussion above seeks to illustrate the existence of correspondence, or the lack thereof, in other countries in the region. The rest of this Part is devoted to an analysis of the available Nigerian data: first, discussing compliance with the court's decisions in Nigeria, and, second, discussing evidence of correspondence that lies beyond the compliance optic.

B. The Court's Impact on Executive Decision-Making and Action in Nigeria

1. *Overview of the Executive Branch's Compliance*

Just like its West Africa-wide domestic impact, the court's record of attracting compliance from the Nigerian government's executive branch is a mixed one. This mixed reality is reflected by the widely different views among even the most well-positioned actors within, and keenest observers

117. El Tayyib Bah v. Republic of Sierra Leone, No. ECW/CCJ/JUD/11/15, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (May 4, 2015), https://ihrda.uwazi.io/en/document/wc08uw8cixc5l1zyoshe61or?page=4 [https://perma.cc/H58P-TLQY]; Anene-Maidoh, *supra* note 13, at 8–9; Amadu Daramy, *Gov't Agrees to pay Tayyib Bah*, Global Times (Mar. 18, 2021), https://www.globaltimes-sl.com/archive/govt-agrees-to-pay-tayyib-bah-2/ [https://perma.cc/FBF7-698H]; Interviewee 17, *in* Appendix B.

118. Women Against Violence and Exploitation in Soc'y v. The Republic of Sierra Leone, No. ECW/CCJ/JUD/37/19, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Dec. 12, 2019), https://ihrda.uwazi.io/en/entity/1i7yfu3qr0cj [https://perma.cc/H58P-TLQY]; *Victory At ECOWAS Court For Girls In Sierra Leone*, Equality Now (Mar. 30, 2020), https://www.equalitynow.org/news_and_insights/victory_for_girls_in_sierra_leone/ [https://perma.cc/4C5M-FAKT].

119. Congrès pour la Démocratie et le Progrès v. Burkina Faso, No. ECW/CCJ/JUG/16/15, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Jul. 13, 2015), https://ihrda.uwazi.io/en/entity/gdbtk3q5fn8xdugfvsrtchaor?page=1 [https://perma.cc/6SGR-BWTH].

120. Interviewee 20, *in* Appendix B.

of, the court. For example, a recently retired judge of the court declared in an interview that "the court is having a positive impact on Nigeria by promoting its observance of the African Charter and imposing limits and restraints on the Nigerian Government."[121] The same judge also noted that government representatives "appear for hearings before the court and comply with judgments."[122] The current President of the court, Judge Edward Asante, has singled out Nigeria and Niger Republic as states that "have significantly enforced the decisions of the Court so far."[123] Furthermore, Nigeria is routinely commended by the court for being one of only five West African states that have appointed a national implementing authority to implement the judgments of the ECOWAS Court.[124] In contrast, the majority of the Nigerian human rights lawyers and activists interviewed did not have as favorable of an impression of the Nigerian government's record of compliance. One of them, admittedly one of the most skeptical of the cohort, even went as far as to claim that "the court seems not to exert any major influence in Nigeria."[125]

The reality lies somewhere in between these impressions. For example, while on a sensitization tour of the Lagos State of Nigeria in 2019, a judge of the ECOWAS Court disclosed publicly that the Government of Nigeria had complied with eleven of the twenty-five judgments (or forty-four percent) made against it by the court.[126] Though the court itself noted that this is not an optimal record of compliance, it is nevertheless closer to the middle of the spectrum of compliance.[127]

From a careful analysis of the evidence, the ECOWAS Court's domestic impact on Nigeria's executive branch in most of the identified cases of "compliance" was, in fact, some type of correspondence beyond the direct compliance optic. Nevertheless, some evidence certainly does exist of direct compliance by the executive branch with the ECOWAS Court's rulings, whether in full or partial measure. Two examples of these incidences of "compliance" are as follows. In the *Jerry Ugokwe* case, the executive branch complied with the ECOWAS Court's interim order not to seat a person who had been declared the winner of an election to Nigeria's federal legislature. In the *Alimu Akeem* case, a Nigerian soldier who had been detained without

121. Interviewee 16, *in* Appendix B.

122. *Id.*

123. Oludare Richards, *ECOWAS Court Laments Poor Enforcement of Judgments*, The Guardian (Oct. 30, 2018), https://guardian.ng/features/ecowas-court-laments-poor-enforcement-of-judgments/ [https://perma.cc/4CY2-6UFF].

124. *See, e.g.*, Interviewee 2, *in* Appendix B.

125. Interviewee 12, *in* Appendix B.

126. *See ECOWAS Court tasks Nigerians on protection of their rights*, Vanguard (Oct. 4, 2019), https://www.vanguardngr.com/2019/10/ecowas-court-tasks-nigerians-on-protection-of-their-rights/ [https://perma.cc/W7YH-4FYG] (noting that the concept of compliance is used rather loosely here and without necessarily accounting for any other impacts that lie beyond reach of the compliance optic).

127. *Id.*

trial for two years was released from detention, in part as a result of litigation at the ECOWAS Court.

2. *The* Jerry Ugokwe *Case*

Jerry Ugokwe v. Federal Republic of Nigeria[128] is one of the most well-known cases in which Nigeria's executive branch directly complied with a ruling of the ECOWAS Court.[129] The plaintiff, Jerry Ugokwe, had been declared the winner of an election to a seat in the House of Representatives of Nigeria. His opponent contested this declaration at the election tribunal, which eventually quashed it. The Court of Appeal of Nigeria, acting as the final domestic court in the matter, sustained the tribunal's judgment. Ugokwe then applied to the ECOWAS Court alleging that the tribunal and the Court of Appeal breached his right to fair hearing. He also asked the ECOWAS Court for a "special interim order," to restrain the electoral commission from cancelling the certificate of return that he had been issued, and to restrain his electoral opponent from being seated in the House of Representatives, pending the determination of the dispute before the court. The ECOWAS Court granted this interim order.[130] Despite Nigeria's strong objections to the court's assumption of jurisdiction in what it argued was a purely internal matter, as well as much condemnation in the Nigerian press of the interim order, its executive branch complied with it to the fullest extent of its powers.[131] The then-Attorney General of the Federation, Akin Olujimi, immediately advised the Speaker of the House of Representatives not to seat the plaintiff's opponent until the ECOWAS Court determined the matter.[132] Though the ECOWAS Court eventually rejected the main application on the grounds that it lacked jurisdiction in the matter,[133] the key point here is the Nigerian government's direct compliance with the highly controversial interim order at the highest levels of the executive and legislative branches.

Significantly, as the correspondence theory predicts, at least one of the plaintiff's counsel of record, Kayode Ajulo, identifies as a human rights lawyer and is the founder and chair of Egalitarian Mission Africa, a human rights NGO. This case thus illustrates correspondence theory in action,

128. Ugokwe v. Fed. Republic of Nigeria, No. ECW/CCJ/JUD/03/05, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Oct. 7, 2005), https://ihrda.uwazi.io/api/files/1524732618117yx2hxr8wt41n3lv30widx6r.pdf [https://perma.cc/4JLZ-9AZS].

129. *See* Sègnonna H. Adjolohoun, '*Made in Courts' Democracies? Constitutional Adjudication and Politics in African Constitutionalism*, *in* Constitutional Adjudication in Africa 247, 284 (Charles M. Fombad, ed., 2017) (providing an in-depth look into the case); Solomon Ebobrah, *Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice*, 54 J. Afr. L. 1 (2010); Alter et al., *supra* note 4, at 758–60.

130. *Ugokwe*, No. ECW/CCJ/JUD/03/05.

131. Alter et al., *supra* note 4, at 758–60.

132. Ise-Oluwa Ige, *Nigeria: Olujimi Writes Speaker Not to Accept Man Into House*, Vanguard (May 23, 2005), https://allafrica.com/stories/200505230916.html [https://perma.cc/924A-SFU2].

133. *Ugokwe*, No. ECW/CCJ/JUD/03/05 at 38.

driven in large part by someone who identifies as a part of the CSA community, which in turn forms a segment of the activist forces in Nigeria. This human rights lawyer and his co-counsel clearly made ends-means calculations about deploying the ECOWAS Court to temporarily prevent the seating of the plaintiff's political opponent in the House of Representatives (a goal in which they succeeded), while they sought to have that opponent's victory in the domestic court annulled by the ECOWAS Court (a goal in which they ultimately did not succeed). Nevertheless, in the end, they still served as the brainy relays that transmitted the ECOWAS Court's normative energy to the Nigerian domestic sphere.

3. *The* Alimu Akeem *Case*

In *Private Alimu Akeem v. Federal Republic of Nigeria*,[134] a Nigerian soldier, Private Alimu Akeem, was arrested and detained in military custody without trial for two years based on a missing rifle from the home of the then-Chief of the Army Staff to which he had been posted as a guard.[135] He was later tried at a court martial and sentenced to a term of imprisonment. He filed a suit at the ECOWAS Court for alleged violations of his fundamental human right to dignity and personal liberty, and for ten million NGN (worth USD$50,000 at the relevant time) in compensation for injuries suffered as a result.[136] The ECOWAS Court ordered his immediate release and the payment of monetary compensation to him.[137] He was released from detention, largely in compliance with this decision of the ECOWAS Court.[138]

This matter was brought to the court on behalf of Private Alimu by the law office of noted human rights lawyer, Femi Falana, a veteran leader of Nigeria's longstanding human rights struggles against the military and civilian regimes, who is also a highly visible participant in the civil society networks and alliances involved in these campaigns. The observed partial compliance by the executive branch (i.e., hastening Private Alimu's release) was produced by the ends-means calculations made by the human rights lawyer and associate counsel. Their calculation to deploy the ECOWAS Court as one point of leverage constituted a deeply integrated part of a broader political and administrative strategy (including a campaign in the popular press) to secure his release. The means through which compliance was generated here was therefore similar to the process through which cor-

134. Akeem v. Republic of Nigeria, No. ECW/CCJ/JUD/01/14, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Justice] (Jan. 28, 2014), https://ihrda.uwazi.io/en/entity/8azwc3a6j65?page=3 [https://perma.cc/XRK8-VNWL].

135. *Id.*

136. *Id.*

137. *Id.*

138. Interviewee 3, *in* Appendix B.

respondence beyond the compliance framework's optic has been generated in Nigeria with the ECOWAS Court's findings.[139]

C. Correspondence Beyond the Compliance Optic

This segment analyzes an illustrative sample of the available evidence regarding the generation of correspondence between executive decision-making and action in Nigeria and the jurisprudence of the ECOWAS Court. The sample focuses on seven ECOWAS Court rulings, each of which is an appreciably important element of broader political struggles to advance human rights.

In the first example, the ECOWAS Court's ruling in the *SERAP Environmental Rights* case contributed significantly to the executive branch's increased attention to the necessity of ending and cleaning up oil pollution in the Niger Delta region, markedly shaping discussions during national consultations convened by the government, and influencing the content and orientation of the national policy document issued by the executive branch. This ruling, alongside another ECOWAS Court ruling in the *SERAP Basic Education* case, has had a significant impact on Nigeria's National Human Rights Commission, including the content of the Draft National Human Rights Action Plan that it has produced. Third, the discussion of the *Dasuki* matter that follows focuses on the significant influence of the relevant ECOWAS Court's ruling in shaping the executive branch's eventual decision to release Colonel Dasuki from years of detention. The fourth example, the *APO Eight* case, contributed appreciably to the compensation that the executive branch eventually paid to eight motorcycle taxi drivers who had been killed unlawfully by security forces. Fifth, the *Sa'adaatu Umar* case shows how the filing of a suit at the ECOWAS Court (as opposed to issuance of a ruling by that court) was enough to pressure a law enforcement department to release an unlawfully detained person. Sixth, the *Dorothy Njemanze* case illustrates how the ruling of the ECOWAS Court in that matter made a marked, positive difference in the anti-gender-based violence campaign of a now noted women's rights activist in Nigeria. Lastly, the *Aliyu Tasheku* case is analyzed to demonstrate the significant value that filing a case at the ECOWAS Court often adds to the broader political struggles to shape executive branch action in Nigeria.

1. *The* SERAP Environmental Rights *Case and Environmental Decision-Making and Action*

The now celebrated decision of the ECOWAS Court in the *SERAP Environmental Rights* case has had important impacts on executive decision-making and action in Nigeria, for the most part beyond the optic and range of

139. Okafor, *supra* note 6, at 91–154.

the direct compliance framework.[140] In this case, the plaintiff—a human rights NGO known as the Socio-Economic Rights and Accountability Project ("SERAP")—sued the Government of Nigeria and six oil companies over their alleged human rights violations stemming from the oil pollution caused by their oil production activities in the Niger Delta region of Nigeria.[141] SERAP alleged that the defendant had violated several economic and social rights of people living in the Delta as a result of the pollution, including the right to a healthy environment, food, and water.[142] It also alleged failure on the part of the Government to enforce its domestic laws and regulations that were designed to protect the environment and prevent pollution.[143]

The ECOWAS Court found that although almost all of the violations had been directly committed by certain oil companies, the Government was still legally liable for the abuses. In effect, the court held that, by failing to protect both the peoples of the Niger Delta and their environment from the harmful operations of oil companies in that region of the country, the Nigerian government had violated the relevant provisions of the African Charter.[144] Further, the court upheld the rights of these peoples to a healthy environment, food and water, and held that these rights had been infringed by virtue of the destruction of the Niger Delta environment by oil pollution. The court then ordered Nigeria to remedy the environmental damage in the Niger Delta region, to prevent further environmental damage, and to hold the offenders accountable.[145]

The literature has shown that over time, this ECOWAS Court decision helped make the Government of Nigeria "more sensitive to the environmental and social responsibilities of the oil companies,"[146] and to its own duty to ensure the enjoyment of the right to a healthy environment. One of the ways in which this has occurred is illustrated by the effort to clean up oil pollution in Ogoniland, a section of Nigeria's Niger Delta. The ECOWAS Court's decision contributed significantly to the pressure mounted by SERAP and other groups on the Government of Nigeria to take steps to clean up the Niger Delta environment and regulate environmental pollution much more effectively.

140. *See* Registered Trs. of Socio-Econ. Rts. & Accountability Project v. Fed. Republic of Nigeria, No. ECW/CCJ/JUD/18/12, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Dec. 14, 2012), https://ihrda.uwazi.io/en/document/pftlz3gneo0wxsgq0kdszto6r [https://perma.cc/3ZJ8-5Z9S] (filed in July 2009); Owie & Ikhimiukor, *supra* note 20, 279–80.

141. *Id.* at ¶¶ 1–3.

142. *Id.* at ¶ 3.

143. *Id.* at ¶ 3.

144. *Id.* at ¶ 121.

145. *Id.*

146. Obiora C. Okafor, *Modest Harvests: On the Significant (but Limited) Impact of Human Rights NGOs on Legislative and Executive Behaviour in Nigeria*, 48 J. Afr. L. 23, 24 (2004). *See also* Eghosa Ekhator, *Improving Access to Environmental Justice under the African Charter on Human and Peoples' Rights: The Roles of NGOs in Nigeria*, 22 Afr. J. Int'l & Comp. L. 63, 75 (2014).

In 2006, prior to the launch of the *SERAP Environmental Rights* case, Nigeria's executive branch of government commissioned the United Nations Environment Programme ("UNEP") to assess the extent of the environmental devastation in Ogoniland.[147] This request was precipitated by decades of oil pollution in the area and a long-running struggle by the Ogonis and other Niger Delta peoples against the Government concerning the devastation of their environment by oil pollution.[148] This struggle was initiated in part by the Movement for the Survival of the Ogoni People ("MOSOP"), along with other civil society actors such as the Social and Economic Rights Action Centre ("SERAC").[149] SERAP and other groups later took up the judicial aspect of the struggle.[150] This resistance also resulted in the widely condemned hanging by the brutal Abacha-led military dictatorship of some leaders of the Ogoni, including the famous writer Ken Saro-Wiwa.[151] The Government's subsequent (and admittedly slow, troubled, and imperfect) bid to implement the UNEP's 2011 assessment report is still ongoing.[152] According to the agency directly in charge, the clean-up of Ogoniland was scheduled to end in 2020, though delays previously set back the project's timeline.[153]

Before the clean-up began, Nigeria's executive branch had, as part of its efforts to respond to and implement the UNEP report and to meet some of the environmental demands of the Niger Delta peoples and their activist groups and allies, established the Hydrocarbon Pollution Restoration Pro-

147. *See* U.N. Env't Programme: Nigeria, https://www.unep.org/explore-topics/disasters-conflicts/where-we-work/nigeria [https://perma.cc/7RKD-VNH6] (last visited Mar. 10, 2022).

148. *Id. See also* Amnesty International, Nigeria: Shell complicit in the arbitrary executions of Ogoni Nine as writ served in Dutch court (Jun. 29, 2017), https://www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/ [https://perma.cc/76VA-6TVB]; Obiora C. Okafor, *Self-Determination and the Struggle for Ethno-Cultural Autonomy in Nigeria: The Zangon-Kataf and Ogoni Problems*, 6 Afr. Soc'y Int'l & Compar. L. Proc. 88 (1994).

149. *See generally* Obiora C. Okafor, Legitimizing Human Rights NGOs: Lessons From Nigeria 33, 63, 77–122, 137–38 (2006).

150. Obiora C. Okafor, *International Law, Human Rights and the Allegory of the Ogoni Question, in* Legitimate Governance in Africa: International and Domestic Legal Perspectives 515 (Edward K. Quashigah & Obiora C. Okafor, eds., 1999). *See* Amnesty International, *supra* note 148.

151. *See* Ogoni's Agonies: Ken Saro-Wiwa and the Crisis in Nigeria (Abdul Rasheed Na'Allah, ed., 1998); Amnesty International, *supra* note 148.

152. *See* U.N. Env't Programme, *supra* note 147; U.N. Env't Programme: Nigeria Launches $1 Billion Ogoniland Clean-up and Restoration Programme (2017), https://www.unep.org/news-and-stories/story/nigeria-launches-1-billion-ogoniland-clean-and-restoration-programme [https://perma.cc/UA4J-LFNM]. For the full Assessment Report, *see* U.N. Env't Programme: Environmental Assessment of Ogoniland report (2011), https://www.unep.org/explore-topics/disasters-conflicts/where-we-work/nigeria/environmental-assessment-ogoniland-report [https://perma.cc/Q9ZK-83CV]. *See also* Agaptus Nwozor, *Depoliticizing Environmental Degradation: Revisiting the UNEP Environmental Assessment of Ogoniland in Nigeria's Niger Delta Region*, 85 GeoJ. 883 (2020); Amnesty International et al., No Clean-Up, No Justice: An Evaluation of the Implementation of UNEP's Environmental Assessment of Ogoniland, Nine Years On (2020), https://www.justice.gov/eoir/page/file/1294376/download [https://perma.cc/X4F5-FTBY].

153. *See* Hydrocarbon Pollution Remediation Project, Ogoni Clean-up: Achievements in Three Years (2020), https://hyprep.gov.ng/ogoni-clean-up-achievements-in-three-years/ [https://perma.cc/VH6C-JLE5].

ject ("HYPREP").[154] Because of significant problems with the functioning of the HYPREP, it was eventually re-established and relaunched by a new federal government in 2016.[155] The HYPREP includes a Board of Trustees and a Governing Council.[156] Both organs of the HYPREP are comprised of high-level representatives from the Nigerian Ministries of Petroleum Resources, Environment, and Finance, as well as representatives from Ogoniland and NGOs.[157]

Prior to the establishment of HYPREP, the *SERAP Environmental Rights* case was filed at the ECOWAS Court on July 23, 2009.[158] After being stalled for about three years, the comparatively more democratic Jonathan administration finally began the UNEP assessment in November of that same year.[159] The ECOWAS Court issued its now-famous decision on December 14, 2012. The HYPREP was, however, first established on paper in July 2012—some months before the ECOWAS Court issued its decision—and officially gazetted two years later. The filing of the case at the ECOWAS Court was certainly an explicit strategy adopted by some of those who waged the political struggle against the government for the clean-up of Ogoniland and the rest of the Niger Delta.[160] This struggle had led to many achievements, including the commission of the UNEP report and the establishment and re-establishment of the HYPREP to implement that report.[161] However, it does not appear that the ECOWAS Court judgment in and of itself caused or triggered the establishment and reform of the

154. Official Extraordinary Gazette of the Federal Government of Nigeria (Jul. 2, 2014), Vol. 101, No. 65 (establishing the HYPREP) (on file with Authors).

155. Cletus Ukpong, *Buhari names governing council, board of trustees for Ogoni Clean-up – FULL LIST*, Premium Times (Aug. 5, 2016), https://www.premiumtimesng.com/news/top-news/208098-buhari-names-governing-council-board-trustees-ogoni-clean-full-list.html [https://perma.cc/S5LC-TNEF]; Establishment of the Hydrocarbon Pollution Remediation Project (HYPREP) No. (18) (2016) 103:176 O.G. (re-establishing the HYPREP under the Federal Ministry of Environment); Federal Ministry of Environment of Nigeria, *supra* note 151; Afr. Confidential, Vol. 60 No. 14 (2019), https://www.africa-confidential.com/article/id/12692/HYPREP's_checkered_rep [https://perma.cc/CK8J-F6KN].

156. Mashood Isah, *Cleaning Ogoniland: The Myths and Realities*, Afr. Confidential (Jul. 12, 2019), https://economicconfidential.com/2016/04/cleaning-ogoniland-myths-realities/ [https://perma.cc/HY7D-46PP]; Kialee Nyiayaana, *The State and the Environmental Clean-up in Ogoni: Building Peace or the Continuation of Oil Politics*, Kujenga Amani (Sept. 18, 2018), https://kujenga-amani.ssrc.org/2018/09/18/the-state-and-the-environmental-clean-up-in-ogoni-building-peace-or-the-continuation-of-oil-politics-in-the-niger-delta/ [https://perma.cc/7XLD-36RD].

157. Ukpong, *supra* note 155.

158. *See* Ruling on Preliminary Objection, *in* Socio-Econ. Rts. & Accountability Project v. Fed. Republic of Nigeria, No. ECW/CCJ/JUD/18/12, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Dec. 14, 2012), https://ihrda.uwazi.io/en/document/pftlz3gneo0wxsgq0kdszto6r [https://perma.cc/3ZJ8-5Z9S].

159. *See* Elisabeth A. M. Rijnierse, *Oil Spills in the Niger Delta: 'Glocal' Action on Social Responsibility and Development*, *in* Territories of Social Responsibility: Opening the Research and Policy Agenda 68 (Patricia A. Ashley & David Crowther eds., 2016).

160. *See* Registered Trs. of Socio-Econ. Rts. & Accountability Project, No. ECW/CCJ/JUD/18/12 at ¶¶ 12–18.

161. U.N. Env't Programme, *supra* note 147.

HYPREP. Nevertheless, it has contributed to the pressure currently being exerted on the government.

Beyond the establishment of the HYPREP, several consultations were held between the Ministry of Environment and certain stakeholders as part of the effort to clean up the pollution in Ogoniland.[162] During one of these consultations, the National Environmental Standards and Regulations Enforcement Agency ("NESREA")—an agency within the Ministry of Environment—conducted a review of the ECOWAS Court's decision in *SERAP* (as well as other relevant cases decided by domestic and international courts on the Niger Delta).[163] NESREA's review discussed extensively the nature and extent of the duties imposed on the Nigerian government by these cases.[164] Therefore, the ECOWAS Court's decision in *SERAP* contributed appreciably to the executive branch's decision-making processes on the means of dealing with the oil spillage and clean-up issues in the Niger Delta. It was also one of the factors that shaped the executive branch's thinking about the issue at hand. This consultation's emphasis on the need for the government's policy and action to conform with its international law duties in this area is related to the impact that the ECOWAS Court judgment made on the government's decision-making processes.

Subsequent consultations were held by the Ministry of Environment and Ogoni representatives in Abuja in November 2014, and in another meeting in July 2015.[165] In meetings held in both Abuja and Port Harcourt, the Ministry of Justice, in collaboration with the Ministry of Environment, provided implementation guidelines for the clean-up exercise. These included adherence to the ECOWAS Court's judgment in *SERAP* to ensure that the Government exercised its duty to take responsibility for the environmental activities of the oil companies and their agents operating in Nigeria.[166] The judgment was thus significantly impactful on at least this part of the executive branch's decision-making process.

Another stakeholders' sensitization meeting was held in Port Harcourt on April 28, 2016, at which stakeholders, including Nigeria's executive branch, committed to an agreement to not re-pollute after the clean-up.[167] At the meeting, the then-Honourable Minister of Environment promised to constitute four ad hoc committees, as well as various task teams, to commence preparation for activities on the clean-up project, citing the

162. *Id*. *See also National Policy on the Enforcement of Environmental Standards and Pollution Control*, National Environmental Standards and Regulations Enforcement Agency (Legal and Technical Working Group) 12 (2016) (on file with Authors); Okechukwu Effoduh, The ECOWAS Court, Activist Forces and the Pursuit of Socioeconomic and Environmental Justice in Nigeria 77 (Nov. 2017) (LL.M. thesis, York University) (on file with York University's Faculty of Graduate Studies).

163. *National Policy on the Enforcement of Environmental Standards and Pollution Control*, *supra* note 162, at 12.

164. *Id.* Effoduh, *supra* note 162, at 77.

165. *See* Effoduh, *supra* note 162, at 77–78.

166. *Id.*

167. *Id.* at 78.

ECOWAS Court's decision in *SERAP* as one of the rationales for the clean-up exercise.[168] The Minister then constituted and inaugurated these committees and task teams on May 24, 2016.[169] A few weeks later, Nigeria's President Muhammadu Buhari launched the clean-up of Ogoniland in Bodo, Rivers State.[170] Despite these advances, some human rights groups have since decried the slow pace of this ongoing effort.[171]

The environmental rights values espoused in *SERAP*, though not mentioned in the document itself, are reflected in the development process and content of Nigeria's *Revised National Policy on the Environment* of 2016. First adopted in 1991, and later revised in 1999, this revised policy was adopted in its current form by the Federal Executive Council in February 2017.[172] The Ministry justified this latest revision by arguing in favor of the need to "catch up" with recent trends in environmental protection and to improve its strategies in tackling the inter-sectorial issues concerning the environment in Nigeria, which includes the need to secure environmental and socioeconomic justice for Nigerians, including the people of the Niger Delta.[173] More specifically, while developing the legal framework for this *Revised National Policy*, the Ministry of Environment captured eleven critical trends that have arisen on Nigeria's environmental landscape.[174] Included in these trends is the justiciability of environmental and socioeconomic rights in Nigeria as adjudicated by the ECOWAS Court.[175] The policy referred

168. *Id.*

169. *Id.*

170. *Id.*

171. Cletus Ukpong, *MOSOP, Others Decry Slow Pace of Ogoni Clean-up*, Premium Times (Aug. 17, 2017), https://www.premiumtimesng.com/regional/south-south-regional/240532-mosop-others-decry-slow-pace-ogoni-clean.html [https://perma.cc/V4MZ-D4MW]. *See also* Nwozor, *supra* note 152, at 15.

172. *FEC approves new policy on environment,* Vanguard (Feb. 22, 2017), https://www.vanguardngr.com/2017/02/fec-approves-new-policy-environment/ [https://perma.cc/PMK7-JKPH].

173. Fed. Ministry of Env't of Nigeria, *Revised Environmental Legal Framework and Management Policy for the Niger Delta* FME/P/LFMP/2 13–14 (2017). *See also* Effoduh, *supra* note 162, at 80.

174. *Id.*

175. The stated critical trends (see *Revised Environmental Legal Framework and Management Policy for the Niger Delta*, *supra* note 173) included: (1) National resource management; (2) Reduction in deforestation; (3) Declaration of national environmental emergency: climate change and the impact of oil spills—both combining to create a serious threat to national security; (4) Environmental protection framework; (5) Environmental management and stewardship; (6) Legality of environmental and human rights (Community Court of Justice of the Economic Community of West African States (ECOWAS) rulings and judgment) (*see* Registered Trs. of Socio-Econ. Rts. & Accountability Project v. Fed. Republic of Nigeria, No. ECW/CCJ/JUD/18/12, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Dec. 14, 2012), https://ihrda.uwazi.io/en/document/pftlz3gneo0wxsgq0kdszto6r [https://perma.cc/3ZJ8-5Z9S]; Registered Trs. of the Socio-Economic Rts. & Accountability Project v. Fed. Republic of Nigeria Universal Basic Educ. Comm'n, No. ECW/CCJ/APP/0808, Ruling on Preliminary Objection, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Oct. 27, 2009), http://www.worldcourts.com/ccj/eng/decisions/2005.10.26_Barbados_Rediffusion_v_Mirchandani.htm [https://perma.cc/R8SR-34PK]); (7) Oil sector environmental management and regulation; (8) Oil spills and gas flaring reductions; (9) Implementation of the UN Environment Programme Report Recommendations; (10) Waste management and sanitation; (11) Sanitation and clean water provision. *See also* Effoduh, *supra* note 162, at 80.

specifically to the court's decisions in both *SERAP* and another case involving SERAP.[176]

The impact of *SERAP* on the content of this policy is implicit. The document was revised to include the goal that the Ministry of Environment will look beyond the general non-justiciability of environmental rights under the Nigerian Constitution (as opposed to its justiciability under the African Charter relied on by the ECOWAS Court in the case at issue and as pronounced in the ruling in the case, as well as in the related Nigerian African Charter Act), to ensure that the government empowers citizens "to have legal standing and access to justice to be able to protect and enforce the protection of a clean and healthy environment for sustainable development."[177] Paragraph 8.1. of that policy document provides:

> The Nigerian constitutional provision on environmental protection as at now is too tokenistic and inadequate. Likewise, other extant environmental laws, including related laws, policies and regulations, require revision, harmonisation and updating in line with *global best standards and practices*. This policy shall be put in its proper legal context for effectiveness and impact. . . . [The government] recognizes that everyone in Nigeria has the right to (i) an environment that is not harmful to her or his health or wellbeing; (ii) have the environment protected, for the good of present and future generations through reasonable laws and other way of; (iii) preventing pollution and ecological degradation; (iv) promoting conservation and; (v) securing ecologically sustainable development and use of our natural resources, while at the same time promoting valid economic and social development.[178]

The above statement is the first statement of its kind to be published by a federal ministry in Nigeria as a national policy that relocates the legal framework of the Ministry beyond Nigeria's constitution to international human rights standards. Given the impact that the ECOWAS Court's ruling in the *SERAP Environmental Rights* case had on the consultations and meetings that led to the development of this revised policy (including the Environment Minister's explicit utilization of that ruling as a basis for her decision-making), it is only logical that the international human rights standards to be adhered to by the government under the policy include the

176. *See* The Registered Trs. of the Socio-Econ. & Accountability Project v. Fed. Republic of Nigeria & Universal Basic Educ. Comm'n, No. ECW/CCJ/JUD/07/10, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Nov. 30, 2010), https://ihrda.uwazi.io/en/document/qrb6wqua4frswtjqwichxgvi [https://perma.cc/JG84-BEW8] (discussing the right to basic education in Nigeria).

177. Permanent Sec'y, Nigeria Fed. Ministry of Env't, *National Policy on the Environment (Revised 2016)* 49, (Jan. 1, 2016), https://leap.unep.org/countries/ng/national-legislation/national-policy-environment-revised-2016#:~:text=the%20goal%20of%20the%20National,natural%20resources%20for%20sustainable%20development [https://perma.cc/J6H5-8Z9W].

178. *Id.* (emphasis added).

rationale of the ECOWAS Court's ruling in that case. The fact that it is the only international court ruling that affirmed a justiciable right to environment in Nigeria strongly reinforces this point.

The *SERAP Environmental Rights* case was brought by the noted Nigerian human rights NGO SERAP, which was supported by other CSAs, most notably the MOSOP. The case was also argued by notable Nigerian human rights lawyers, including Femi Falana, Adetokunbo Mumuni, and Sola Egbeyinka. In short, the case was largely created and managed by Nigerian activist forces. These forces were and remain in a virtual and informal human rights alliance. The ECOWAS Court was also part of this implicit alliance because it shared a common purpose with these CSAs, and purposefully acted accordingly. The CSAs functioned as brainy relays who made ends-means calculations about deploying the ECOWAS Court's processes and rulings to create added pressure and augmented leverage in what was, and has always been, a wider political struggle about environmental degradation and socioeconomic injustice in Ogoniland and the Niger Delta. The goals were to add to the human rights voices of the Ogoni and other Niger Deltans and to contribute to alterations being made in the government's decision-making processes and actions in this area. As a result of litigating this case, the Ogoni and other Niger Delta peoples achieved success: their case was often raised in the government consultations and meetings, and initiated appreciable changes to the environmental policy, guidelines, and clean-up efforts of the oil pollution in Ogoniland.

2. *The Effect of the SERAP Cases on the NHRC and Nigeria's Human Rights Action Plan*

Correspondence between the ECOWAS Court's rulings and the executive branch's activities is also illustrated in a second example concerning the *Consultative Draft of the National Action Plan (NAP) for the Promotion and Protection of Human Rights in Nigeria*.[179] This draft was published by the National Human Rights Commission ("NHRC"), an agency that—though quite independent—is in practice treated as part of Nigeria's executive branch of government.[180] The ECOWAS Court's socioeconomic rights-fo-

179. *See* National Human Rights Commission Act of 1995 (2004, as amended in 2010) Cap. (46) (Nigeria); National Human Rights Commission, *Consultative Draft of the National Action Plan for the Promotion and Protection of Human Rights in Nigeria (2017 to 2021)* (on file with Authors).

180. The National Human Rights Commission ("NHRC") is Nigeria's national human rights institution. Its main mandates, as outlined in the National Human Rights Commission Act, *supra* note 179, are to promote and protect human rights in Nigeria. Note that although the NHRC facilitated the consultative process for the development of the National Action Plan, the responsibility for the final adoption and implementation of the Plan rests with higher levels of the executive branch of the Nigerian government, the directing minds of the Nigerian state. *See* Vienna Declaration and Program of Action, art. 71, Jun. 25, 1993, U.N. Doc. A/CONF.157/24 (noting that "[t]he World Conference on Human Rights recommends that each *state* consider the desirability of drawing up a national action plan identifying steps whereby that state would improve the promotion and protection of human rights").

cused rulings in the *SERAP Environmental Rights* case and the *SERAP Basic Education Rights* case have markedly affected the content and orientation of important parts of this NAP Draft, and its finalized version. The chapter of this NAP Draft on "Economic, Social and Cultural Rights" states that socioeconomic rights in Nigeria can now be enforced, "possibly through the ECOWAS Court," and are, partly because of this possibility, "*now enforceable*" in the country.[181] This NAP Draft also states that, having regard to Nigeria's international legal obligations to respect, protect, and fulfill environmental and socioeconomic rights (including its obligations under the African Charter as articulated and applied by the ECOWAS Court in the SERAP cases), the government now recognizes the need to establish "necessary institutions" in Nigeria to realize these environmental and socioeconomic rights for its residents.[182]

Notably, the two major socioeconomic rights cases that have been instituted against Nigeria at the ECOWAS Court were both instituted by the SERAP.[183] The provisions in the NAP Draft, which also made it into the final version of the NAP clearly indicate that the ECOWAS Court's rulings in the SERAP socioeconomic rights cases have significantly impacted the content and orientation of this key national human rights policy document produced by Nigeria's executive branch.[184]

Additionally, the *SERAP Educational Rights* case has also influenced the NHRC's argumentation in other contexts, such as in the justification of the existence of a justiciable right to education in Nigeria. This issue has been very contentious until fairly recently because of the seemingly contrary provisions of both Nigeria's defunct 1979 Constitution and its currently operative 1999 Constitution,[185] and was clarified and supported by both SERAP socioeconomic rights cases. For example, the NHRC's "State of Human Rights Report" for 2016 to 2017 referred to and relied on the *SERAP Educational Rights* case in this exact way.[186]

Here again, these significantly impactful cases were brought by a local CSA that operates in a virtual and informal human rights alliance with its peers and with the ECOWAS Court itself. These CSAs acted as brainy relays in a broader political strategy and made ends-means calculations which

181. *See* National Human Rights Commission, *supra* note 179, at 57 (emphasis added).

182. *Id.*

183. *See* Registered Trs. of Socio-Econ. Rts. & Accountability Project v. Fed. Republic of Nigeria, No. ECW/CCJ/JUD/18/12, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Dec. 14, 2012), https://ihrda.uwazi.io/en/document/pftlz3gneo0wxsgq0kdszto6r [https://perma.cc/3ZJ8-5Z9S]; The Registered Trs. of the Socio-Econ. & Accountability Project v. Fed. Republic of Nigeria & Universal Basic Educ. Comm'n, No. ECW/CCJ/JUD/07/10, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Nov. 30, 2010), https://ihrda.uwazi.io/en/document/qrb6wqua4frswtjqwichxgvi [https://perma.cc/JG84-BEW8].

184. Interviewee 199E, *in* Appendix B.

185. *See* Constitution of the Federal Republic of Nigeria 1979 (defunct); Constitution of the Federal Republic of Nigeria 1999 (No. 24 of 1999).

186. National Human Rights Commission, *State of Human Rights Report (2016–2017)* 81 (on file with Authors).

allowed them to transmit the ECOWAS Court's rulings and judicial values into the domestic sphere. This helped to, among other things, give added attention to the human rights struggles of the socioeconomically deprived in Nigeria. In this way, the CSA forces were able to add appreciably to the pressure directed at the Nigerian government to alter its thinking and action about the justiciability of socioeconomic rights, producing enough leverage that the justiciability of such rights was entrenched even more firmly into the latest version of Nigeria's human rights NAP.

3. *The* Dasuki *Case*

A third example of the generation of correspondence in Nigeria relates to the ECOWAS Court's judgment in *Colonel Mohammed Sambo Dasuki (rtd) v. The Federal Republic of Nigeria* ("*Dasuki*").[187] This case has had a significant—albeit in some ways partial and limited—long-term impact on executive branch decision-making and action in Nigeria. Retired Colonel Sambo Dasuki served as the national security adviser to President Goodluck Jonathan of Nigeria.[188] Following Jonathan's succession in May 2015 by President Muhammadu Buhari, Dasuki was promptly arrested and jailed, where he remains pending a slow and still-ongoing trial on formal charges of possession of a weapon and corruption.[189] The government often presented him to the public as a massively corrupt former official who was a national security threat and needed to be punished for his transgressions.[190] He was soon granted bail by a Nigerian court but was re-arrested momentarily after his release, allegedly on other charges.[191] He was subsequently re-granted bail on several other occasions, all to no avail.[192]

Following the first order for his release, his re-arrest, and continued illegal detention, Dasuki sued the Nigerian government in the ECOWAS Court alleging violations of his human rights.[193] The ECOWAS Court found in his favor in October 2016 and ordered his immediate release from detention and damages in the amount of thirty million NGN (about USD$83,000 at the time) as compensation for his illegal detention.[194] The government strongly resisted these release orders, claiming that to comply

187. Dasuki v. The Fed. Republic of Nigeria, No. ECW/CCJ/JUD/23/16, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Oct. 4, 2016), https://africanlii.org/ecowas/judgment/ecowas-community-court-justice/2016/54-0 [https://perma.cc/R89K-9WCF].

188. *Id.*

189. *Id.*

190. Rafiu Ajakaye, *Nigeria: Ex-security adviser's family urges his release* (Anadolu Agency, Dec. 29, 2017), https://www.aa.com.tr/en/africa/nigeria-ex-security-advisers-family-urges-his-release/1018315 [https://perma.cc/2DS6-ARZT].

191. Tobi Soniyi, *Dasuki: Forgotten in Jail*, This Day (Sept. 26, 2017), https://www.thisdaylive.com/index.php/2017/09/27/dasuki-forgotten-in-jail/ [https://perma.cc/HAQ9-ER5D].

192. *Id.*

193. Dasuki v. The Fed. Republic of Nigeria, No. ECW/CCJ/JUD/23/16, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Oct. 4, 2016), https://africanlii.org/ecowas/judgment/ecowas-community-court-justice/2016/54-0 [https://perma.cc/R89K-9WCF].

194. *Id.*

with them would seriously harm its national security.[195] One legally trained presidential aide even errantly alleged that the ECOWAS Court's rulings were merely "an advisory opinion."[196]

The fact that this ECOWAS Court ruling was obtained through international litigation that was part and parcel of a broader national political and judicial campaign to free Dasuki (and other prominent government opponents like him) is best illustrated by a respected newspaper's report on the success of the long campaign for his release from detention. As the report stated, "[h]e was released on the same day as Omoyele Sowore, an activist who is being prosecuted for calling for a revolution against bad governance. The government, which had come under intense criticism from local and foreign observers since its illegal detention of Mr Sowore, eventually buckled."[197]

Although the lawyers who directly argued the matter on Dasuki's behalf are not widely noted for their human rights work, notable CSAs provided substantial support to the campaign to release Dasuki. For example, Femi Falana, a noted Nigerian lawyer, waged a newspaper campaign for his release.[198] And the SERAP's deputy executive director spoke to the press immediately after Dasuki was released, celebrating the event.[199]

Most of these campaigners invoked as their primary justificatory logic the fact that his release had been ordered not just by the domestic courts, but also by the ECOWAS Court (which was more clearly in a triadic position in relation to the government and Dasuki alike). To these campaigners, the ECOWAS Court decision added significant strength to the sociopolitical, moral, and legal legitimacy of their argument (i.e., the sense that they were "right" and the government was "wrong"). Relatedly, these CSAs tended to present this failure to heed even the order of the ECOWAS Court as a heightened and more egregious level of malfeasance on the part of the executive branch. For example, in one of his public statements attacking the government for not releasing Dasuki on bail when ordered by the courts, Falana stated that:

> Although the defendant has been admitted to bail by both [domestic] trial courts, the SSS [state security service] has continued

195. *Id.*

196. Taiwo-Hassan Adebayo, *Nigeria not duty-bound to obey ECOWAS Court ruling on Dasuki–Buhari's aide*, Premium Times (Oct. 15, 2016), https://www.premiumtimesng.com/news/headlines/212838-nigeria-not-duty-bound-obey-ecowas-ruling-dasuki-buharis-aide.html [https://perma.cc/X7BG-WGTD].

197. *See, e.g.*, Halima Yahya, *Review: Sambo Dasuki's long road to 'freedom'*, Premium Times (Dec. 26, 2019), https://www.premiumtimesng.com/news/headlines/369962-review-sambo-dasukis-long-road-to-freedom.html [https://perma.cc/Y6UW-7LTX].

198. Rayyan Alhassan, *Falana writes new DSS boss, demands release of Dasuki, El-zakzaky, others*, Daily Nigerian (Aug. 13, 2018), https://dailynigerian.com/falana-writes-acting-sss-boss-demands-release-of-dasuki-el-zakzaky-others/ [https://perma.cc/4W3V-N7EB].

199. News Agency of Nigeria, *Release of Dasuki, Sowore excites lawyers, others*, Pulse NG (Dec. 24, 2019), https://www.pulse.ng/news/local/release-of-dasuki-sowore-excites-lawyers-others/lnkdlvw [https://perma.cc/9XTU-Z7QZ].

> to detain him without any legal justification. As if that is not enough, *the order of the Court of Justice of the Economic Community of West African States* directing the Federal Government to release Col. Dasuki on bail pending trial has also been treated with disdain by the SSS.[200]

This ECOWAS Court ruling was also cited by some of these CSAs in appeals to the Court of Appeal of Nigeria and was relied on by at least one of that court's panels in *Colonel Sambo Dasuki v. Director-General State Security* as a justification for sustaining the orders of several high courts to release Dasuki and to significantly ease the bail conditions that had been imposed on him by those high courts.[201]

Unsurprisingly, given widespread consternation among human rights activists regarding the government's disobedience when it comes to domestic court orders,[202] counsel in this case found themselves in a virtual, or even actual, informal alliance with human rights activists and other lawyers and groups in the country. Alongside these other CSAs, the counsel acted as brainy relays who made rational end-means calculations to deploy and maintain the deployment of the ECOWAS Court as part of a broader political strategy to augment the pressure exerted on the government in the face of its sustained failure to obey domestic courts' orders to release Dasuki.

The end goal, which was eventually achieved, was to gain added political leverage over the government, alter its adherence to a certain logic of appropriateness that justified such disobedience to court orders, and cajole it or force its hand. This shift was evident in the Attorney General of Nigeria's remarks. In 2018, he claimed that the executive branch was right in disobeying the first domestic high court order ordering Dasuki's release because, in his view, Dasuki's "personal right[s] can be violated for the larger public good."[203] In 2019, he stated that "[t]he only reasons for the release of Omoyele Sowore and Sambo Dasuki revolved around our commitment to the rule of law, obedience to court orders [which presumably included a subsisting order of the ECOWAS Court that it was bound by the rule of law

200. Rayyan Alhassan, *supra* note 198.

201. Dasuki v. Dir.-Gen. State Sec. (2019), LCN/13916 (CA) (Nigeria). *See also Appeal Court Orders Dasuki Release from DSS Custody*, Channels TV (Jul. 14, 2019), https://www.channelstv.com/2019/07/14/appeal-court-orders-dasuki-release-from-dss-custody/ [https://perma.cc/P8UC-88AQ]; Obiora C. Okafor et al., *Explaining the ECOWAS Court's Minimal Impact on Legislative and Judicial Decision-Making and Action in Nigeria* (forthcoming 2022) (on file with Authors).

202. Femi Falana, *I Will Not Relent Until 40 People Detained Illegally Are Released*, The Interview (May 12, 2019), https://theinterview.ng/2019/05/24/i-will-not-relent-until-40-people-detained-illegally-are-released-femi-falana/ [https://perma.cc/3SUC-53HV].

203. Halima Yahya, *Lawyers berate Malami over statement on Dasuki*, Premium Times (Jul. 25, 2018), https://www.premiumtimesng.com/news/top-news/277781-lawyers-berate-malami-over-statement-on-dasuki.html [https://perma.cc/PY2X-K498].

to obey] and compassionate grounds."[204] The CSA campaign for Dasuki's release also gave an added human rights voice to his cause.

To be clear, the Dasuki affair is not being used to argue that the ECOWAS Court's ruling was the only factor that contributed to his release. Rather, the ruling was clearly one significant factor among a handful of factors that combined to exert enough pressure on the government to induce it to obey the consistent decisions of its domestic courts on the matter. Without this ECOWAS Court ruling, the CSAs who initiated and drove this broad, prolonged, and intense pressure campaign would have lacked an important legitimization resource and would have been unable to offer as strong an argument for his release in both the local courts and the domestic courts of public opinion.

Other aiding factors included the numerous domestic court rulings already discussed, CSA media campaigns that caught the attention of a significant section of both the Nigerian public and of influential foreign observers,[205] and the public condemnation of its behavior by its own National Human Rights Commission.[206] Even so, through Dasuki's prolonged period of detention, the key factor was the intense pressure mounted by local CSAs on the government to obey the domestic and ECOWAS Court rulings ordering his release on bail. Nigerian press reports also show that after the sustained disobedience of the high court rulings, the pressure campaign for Dasuki's release relied *primarily* and *almost exclusively* on the rulings of the ECOWAS Court.[207] These same rulings were also offered as justification by many of the foreign observers who pressed for Dasuki's release.[208]

This was not a story of direct state compliance with court orders. The government never obeyed any one of the numerous court orders (be it domestic or ECOWAS) issued in relation to the Dasuki affair. And the executive branch was never able to indicate—even when interviewed by the Authors—precisely which court orders it was responding to, among the many issued in respect of the matter. The executive branch focused on respecting the rule of law and court orders in general, as can be seen from the Attorney General's statement quoted above. As such, what occurred in this

204. Timileyin Omilana, *Malami tackles Falana over Sowore, Dasuki release*, The Guardian (Dec. 31, 2019), https://guardian.ng/news/malami-tackles-falana-over-sowore-dasuki-release/ [https://perma.cc/N29S-ELQS].

205. Camillus Eboh, *Nigeria Releases Sowore and Dasuki after AG Orders Bail*, Saltwire (Dec 24, 2019, updated Dec. 25, 2019), https://www.saltwire.com/prince-edward-island/news/world/nigeria-releases-sowore-and-dasuki-after-ag-orders-bail-391703/ [https://perma.cc/MF8Q-UD4M].

206. *Id*.

207. *See* Rayyan Alhassan, *supra* note 198. *See also* Ade Adesomoju, *Release Dasuki, others, Falana tells Buhari*, The Punch (Nov. 13, 2016), https://punchng.com/release-dasuki-others-falana-tells-buhari/ [https://perma.cc/M6TU-R9SP].

208. *See, e.g.*, *Nigeria releases Sowore and Dasuki after AG orders bail*, Reuters (Dec. 25, 2019), https://ng.investing.com/news/commodities-news/update-1nigeria-orders-release-of-sowore-and-dasuki-after-court-orders-attorney-general-105500 [https://perma.cc/WTL4-SPU5].

affair is much better characterized as a form of correspondence than as an instance of direct compliance with a court order.

4. *The APO Eight Case*

A fourth instance of correspondence is the Nigerian executive branch's eventual implementation of the ECOWAS Court's decision in *The Incorporated Trustees of Fiscal and Civic Right Enlightenment Foundation & 19 Ors v. Federal Republic of Nigeria & 2 Ors*.[209] Nigerian security personnel opened fire and killed eight Nigerians (now widely referred to as the "APO eight") in the Apo district of the Federal Capital Territory on allegations that they were linked to the terrorist Boko Haram group.[210] They were later found to be commercial motorcycle taxi riders sheltering in the uncompleted building in which they were shot because they did not have access to housing.[211] A suit was brought on behalf of the deceased persons against Nigeria at the ECOWAS Court in February 2014.[212] The ECOWAS Court issued its decision in June 2016.[213] It found that Nigeria had committed grave breaches of the human rights of the victims and ordered Nigeria to pay damages of USD$200,000 to the families of each of those killed, and USD$150,000 to the families of those who had suffered injuries—a grand total sum of USD$3.3 million.[214] By April 2018, the Government had paid out a total of 135 million NGN to all the plaintiffs in the ECOWAS Court matter (which because of depreciation of the Nigerian Naira amounted to about USD$375,000 at the time of payment).[215] resulting from protracted negotiations, this much-reduced sum only conformed in part with the enormous damages awarded by the ECOWAS Court.[216]

The main applicant in, and primary driver of, the litigation of this case was a human rights NGO, the Incorporated Trustees of Fiscal and Civil Right Enlightenment Foundation. This group is a part of a virtual human rights alliance that worked as the brainy relays to bridge the ECOWAS Court jurisprudential energy and executive branch decision-making and action in Nigeria.

The alliance launched this case as an integral part of a broader and ongoing strategy, based on ends-means calculations. The goal was to give greater

209. The Inc. Trs. of Fiscal and Civic Rt. Enlightenment Found. v. Fed. Republic of Nigeria, No. ECW/CCJ/JUD/18/16, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Jun. 7, 2016), https://ihrda.uwazi.io/ar/entity/mw5l47bb1mlnaaynkkt6v42t9?raw=true [https://perma.cc/KF88-Q6HQ].

210. *Apo 8: ECOWAS Court fines Nigeria $3.3 million for extra-judicial killings*, Premium Times (Jun. 8, 2016), https://www.premiumtimesng.com/news/top-news/204946-apo-8-ecowas-court-fines-nigeria-3-3-million-extra-judicial-killings.html [https://perma.cc/FL27-RENW].

211. The Inc. Trs. of Fiscal and Civic Rt. Enlightenment Found., No. ECW/CCJ/JUD/18/16, ¶ 1.

212. *Id*.

213. *Id*.

214. *Id.* at 48.

215. *Id*.

216. Interviewee 39E, *in* Appendix B.

human rights voice to the APO eight and their families, and to gain leverage against the executive branch in the political and administrative arena. As the ECOWAS Court itself found, this matter and other similar killings had received intense and widespread publicity and attention by human rights groups in Nigeria.[217] These groups petitioned the Nigerian President, and a presidential committee recommended that compensation be paid to all victims of such actions, a recommendation that was rejected by the government.[218] The human rights network that worked on this case also petitioned Nigeria's federal legislature (the National Assembly), which launched a joint public hearing on the matter led by two of its main committees, and found that the killings were not justified.[219] Before filing the suit at the ECOWAS Court, this human rights network had also approached the NHRC in 2013, which having conducted its own investigation, issued a report in April 2014 that supported the position of the plaintiffs, and ordered the government to award them 135 million NGN (about USD$685 million at the time), a decision that a court later confirmed.[220]

All of this pressure, partly owing to the ECOWAS Court's proceedings and ruling in this matter, eventually produced enough focused pressure on the executive branch that it markedly altered its decision not to compensate the victims, eventually negotiating and paying out relatively large sums to each victim as compensation in 2018.

In terms of the relative weights of the contributions of the NHRC's report and the ECOWAS Court's rulings to payment of the compensation by the government, the fact that the plaintiffs and the CSAs that supported their cause still felt the need to file a suit in the ECOWAS Court *after* they had obtained a favorable decision from the NHRC, as well as a legislative panel, shows that they valued the court as a way of augmenting the existing pressure on the government to compensate them. This is one measure of the added value that the ECOWAS Court proceedings and ruling brought to these actors' efforts to gain enough additional leverage over the executive branch to make them compensate the plaintiffs.

Two factors—that the Nigerian Attorney General entrusted the awards in the hands of the NHRC for distribution to victims' families, and that the sum exactly matched the value of the NHRC's 2014 award of compensation—both strongly suggest an attempt to respond more directly to the NHRC's 2014 findings as confirmed by a high court. However, an NHRC

217. The Inc. Trs. of Fiscal and Civic Rt. Enlightenment Found., No. ECW/CCJ/JUD/18/16, 4.
218. *Id.* at 5–6.
219. *Id.*
220. Ade Adesomoju, *Apo Eight: FG pays N135m Compensation to Relatives, Survivors*, The Punch (Apr. 26, 2018), https://punchng.com/apo-eight-fg-pays-n135m-compensation-to-relatives-survivors/ [https://perma.cc/EJV5-X3EG]; Kevwe Ebireri, *NHRC Report Indicts DSS, Army Over Apo 8 Killings*, Int'l. Ctr. Investigative Rep. (Apr. 7, 2014), https://www.icirnigeria.org/nhrc-report-indicts-dss-army-over-apo-8-killings/ [https://perma.cc/6A7C-VQWT].

official confirmed that Nigeria's decision to pay the much lower sum awarded by the NHRC, instead of the massively larger sum ordered by the ECOWAS Court, was largely tactical.[221] The key factor was affordability, given the relatively small size of the maximum available resources of Nigeria.[222] This statement was corroborated by a senior official of the Ministry of Justice, who stated clearly that the lower sum was paid because "it was within the immediate reach and compliance of the DSS [Department of State Security] that was the main respondent."[223] In a clear recognition of the ECOWAS Court's significant contribution to altering the government's decision-making and action, this senior justice ministry official also noted that the executive branch recognized that it was faced with two rulings on the APO eight matter—one domestic and the other at the ECOWAS Court level—and that it was responding to both rulings when the payments were made in the manner that was most affordable.[224] Elaborating, the senior Ministry of Justice official added that:

> [T]he NHRC was chosen to effect the payment to the beneficiaries because it was part of the committee set up by the HAGF [Hon. Attorney-General of the Federation] to address the issue. Being an independent body and with its peculiar function, it was decided that it would be easy for the money to be paid through the commission. That is why the DSS was instructed to transfer the money to the NHRC for onward payment to the beneficiaries.[225]

Though there is no clear evidence of direct state compliance with this ECOWAS Court's decision, there is a strong indication of a partial but still significant level of correspondence between that court's ruling and the actions of Nigeria's executive branch in this matter. The ECOWAS Court's ruling was clearly one of the two main factors that the government was responding to. As two officials put it, the executive branch negotiated with the plaintiffs to accept the lower sum awarded by the NHRC as full and final satisfaction of the payments demanded from it in both the NHRC's decision and the ECOWAS Court's ruling.[226]

5. *The* Sa'adatu Umar *Case*

A fifth example of the phenomenon at issue is the creative and effective use to which the ECOWAS Court case of *Sa'adatu Umar v. The Federal Re-*

221. Interviewee 77E, *in* Appendix B.
222. *Id.*
223. Interviewee 39E, *in* Appendix B.
224. *Id.*
225. *Id.*
226. Interviewee 77E, *in* Appendix B. *See also* Interviewee 39E, *in* Appendix B (noting that "series of meetings and negotiations" were held between the plaintiffs and the government before the decision to pay via the NHRC was made).

public of Nigeria was put by the human rights lawyers who filed it.[227] The creative utilization of the ECOWAS Court's *process* was in and of itself sufficient to generate significant pressure on a recalcitrant division of the Nigerian Police Force ("NPF") to alter their previous attitude and heed the decision of a domestic court. In this case, a Nigerian woman and her children were arrested and detained by Nigerian police officers without bail.[228] She sued the NPF in a domestic high court for the enforcement of her rights under both the Nigerian Constitution and the African Charter on Human and People's Rights (Ratification and Enforcement) Act, which is part of Nigerian law.[229] The domestic court held in her favor, ordering her release from detention and the payment of compensation to her.[230]After the NPF failed to comply with the domestic court's orders, the same case was brought to the ECOWAS Court on Umar's behalf by Chino Obiagwu, a well-known human rights lawyer and campaigner and the Coordinator of the Legal Defence and Action Program ("LEDAP"). For decades, Obiagwu has been deeply entrenched in the networks of activist forces that defeated military rule in Nigeria, and which have continued the human rights struggle against subsequent civilian governments.[231] Although the ECOWAS Court declared the case inadmissible on the basis that it would not reconsider a matter previously adjudicated in a national court of an ECOWAS member state (applying a form of the *res judicata* rule),[232] the plaintiff's counsel deployed the fact that he had filed and publicized a suit at the ECOWAS Court against the NPF as additional pressure that helped successfully cajole this national law enforcement agency to heed the subsisting order of the domestic court.[233]

This matter was, yet again, driven by a local CSA, a noted human rights lawyer, and the long-functioning NGO that he leads. This NGO is a prominent member of the human rights community in Nigeria and is in a virtual alliance with other human rights actors in the country. The lawyer driving this case led this NGO to act as the brainy relays that, because of key ends-means calculations, chose the creative and effective strategy of filing an application against Nigeria at the ECOWAS Court, which enabled them to bring attention to the predicament faced by the plaintiff and to transmit that court's normative energy into the domestic realm. These CSAs did so in a way that effectively cajoled the NPF to release Umar, resulting in correspondence between the NPF's actions and the ECOWAS

227. Umar v. The Fed. Republic of Nigeria, No. ECW/CCJ/JUD/17/12, ECW/CCJ/APP/12/11, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Dec. 14, 2012).

228. *Id*. at 2.

229. African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (1983) Cap. (10), (Nigeria).

230. Umar v. The Fed. Republic of Nigeria, No. ECW/CCJ/JUD/17/12, ECW/CCJ/APP/12/11, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.], 9 (Dec. 14, 2012).

231. *See id.*

232. *See id.* at ¶ 219.

233. Interviewee 15, *in* Appendix B.

Court's human rights values and previous decisions on the human rights violations occasioned by the unlawful detention of citizens. This was a creative and effective tactic that reflected not just the intelligence and training of Obiagwu and the CSA brain trust in Nigeria, but even more importantly, a longstanding and intense engagement with the local sociopolitical, administrative, and judicial structures and terrain.

This case is significant not as an instance of direct compliance, but rather because it illustrates that merely utilizing the ECOWAS Court's process creatively by filing a suit at that court and then deploying the fact of bringing that process against the NPF generated a measure of additional pressure on the NPF to heed the decision of the domestic court, which it had up until then disobeyed. The ECOWAS Court proceedings were thus used as leverage over the NPF, extending beyond the ECOWAS Court itself to the political and administrative struggle to secure the release from detention of the plaintiff and her children. This heeding of the domestic court's release order in turn generated correspondence with the ECOWAS Court's normative values.

6. *The* Dorothy Njemanze *Case*

The sixth example of correspondence concerns the Dorothy Njemanze women's rights violations saga. In this matter, partly because of pressure created by the ECOWAS Court's ruling,[234] Nigeria's NHRC summoned a number of powerful executive branch actors and agencies to a hearing to answer to a petition filed against them by a Nigerian movie personality and activist, Dorothy Njemanze.[235] These agencies included the Federal Capital Territory ("FCT") Administration, the FCT social development secretariat, the Abuja Environmental Protection Board ("AEPB"), the most senior police officer in the country, and the head of the police command in the FCT. These summons were issued largely because of the pressure produced by Njemanze's media campaign, which she had mounted with the support of a host of human rights groups and activists.[236] This campaign was aimed at addressing one type of sexual and gender-based violence ("SGBV") in Nigeria: the public harassment, assaults, arrests, detentions, and other abuses too often suffered by women who law enforcement agents and others sus-

234. Njemanze v. The Fed. Republic of Nigeria, No. ECW/CCJ/JUD/08/17, ECW/CCJ/APP/17/14, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Oct. 12, 2017), https://ihrda.uwazi.io/en/document/0h6sf6nakud8ntpr39gdabrzfr [https://perma.cc/6SVG-4Q4U]. *See* Maame Efua Addadzi-Koom, *Of the Women's Rights Jurisprudence of the ECOWAS Court: The Role of the Maputo Protocol and the Due Diligence Standard*, 28 Feminist Legal Stud. 155 (2020) (analyzing ECOWAS Court's ruling in the *Dorothy Njemanze* case in light of the court's other rulings on sexual and gender-based violence).

235. Njemanze v. Abuja Environmental Protection Board, No. NHRC/SGBV/2019/ABJ/3, Oct. 30, 2019 (Nigeria).

236. Interviewee 21, *in* Appendix B; Interview with senior official of the National Human Rights Commission of Nigeria (on file with Authors).

pect of being engaged in sex work.[237] As part of their self-described effort to rid the city of sex workers, the AEPB and law enforcement agents often rounded up and detained women they found walking on the street in the evening and night in certain parts of Nigeria's capital city.[238] Notwithstanding Njemanze's public persona as a movie actress, she was assaulted on two occasions by agents of the AEPB while out at night, but managed to escape detention on each occasion by creating a scene and fighting off the agents.[239]

This behavior led her and others to file a suit against Nigeria at the ECOWAS Court,[240] resulting in the court's highly publicized judgment in *Dorothy Njemanze v. Federal Republic of Nigeria*.[241] The ECOWAS Court held that the failure of the Nigerian government to recognize, promote, and protect the rights of the plaintiffs, and to investigate and discipline the persons responsible for the conduct described above, violated several provisions of the African Charter, the Protocol to the African Charter on the Rights of Women, and Convention on the Elimination of Discrimination against Women.[242] The court also held that this treatment constituted gender-based discrimination.[243] In the court's view:

> From the totality of evidence offered, it seems that the whole hug [*sic*] of the operation was targeted against women. This systematic sting operation directed against only the female gender furnishes evidence of discrimination. There is an obligation placed on State Parties to Convention on Elimination of All Forms of Discrimination against Women (CEDAW) to adopt laws, administrative and Policy measures to prevent gender based discrimination. Prostitution is claimed to be a crime in the laws of the Defendant. However, it takes two persons to engage in such criminal activity. There is no law that suggest[*sic*] that when women are seen on the streets at midnight or anytime thereafter, they are necessarily idle persons or prostitutes. If it were so, it ought to apply to all persons irrespective of sex.[244]

237. Onyinye Edeh, *Holding Nigeria's Law Enforcers to Account*, Inst. of Current World Aff. (Apr. 2, 2018), https://www.icwa.org/holding-nigerias-law-enforcers-to-account/ [https://perma.cc/343H-CPHE]. *See also* Interviewee 21, *in* Appendix B.

238. *Id.*

239. *Id.*

240. *Id.*

241. Njemanze v. The Fed. Republic of Nigeria, No. ECW/CCJ/JUD/08/17, ECW/CCJ/APP/17/14, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Oct. 12, 2017), https://ihrda.uwazi.io/en/document/0h6sf6nakud8ntpr39gdabrzfr [https://perma.cc/6SVG-4Q4U].

242. *Id.* at 41.

243. *Id.* at 42.

244. *Id.* at 38.

Judging by the media attention and reaction that the case has received,[245] the clear public support of CSAs,[246] and the subsequent reaction of high-level authorities including relatively rare comments from Nigeria's Vice President,[247] the pressure on the executive branch generated by Njemanze's broader campaign against the impugned behavior was significantly augmented by this ECOWAS Court ruling.

The ECOWAS Court suit was filed as a part of this broader political strategy to gain increased leverage beyond the court in the political and administrative realm. Prior to filing the ECOWAS Court suit, Njemanze also made a movie, "Silent Tears,"[248] and gave many interviews to the press,[249] both of which helped focus public attention on the issue. Njemanze's prior attempt to litigate the matter in a domestic court had been frustrated by a technicality.[250] What is more, while the first petition she had filed at the same NHRC in 2013[251] had led to the NHRC writing a letter to an executive branch agency,[252] it had not led the NHRC to take

245. Onyinye Edeh, *supra* note 237; Interviewee 21, *in* Appendix B. One significant (though somewhat limited) measure of the media attention this ruling received is the discussion and use of the case on the Internet. For example, a simple Google search of this case on June 8, 2020 using the search terms "Dorothy Njemanze v. Federal Republic of Nigeria" produced nearly 2,000 hits. A simple Google search of these same terms nearly one year later, on March 4, 2021 produced about 1,400 results. Both search results are in the same broad quantitative range. This speaks to the vast public attention that the case has attracted (especially with several prominent Nigerian and other news sources citing the case in their news reports). However, these Google search results were not conclusive since, for example, the case may have also been referenced in other ways such as "Njemanze v. FRN." The Google search engine also has various technical limitations. This is why we employed other Google searches with different terms to cross-check the previous searches. For example, separate Google searches of (a) the exact *case* number of the *Dorothy Njemanze* case, and (b) the exact *judgment* number of that same case, produced 134 and 363 hits, respectively (as of March 4, 2021). It should be noted that case and judgment numbers are rarely used in discussions by the general public on the internet.

246. A measure and illustration of the value that the ruling brought to CSA pressure campaigns on this issue is that over fifty human rights activists and groups (including Njemanze herself and the Dorothy Njemanze Foundation) issued a press release on April 30, 2019 citing this ECOWAS Court's ruling as the basis of their strong condemnation of a subsequent raid on an Abuja night club where women were assaulted, arrested, and detained. *See, e.g.*, *Cease and Desist! Stop Harassment of Women in Nigeria*, Action Aid (Apr. 30, 2019), https://nigeria.actionaid.org/news/2019/press-release [https://perma.cc/RY63-RWAA].

247. The matter has now become so salient and placed enough pressure on the government that, on more than one occasion, the Vice President of Nigeria himself has issued a statement denouncing such behavior by the AEPB and the Police. It is unusual for the vice president of a country (and Nigeria in particular) to attend *personally* to such issues. This is a solid and remarkable measure of the extent of the pressure that the entire Njemanze affair (including the litigation at the ECOWAS court) has placed on the executive branch in Nigeria. *See, e.g.*, Dede Ifayemi, *Osinbajo condemns police raid on women in Abuja*, Today's Echo (May 6, 2019), https://www.todaysecho.com/politics/osinbajo-condemns-police-raid-on-women-in-abuja/ [https://perma.cc/2UU2-LKKZ].

248. amateurheads, *Silent Tears - Dorothy*, YouTube (Jun. 21, 2017), https://www.youtube.com/watch?v=GYSsd6Ky0Q0 [https://perma.cc/4SD2-VDWP].

249. Njemanze v. The Fed. Republic of Nigeria, No. ECW/CCJ/JUD/08/17, ECW/CCJ/APP/17/14, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.], 5 (Oct. 12, 2017), https://ihrda.uwazi.io/en/document/0h6sf6nakud8ntpr39gdabrzfr [https://perma.cc/6SVG-4Q4U].

250. Onyinye Edeh, *supra* note 237. *See also* Interviewee 21, *in* Appendix B.

251. Interviewee 21, *in* Appendix B.

252. *Id*.

the much bolder and consequential step of issuing the kinds of summons to attend a hearing that it eventually issued in October 2019.[253] It also had not led the NHRC to take any other more robust action. Following the ECOWAS Court ruling, and largely because of it, the NHRC was persuaded by Njemanze and allied CSAs to make the heads of the AEPB and other executive agencies appear before it and explain the behavior of their agents, promising on at least one occasion to end the practice.[254] This significantly impacted the decision-making of this key executive branch agency.

Further, following the focused and unrelenting pressure campaigns on the NHRC by Njemanze and her allies, grounded in the ECOWAS Court's ruling, the NHRC has since taken appreciably stronger action against the AEPB and law enforcement officers.[255] It has mounted training sessions for law enforcement officers.[256] It has also established six panels to investigate the kind of SGBV that was at issue in the *Njemanze* case in the six geopolitical regions of Nigeria.[257] While the NHRC could have engaged in these actions without being influenced by the ECOWAS Court ruling, they were in reality influenced by the campaign mounted by Njemanze and other CSAs. Moreover, both Njemanze and the NHRC acknowledge that the ruling played a significant role in the latter's decision-making and action on the impugned type of SGBV. As one of the NHRC's highest ranking officials firmly stated in August 2020:

> We were aware of the Dorothy Njemanze Case as soon as it was issued and it pre-dated many of our decisions and actions on gender issues and sexual and gender-based violence (SGBV). I can say, *without fear of contradiction*, that the decision of the ECOWAS Court in Dorothy Njemanze's Case partly informed our decision and policies, especially on SGBV.[258]

Among other things, the ruling in the *Dorothy Njemanze* case continues to augment the legitimacy of the NHRC's strong positions against such SGBV, allowing it to put even more pressure on law enforcement and executive branch officials that this agency seeks to rein in. The NHRC has, for

253. Njemanze, No. ECW/CCJ/JUD/08/17, at 7 (noting that this earlier petition to the NHRC and petitions to other executive bodies did not lead to redress for Njemanze).

254. Interviewee 21, *in* Appendix B. *See also* Interviewee 91T, *in* Appendix B.

255. Nike Adebowale, *Abuja authorities agree to suspend raid of nightclubs – Official*, Premium Times (May 24, 2019), https://www.premiumtimesng.com/entertainment/naija-fashion/331482-abuja-authorities-agree-to-suspend-raid-of-nightclubs-official.html [https://perma.cc/96HT-U6D8].

256. Nike Adebowale, *Nigeria: Nightclub Raids - NHRC Begins Hearing Over Alleged Harassment of Women*, Premium Times (May 17, 2019), https://allafrica.com/stories/201905170544.html [https://perma.cc/792F-SJ3Q].

257. Ibrahim Shuaibu, *Human Rights Commission Unveils Panel on Sexual, Gender-based Violence in Kano*, ThisDay (Feb. 18, 2020), https://www.thisdaylive.com/index.php/2020/02/18/human-rights-commission-unveils-panel-on-sexual-gender-based-violence-in-kano/ [https://perma.cc/5BTB-M348].

258. Interviewee 91T, *in* Appendix B.

instance, initiated investigative panels focused on probing and highlighting the incidence of SGBV in the main regions of Nigeria.[259]

The ruling raised the human rights profile of the victims of SGBV, in particular, and women's rights in general, in Nigeria. The ruling garnered publicity inside and outside Nigeria.[260] It also ran counter to the argument of Nigerian CSAs that women who are out at night ought not to be stigmatized, harassed, assaulted, detained, or abused merely, because of that fact. This contribution amplified the human rights arguments supporting and defending victims of SGBV in Nigeria.[261] That the ruling has continued to be cited thereafter by a host of women's groups and other activists, as they advocate publicly for other victims of SGBV in Nigeria, illustrates this point.[262]

Significantly, the case was driven by a women's rights activist and other victims. Njemanze herself founded and leads the Dorothy Njemanze Foundation, a human rights NGO. The case was primarily argued by a human rights lawyer who has worked for an international NGO. Both Njemanze and her counsel were supported by a coalition of CSAs.[263] Another civil society actor, the Open Society Initiative for West Africa ("OSIWA"), funded the movie that Njemanze made before the case, which focused on the impugned type of SGBV in Nigeria.[264] Along with many other CSAs in Nigeria, this coalition functions as part of a virtual and informal alliance with the ECOWAS Court itself.

Led by Njemanze and her counsel, these CSAs, a segment of the activist forces in the country, made detailed ends-means calculations that enabled them to function as brainy relays, transmitting the ECOWAS Court's normative energy and values to the NHRC, thereby triggering more robust action on its part. An alteration in the NHRC's decision-making and action was produced through the pressure engineered to a large extent by these activists based on the proceedings and judgment in this case—all of which was fertile ground to help germinate the seeds planted in it.

7. *The* Aliyu Tasheku *Case*

The last example of the kind of correspondence at issue in this Article concerns the Aliyu Tasheku matter. Tasheku, a suspected member of the Boko Haram terrorist group, had been arrested and detained by the Niger-

259. *Id*.

260. *See supra* note 245, on the metrics for gauging the extent of public awareness and media discussion of this case.

261. Onyinye Edeh, *supra* note 237; Interviewee 21, *in* Appendix B.

262. Action Aid, *supra* note 246.

263. Interviewee 21, *in* Appendix B; Onyinye Edeh, *supra* note 237.

264. Onyinye Edeh, *supra* note 237.

ian Police on September 18, 2010.[265] In this highly sensitive national security matter, the High Court of the Federal Capital Territory of Nigeria ruled on May 19, 2011, that Tasheku's arrest and detention were illegal, and ordered his release.[266] Tasheku was also awarded five million NGN in damages (about USD$25,000 at the time).[267] Despite obtaining this favorable domestic court order, the Police did not immediately release him.[268] The domestic court reiterated its order on May 26, 2011.[269]

While detained, Tasheku applied for similar relief at the ECOWAS Court on June 10, 2011,[270] and was released two weeks later, albeit without damages.[271] Thus, despite the ECOWAS Court holding[272] that the suit Tasheku filed was inadmissible for being "essentially the same" as the one already ruled upon by the domestic court,[273] the value of the ECOWAS Court judgment is that it added to the pressure to free Tasheku. The ECOWAS suit did this mainly by increasing the publicity that the case attracted.[274] The suit also strengthened the justification of releasing—in the middle of a war against brutal terrorists—someone whom the Government had insisted was evidently a terrorist.[275] Significantly, two previous domestic court orders had not on their own resulted in Tasheku's release.[276]

Human rights groups and lawyers championed the Tasheku suits in the domestic and ECOWAS courts. The suit in the domestic court was brought with an NGO, the Society against Discrimination, and other Related Intolerance, as a co-plaintiff and supporter.[277] The suit at the ECOWAS Court was brought by the noted human rights lawyer, Chino Obiagwu.[278] Other human rights groups, such as Amnesty International, regularly and keenly commented on and publicized both matters.[279] These groups were both obviously and virtually or informally aligned with one another, with an ECOWAS Court that was by design and agency amenable to their human rights craft. The ECOWAS Court suit augmented the human rights voice of the applicant and his activist and lawyer allies, raising the profile of the

265. Tasheku v. Fed. Republic of Nigeria, No. ECW/CCJ/RUL/12/12, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Jun. 12, 2012), https://ihrda.uwazi.io/en/document/2nhlzj07euaapr51t3urofxbt9?page=1 [https://perma.cc/E37A-VR75].

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *See Tasheku*, No. ECW/CCJ/RUL/12/12.

271. Interviewee 15, *in* Appendix B.

272. *Tasheku*, No. ECW/CCJ/RUL/12/12.

273. Interviewee 15, *in* Appendix B.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *See Tasheku*, No. ECW/CCJ/RUL/12/12.

279. *See Urgent Action: Detention Without Contact with the Outside World*, Amnesty International (May 12, 2011), https://www.amnesty.de/urgent-action/ua-140-2011/haft-ohne-kontakt-zur-aussenwelt?destinationN°de%2F5309 [https://perma.cc/QN8A-M5WD].

case. In this way, the suit also added leverage to activist forces in the broader political campaign to secure Tasheku's release. Tasheku's release evidenced a change in thinking and behavior, produced as a result of ends-means calculations made by activist forces as part of a broader politico-judicial strategy to gain leverage over the Police, altering the logic of the appropriateness of holding him in continued detention.

Additionally, there was no direct compliance here with any ECOWAS Court ruling, as none had even been issued at the time of Tasheku's release. Instead, correspondence with the court's human rights jurisprudence and values was generated in part by the added pressure on the Police and the executive branch by the highly publicized *filing* of this suit at the ECOWAS Court. The threat of being subjected to the ECOWAS Court's process was enough, in this case, to help spur the observed outcome—to tip the "cup" over.

8. *General Conclusions on the Generation of Correspondence Beyond the Compliance Optic*

As discussed above, between 2005 and 2019, many CSAs in Nigeria have, with the support of their allies, been able to deploy an amenable and pro-human rights ECOWAS Court to generate a significant, though limited, degree of correspondence between executive branch action in Nigeria and the rulings and normative values of the court. The relevant CSAs acted as the *brainy relays* that transmitted the human rights values of the court to Nigeria's domestic realm, effectively co-creating the court's human rights impact within that sphere.

These *activist forces* (comprising CSAs in a robust symbiosis with the ECOWAS Court) have also achieved this feat while in a kind of *virtual and informal human rights alliance* that aimed to persuade Nigeria's executive branch to act in a pro-human rights manner. The existence of this virtual alliance is acknowledged by both judges of the court and activists who regularly deploy its processes and rulings. For example, the human rights lawyer who creatively strategized the domestic and ECOWAS Court cases in the *Sa'adatu Umar* matter thinks that the ECOWAS is widely viewed as "an NGO court," i.e., a court that is virtually and informally allied to human rights NGOs, and from which they usually get a "sympathetic" hearing.[280] This sense of identity—of being in a kind of unspoken, non-formalized, cooperative, and mutually rewarding relationship—is also shared by some judges of the ECOWAS Court.[281]

Though significantly fewer cases of direct compliance with the ECOWAS Court's rulings are observable in the Nigerian executive branch context, an appreciable amount of evidence exists and suggests correspondence between

280. Interviewee 15, *in* Appendix B.
281. *See, e.g.*, Interviewees 16, 19, *in* Appendix B.

executive decision-making in Nigeria and the human rights values and jurisprudence of the ECOWAS Court. Correspondence has therefore been the source of the bulk of the impact that the ECOWAS Court has had thus far on the executive branch in Nigeria.

Thus, the deployment of the court by CSAs has produced important positive effects within Nigeria in terms of executive decision-making and action. The court's proceedings and rulings have helped strengthen the human rights voice within the executive, in executive policy documents, in some of the memoranda the executive has produced, and some of its other actions.[282] As described above, the deployment of ECOWAS Court suit filings, proceedings, and rulings has at times also increased the leverage that Nigeria's creative CSAs have had to push their human rights agenda as part of a broader political struggle to create alterations or new directions in executive branch decision-making and action.[283] This added leverage has helped these CSAs pressure the executive for, and contribute significantly to, the achievement of modest changes in executive decision-making and action in Nigeria.[284]

On the whole, these case studies exemplify correspondence theory. They also dovetail with the related theories outlined in Section II.C, *supra*. Specifically, these case studies echo Alter's theory on compliance constituencies who deploy international courts as leverage within specific political terrains, and Gathii's thesis on some African courts being deployed by human rights activists as a part of a broader political strategy. These cases also exemplify the strategic social constructivist approach of Finnemore and Sikkink to the domestic impact of international human rights ideas, norms, and institutions, which argues that human rights activists make ends-means calculations, and draw-up and deploy strategies, to ensure the diffusion of international human rights norms within states.[285]

IV. Explaining the Sub-Optimal Measure of the Court's Impact

The analyses in Part III demonstrate that the ECOWAS Court has had a significant impact on executive, legislative, and judicial decision-making and action, as well as on the work of CSAs within Nigeria. Nevertheless, it should also be clear that this appreciable domestic impact, be it through compliance or the kinds of correspondence that lie beyond that optic, has been sub-optimal. The court has clearly not exhausted the full extent of its possible domestic impact in Nigeria, even accounting for the harsher socio-political context in which it has had to function. To explain this sub-opti-

282. *See also* Section III.B, *supra*.

283. Alter, *supra* note 1, at 19–24, 53; Gathii, *supra* note 2, at 296; Okafor, *supra* note 6, at 93–95.

284. Alter, *supra* note 1, at 19–24, 53; Okafor, *supra* note 6, at 93–95.

285. Finnemore & Sikkink, *supra* note 80, at 895.

mal measure of the court's impact in Nigeria, and to understand how the court could markedly improve its domestic impact, it is important to analyze the exact conditions under which the court has had the desired domestic impact. What factors "help shape the self-understandings, conceptions of interest, or logics of appropriateness held within key institutions in Nigeria," leading to beneficial decision-making and action in many cases?[286] To answer this question, this Part considers factors that have combined to shape domestic impact, meaning the sets of key factors that have either facilitated or militated against the exertion of such influence by West Africa's international human rights court.[287] Discussion of the facilitating factors will precede consideration of the militating ones.

A. The Key Factors that Facilitate the Court's Impact

1. *The Creativity and Dynamism of Local CSAs*

As discussed in the previous Part, one of the most important factors that has facilitated the significant impact of the ECOWAS Court within Nigeria is the "incredible creativity and dynamism" of the Nigerian CSA community.[288] This well-established and widely acknowledged fact is admitted by even some of their strongest critics.[289] Despite the many difficulties CSAs face, and their many shortcomings, Nigerian CSAs remain among the very strongest on the African continent.[290] Most importantly for present purposes, these CSAs have been the primary drivers of the impact that the ECOWAS Court has had on Nigeria's executive branch. Indeed, they have also brought the largest number of cases to the court, far outstripping any other national CSA community.[291] For example, of the 126 cases that are listed on the court's website as of August 5, 2020, thirty originated from Nigeria and almost all of them were driven by Nigerian CSAs.[292] Of the next two most populous countries in the region, only five such cases originated in Côte d'Ivoire, and only four from Ghana.[293] The next highest numbers of cases originated from Togo (fifteen cases) and Mali (fourteen cases), both countries that are not as populous as Ghana and Côte d'Ivoire.[294] These figures are not that surprising given that Nigeria is home

286. This constructivist question, taken from Okafor's previous work, is the key one that correspondence theory seeks to answer, and it bears emphasis here to state that it is not *limited* to the mapping of state compliance. *See* Okafor, *supra* note 6, at 148.

287. A similar exercise is undertaken in relation to the African system's domestic impact within Nigeria in Okafor's earlier work. *See* Okafor, *supra* note 6, at 148.

288. *See generally* Okafor, *supra* note 149.

289. *See, e.g.*, Omolade Adunbi, *Embodying the Modern: Neo-Liberalism, NGOs, and the Culture of Human Rights Practices in Nigeria*, 89 Anthropological Q. N. 2, 431–64 (2016). *See* Ekhator, *supra* note 146; Okafor, *supra* note 149; Okafor, *supra* note 6, at 148–49; Okafor, *supra* note 146.

290. *See, e.g.*, Okafor, *supra* note 6, at 148, 256 n. 110.

291. Interviewee 20, *in* Appendix B.

292. Quantitative analysis report by Kiana Blake (on file with Authors).

293. *Id.*

294. *Id.*

to about half of the population of the ECOWAS region and the ECOWAS Court sits in its capital, Abuja. However, what is significant is that the dynamism of these CSAs is primarily responsible for their dominance in the cases before the ECOWAS Court. This can be illustrated further by the well-documented historical record of CSAs tending to drive most of the cases brought before the African Commission on Human and Peoples' Rights, which sits in Banjul, The Gambia.[295]

To drive this domestic impact, CSAs have worked both in formal coalitions with each other and in a virtual and informal alliance that has included both their peers and the court itself. Nigerian CSAs also received support, at times, from regional and other foreign CSAs, such as the Gambia-based Institute for Human Rights and Development in Africa.[296] There is also strong evidence that these Nigerian CSAs have at times aligned with the ECOWAS Commission (the secretariat of the regional organization of which the court is a part) to strengthen and defend the court's continued availability to them and others as an important resource.[297]

Without the keen and sustained engagement of these CSAs with the ECOWAS Court, the court would have had far less impact on Nigeria's executive branch. Though not all Nigerian CSAs have engaged with the court, desire to engage with it, or are even familiar with or aware of its processes and potential, many of them have engaged with Nigerian CSAs in remarkable ways, often with much profit to themselves, victims of abuses, and the broader community. This dovetails with earlier findings related to CSAs' performance of the "brainy relay" function in the case of the African system's domestic impact in Nigeria and elsewhere in Africa.[298]

2. *An Amenable Court*

As important a factor in facilitating the ECOWAS Court's impact on Nigeria's executive branch is that the court's design, structure, and orientation has made it very receptive to the ideas, tactics, and strategies deployed by CSAs, ensuring its attractiveness to many Nigerian CSAs. As prospective plaintiffs are not required to first exhaust domestic remedies before approaching it,[299] the design of the court as a court of first instance has made

295. Okafor, *supra* note 6, at 258.

296. Interviewee 13, *in* Appendix B.

297. Interviewees 4, 8, *in* Appendix B; Alter et al., *supra* note 4, at 738, 752.

298. *Id.*

299. *See also* Saidykhan v. The Gambia, No. ECW/CCJ/JUD/08/10, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Dec. 16, 2010), https://ihrda.uwazi.io/ar/document/froafttgl56tn7350qszzd7vi?raw=true [https://perma.cc/2UGP-VNZA]; Essien v. The Gambia, No. ECW/CCJ/APP/05/05, Decision, ECOWAS Community Court of Justice [ECOWAS Cmty. Ct. of Just.] (Mar. 14, 2007), http://www.worldcourts.com/ecowasccj/eng/decisions/2007.03.14_Essien_v_Gambia.htm [https://perma.cc/4VS7-6Z7A]; *see also* Amos O. Enabuele, *Sailing against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Court of Justice*, 56 J. Afr. L. J. Iss. 2 268–95 (2012) (providing a critique of this kind of liberal access to the court).

it significantly attractive to local CSAs, who are afforded readier and easier access to the court.[300] As has been shown elsewhere:

> This capability was granted to the court as a result of its (re)design under the *Supplementary Protocol of 2005*. This Protocol introduced a new Article 10(d) into its original *Protocol of 1991* (as amended). This provision achieves this objective by simply omitting any reference to the prior exhaustion of domestic remedies from its rather short list of pre-conditions for the admissibility of human rights cases that are filed at the court.[301]

Increasing its attractiveness to CSAs, the court has also been courageous, independent, and mildly dynamic in orientation. As one of its former judges put it, "[West African] governments are more careful with us [than they are with their domestic courts] because they know our court is independent of them. They don't have jurisdiction."[302] And as a senior human rights lawyer and activist noted, the court is widely perceived as NGO-friendly, which in the Nigerian context also implies that it is both useful for the work of these CSAs and not afraid to rule against the Nigerian government even in the most sensitive cases, an orientation that is palpable from even a cursory glance at its body of caselaw.[303] As a former ECOWAS judge noted, this structure and orientation has generated an appreciable measure of confidence among CSAs in their ability to secure pro-human rights rulings from the court.[304] Even the court's fiercest critics grudgingly admit to this reality. According to one of the critics, despite his disappointment regarding enforcement of the court's rulings, he would still argue that the court is valuable to human rights litigants as a judicial forum in which they can obtain favorable rulings that document the violations against them.[305] It is, in part, because of this relative confidence that the CSAs have regularly deployed ECOWAS Court rulings as an alternative to the domestic court system. This strategy in turn helps CSAs circumvent the politicization of problems within them.[306]

In the end, it is crystal clear that the design, orientation, and attitude of the ECOWAS Court has generated domestic impact in Nigeria, mostly via correspondence. Without its receptivity, and the favorable rulings it gave to CSAs, far less impact would be generated.

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300. *See* Obiora C. Okafor & Okechukwu J. Effoduh, *The ECOWAS Court as a (Promising) Resource for Pro-Poor Activist Forces*, *in* The Performance of Africa's International Courts 106, 133 (James T. Gathii ed., 2020). *See also* Interviewees 8, 13, 15, *in* Appendix B.

301. Okafor & Effoduh, *supra* note 300, at 133.

302. Interviewee 16, *in* Appendix B.

303. Interviewee 15, *in* Appendix B.

304. Interviewee 16, *in* Appendix B.

305. Interviewee 4, *in* Appendix B.

306. *See, e.g.*, Interviewee 15, *in* Appendix B.

3. *The Size of Available Political Space in the Country*

Another major factor that has significantly facilitated the ECOWAS Court's impact on Nigeria's executive branch, is the sizeable political space available in Nigeria, regardless of formal governance regime-type. This factor could also be described as "substantive regime type," an expression that emphasizes the non-formalist sense in which it is intentionally used.[307] There is no doubt whatsoever that substantive regime-type matters when considering the ability of Nigerian CSAs to drive the ECOWAS Court's impact on Nigeria's executive branch.

A large number of deep divisions within Nigeria have made Nigerian political structures and culture much more amenable to negotiation, compromise, and concerted popular pressure than is commonly realized.[308] This has been true in Nigeria's largely quasi-or semi-democratic fourth republic,[309] which has run uninterrupted since 1999.[310] And it was the case during the relatively more liberal democratic Jonathan administration between 2010 and 2015. Jonathan was the first and only president to voluntary concede defeat in an election in which he stood as a candidate to the opposition.[311] Even more remarkable is the fact that this kind of political culture existed during the several decades that Nigeria was under military rule,[312] with the notable exception of 1993 to 1998, when the country was under the unprecedented throes of the bare-fisted repression of the Abacha junta.[313]

One effect of this political culture has been the need among the political elite to secure a modicum of popular legitimacy, which they treat as key to the maintenance of their mutual access to power and status. In turn, the sociopolitical environment almost always tends to be significantly less harsh than expected, and thus is modestly receptive to the pro-human rights pressures of CSAs (including the products of their endeavors at the ECOWAS

307. *See* Okafor, *supra* note 6, at 263–65. Okafor's earlier work has, for instance, shown that the African system had far more influence within (at the time) mostly military-ruled Nigeria than liberal democratic South Africa, and that the extent of the domestic influence of that system has not depended on the status of a given country as a liberal democracy or not. *Id.*

308. Okafor, *supra* note 6, at 149–50; Okafor, *supra* note 146, at 45; Julius O. Ihonvbere, *Are Things Falling Apart? The Military and the Crisis of Democratization in Nigeria*, 34 J. Mod. Afr. Stud. 193, 204 (1996).

309. The term "quasi" is used here mostly in the sense of "partly."

310. Aderonke Majekodunmi & Felix O. Awosika, *Godfatherism and Political Conflicts in Nigeria: The Fourth Republic in Perspective*, 2 Int'l J. Mgmt. & Soc. Sci. Res.. 70, 72 (2013); Okafor, *supra* note 146, at 41–42.

311. Justine C. Igbokwe-Ibeto, *Election and Democratic Consolidation in Nigeria: An Analysis of the 2015 General Elections*, 5 Arabian J. Bus. & Mgmt. Rev. 2, 8 (2016).

312. *See* Ayo Olutokun, *Authoritarian State, Crisis of Democratization and the Underground Media in Nigeria*, 101 Afr. Aff. 317, 317–18 (2002); Ihonvbere, *supra* note 308, at 196–99; Okafor, *supra* note 146, at 26–28.

313. Okechukwu Oko, *Lawyers in Chains: Restrictions on Human Rights Advocacy under Nigeria's Military Regimes*, 10 Harv. Hum. Rts. J. 257, 260–61 (1997).

Court).[314] This attempt to at least present a pro-human rights image of a government that "rules by the law," regardless of its nature as a military junta, has long been described by Nigerian judges as rule *by* law.[315] One experienced human rights lawyer has, for example, correctly noted that even today, perhaps as a legacy of it being caught in between its military era and at least formal democratic constitution, "Nigeria tries to put forward a show that it complies with human rights . . . . It takes the African Commission on Human and Peoples' Rights very seriously and engages with it closely."[316] The Nigerian government's approach is similar in regard to its attitude toward the ECOWAS Court.

Given these realities, it is no surprise that the evidence discussed in Part III, *supra*, revealed a modest level of executive branch correspondence generated in large measure through CSA-driven pressure on state and society in Nigeria. Indeed, the court's official figure of an approximately fifty percent compliance rate by Nigeria (most likely accounting for instances of correspondence as well) fits quite remarkably into this picture of a semi-democratic regime painted by the Nigerian government. This approach is thus moderately amenable to CSA-driven pressure to implement the ECOWAS Court's rulings or normative values. In the end, the point is that "the mildly receptive Nigerian environment was a significantly [if only modestly] fertile soil within which the seed of the . . . [ECOWAS Court] could sometimes germinate and yield a modest harvest."[317]

4. *Less Pivotal Factors*

Lastly, some less significant factors contribute to the domestic impact of the ECOWAS Court in Nigeria. Two of these factors are of most relevance to this Article. The first is that the physical location of the court in Nigeria's capital has contributed to the ease of physical access to, and the intensity of its utilization by, Nigeria's CSAs. This has in turn helped make the court more visible to these local actors than might otherwise have been the case. The second is that the court's ability to adjudicate economic and social rights—and its dynamic insistence on doing so in ways that have strengthened the argument of those local CSAs, such as SERAP, who focus their struggles on the realization of that category of rights—has also helped to bolster the court's impact on the executive branch in Nigeria. Although such rights are widely thought to be non-justiciable as constitutional rights in Nigeria, they may become justiciable as statutorily enacted rights. The ECOWAS Court has provided new terrain within which the CSAs care to work. It is no wonder then that, as Part III shows, the *SERAP Environmental*

314. *See, e.g.*, Okafor, *supra* note 146, at 33–49.

315. This notion was at the very least implied by the Supreme Court of Nigeria in *Ojukwu v. Mil. Gov. Lagos State* [1985] 3 NWLR 26, 39 (Nigeria).

316. Interviewee 13, *in* Appendix B.

317. Okafor, *supra* note 6, at 151.

Rights case and the *SERAP Education Rights* cases have been two of the most popular and impactful within the country.

B. The Key Factors that Militated Against the Court's Impact

1. *Regime Intransigence*

Nigeria's political regime-type has been substantively quasi- or semi-democratic at least since 1999. This political status has also meant that its governance has not been democratic, including during the 2004 to 2019 period under study.[318] Thus, one of the most important of the factors that have militated against the impact of the ECOWAS Court on Nigeria's executive branch has been the harsh nature of its quasi-democracy. For example, for almost the entire period under study, the disobedience of domestic court orders was rife in Nigeria. Countless orders, including in human rights cases, were either outright disobeyed, or for prolonged periods of time. Early in its tenure, the current government was also widely condemned for state-ordered home invasions of judges by the Nigerian Department of State Security ("DSS") under the guise of sting operations to root out corruption.[319] The government also faced uproar when it forced out the then-Chief Justice of Nigeria in a manner that the Nigerian Court of Appeal later determined to be illegal.[320] The DSS's attempted invasion of Nigeria's federal legislature was met with similar condemnation, although the then-acting President fired the then-DSS boss for authorizing the invasion.[321]

The point here is that it would not have been realistic to expect the ECOWAS Court, a relatively young regional human rights court with no enforcement arm, to have had *a very high degree* of impact (especially through direct compliance) on such a quasi-democratic regime. As one former judge of the ECOWAS Court forcefully argued, "we are in the context of the fragility of law. The context [in West Africa] is not really favorable to human rights, the courts, and even the law. Member states do not have a democratic culture."[322] This view was more or less echoed by all ECOWAS Court judges interviewed and all the other respondents, the vast majority of whom were ECOWAS Court officials, government officials, human rights lawyers, and other activists.

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318. Majekodunmi & Awosika, *supra* note 310, at 72–74.

319. Senator Iroegbu & Ernest Chinwo, *DSS Operatives Invade Judges' Homes in Abuja, Rivers, Gombe*, ThisDay (Oct. 8, 2016), https://www.thisdaylive.com/index.php/2016/10/08/dss-operatives-invade-judges-homes-in-abuja-rivers-gombe/ [https://perma.cc/27RB-YRNM].

320. Onnoghen v. Nigeria [2019] LPELR-47689 (Nigeria). *See also* Felix Omohomhion, *Appeal Court upturns Onnoghen's suspension, says it's illegal*, Business Day (May 10, 2019), https://businessday.ng/lead-story/article/appeal-court-upturns-onnoghens-suspension-says-its-illegal/ [https://perma.cc/T45L-BYRP].

321. Stephanie Busari & Bukola Adebayo, *Nigeria's intelligence chief fired over parliamentary blockade*, CNN World (Aug. 7, 2018), https://www.cnn.com/2018/08/07/africa/nigeria-security-chief-daura-fired/index.html [https://perma.cc/8MC6-KMUD].

322. Interviewee 19, *in* Appendix B.

2. *A Persisting Visibility and Awareness Deficit*

Another important factor that has inhibited the success of the ECOWAS Court is that, although the court is highly visible because of its physical location in Abuja and the many media reports of its rulings on Nigerian cases, awareness of the full extent of its existence, utility, and promise as a resource is still sub-optimal. This is true among lawyers and activists, and especially among the general public.[323] Almost all interviewees who commented on this issue lamented the inadequate coverage of the court in Nigerian media.[324] Alternatively, some lawyers who were aware of the existence of the ECOWAS Court—though not necessarily well-versed on its processes and usefulness as a resource—reported their preference not to use it, and to instead deploy the domestic courts.[325] Unfortunately, as previously mentioned, this category of human rights lawyers tend not to be sufficiently aware of, or are even misinformed about, how the court can aid their work.[326] Almost all respondents either said or implied that the ECOWAS Court was still not front and center enough in the minds of lawyers and activists in Nigeria, let alone the general public, and that its media profile in the country needs to be augmented.[327] Many of the respondents suggested that the court itself needed to take action to help popularize itself[328] which for some of them needed to be done in tandem with more widespread teaching about the court at all levels of education, including in law and bar schools in the country.[329] A former judge of the court reported that the court has been highly constrained in its ability to take such steps, especially through undertaking more travelling sensitization campaigns, because of inadequate finances.[330] The court's popularization gap in Nigeria, however large or small it really is, has *reduced* the spread of knowledge about how and when to use it, even among human rights lawyers and activists, thereby curtailing the optimization of its impact within Nigeria.

3. *The Affordability of the Monetary Compensation Awarded by the Court*

Another major factor that has militated against the domestic impact of the ECOWAS Court in Nigeria is the affordability of the monetary compensation it orders against losing governments. As Alter et al., have correctly argued in regard to the *Karaou* case from Niger Republic,[331] the less affordable a judgment debt is, the less the likelihood that the West African state addressed by the court's order will be able to pay, even when they may

323. *See* Interviewees 1, 4, 5, 8, 10, 12, 14, 23, 24, 25, 26, 40X, 64, *in* Appendix B.
324. *See* Interviewee 8, *in* Appendix B.
325. *See* Interviewees 1, 4, 5, 8, 9, 10, *in* Appendix B.
326. *See* Interviewees 4, 9, 21, 25, *in* Appendix B.
327. *See* Interviewees 2, 10, 14, 24, 26, *in* Appendix B.
328. Interviewees 10, 26, *in* Appendix B. *See also* Interviewees 14, 24, *in* Appendix B.
329. Interviewees 10, 14, *in* Appendix B.
330. Interviewee 18, *in* Appendix B. *See also* Interviewee 11, *in* Appendix B.
331. Alter et al., *supra* note 4, at 765–67.

wish to do so. For example, this was an important factor in Nigeria's executive branch's decision to pay the lower sum awarded to the *Apo eight* by the National Human Rights Commission, rather than the "outrageous" larger sum awarded to the same plaintiffs by the ECOWAS Court.[332] Another good illustration is the continued difficulty that the government has faced in paying the massive judgment debt it incurred by consenting to the ECOWAS Court ruling and award in the *Vincent Agu* case, a debt that it freely and openly agreed to pay by not fighting the case and reaching a consent judgment with the plaintiffs.[333] This has been so despite its own counsel's assurances that the government will soon pay the judgment debt.[334]

4. *Other Less Pivotal Factors*

Lastly, the ECOWAS Court is a relatively young court,[335] and the CSAs who have mostly driven its human rights impact within Nigeria are not as well-resourced as they could be.[336] Both factors have clearly imposed on the time the court has had to grow into a distinguished body, as well as the capacity of the CSAs to both take even more cases to it and more deeply engage in the relentless, often resource-intensive, and prolonged campaigns to drive the domestic impact of the court.

Conclusion

There is at present not yet a general theory of domestic impact specific to the ECOWAS Court. Much already exists in terms of acute thinking on the court and its performance. Many of these interventions have been discussed and relied on in this Article. It is, however, still important to integrate these insights with an eye to building, over time, a much more general theory on the court's domestic impact. The evidence, analyses, findings, and theorization presented in this Article are intended to contribute to this suggested theoretical labor.

This discussion clearly demonstrates that many CSAs have acted as the brainy relays or intelligent transmission lines who—in actual or virtual alliance with their peers, the court itself, and others—have deployed the

332. Interviewee 77E, *in* Appendix B.

333. Agu et al. v. The Fed. Republic of Nigeria, No. ECW/CCJ/APP/06/12, No. ECW/CCJ/JUD/14/17, Decision, ECOWAS Community Court of Justice [ECOWQS Cmty. Ct. of Just.], (Oct. 30, 2017), https://africanlii.org/ecowas/judgment/ecowas-community-court-justice/2017/12 [https://perma.cc/UN5W-YW64]; Ikechukwu Nnochiri, *FG agrees to pay N88bn compensation to victims of Biafra war*, Vanguard (Oct. 30, 2017), https://www.vanguardngr.com/2017/10/fg-agrees-pay-n88bn-compensation-victims-biafra-war/ [https://perma.cc/9CTJ-BFK5].

334. *See also* Anene-Maidoh, *supra* note 13, at 9 (recounting statements from the Government's counsel, Femi Falana that the Attorney General of Nigeria had promised him that it would soon pay the agreed sums).

335. Alter et al., *supra* note 4, at 737.

336. Interviewee 5, *in* Appendix B.

ECOWAS Court as an integral part of their broader political struggles, to draw attention to the human rights struggles of those whose voices are otherwise marginalized, and to exert pressure on Nigeria's executive branch, at times gaining sufficient leverage to drive the domestic impact of the court on that branch of government. This impact was mostly achieved through the generation of much more correspondence beyond the compliance optic, rather than through direct compliance. This evidence exemplifies the correspondence theory on the domestic impact of international human rights institutions, and dovetails with some other theories (such as those by Alter, Gathii, and Sikkink and Finnemore).

As discussed above, the domestic impact of an international human rights court lies along a continuum. The ECOWAS Court has had such impact whenever its process or rulings have contributed meaningfully to the augmentation or enhancement of the following: human rights voice; a broader political strategy to pressure the government into altered decision-making and action; leverage over government branches or agencies; and the generation of actual alterations. The focus cannot be exclusively on actual alterations in the behavior of the executive or other branches of government.

Against this background, what then, broadly speaking, are the minimum conditions under which the ECOWAS Court would likely exert *optimal* domestic impact on Nigeria's executive branch? These conditions have already been discussed, even if impliedly, in the last Part of this Article. Such a level of impact will be most likely to occur under conditions in which local CSAs are robust enough; the domestic regime-type allows sufficient space for these CSAs to mobilize even more intensely and to be taken seriously enough; the court is accessible, receptive, and amenable enough; the court is visible enough among human rights lawyers and activists (and even to the general public) and its utility to them is even better appreciated; and its monetary awards are consistently more affordable for the states concerned.[337]

In addition to the factors discussed above, two other factors are relevant. The first is that an international court's domestic impact anywhere tends to require a *process*, often a prolonged one, and is not usually an event. The process may be short, but it is still a process. In quasi-democracies, therefore, there is a need to judge impact over longer periods, even over the long term. This has certainly been the case in Nigeria, where correspondence, and even compliance, has almost always taken longer than normal. Relatedly, the second factor is that the wheels of the Nigerian state usually turn slowly. Importantly, the two points made here are about the need to allow more time for impact to occur. Otherwise, snapshots taken at particular

337. Huneeus is correct that the "difficulty thesis," as she refers to it, always needs to be interrogated for specificity and what lies behind it. The specific difficulty is specified and articulated in detail earlier on in this Article. *See* Huneeus, *supra* note 9.

moments may miss out on the slow churning wheels of progress toward impact—aided significantly by the pressure exerted by the CSAs.

This Nigeria-specific body of evidence and thought on the minimum conditions under which the ECOWAS Court can wield its optimal influence within the most important country in the region, points in the direction of the potential for a more general (though not totalizing) explanation of how the court exerts domestic influence both on other branches of government in Nigeria, and within other West African states. It is thus also suggestive of how the court could realize more fully its potential for optimal domestic impact in those contexts.

Yet, a word of caution must be voiced here. Nigeria is as similar to these other West African states as it is different from them. For one, it is larger and much more socio-politically varied than any of the other states. It is also much more economically and politically influential than any one of the others as a state. Its civil society is one of the most vibrant in the region, and most of the cases that have come before the court have so far come from Nigeria. Having said this, however, on a certain level of generalization, it does share similar political histories, realities, and cultures with all of these other states.

As importantly, it should also be emphasized that the points discussed here also contribute to the explanation of a more general puzzle as to how relatively "powerless" international human rights courts come to exert significant influence on state and society in harsher, quasi-democratic, and more repressive climates. A related puzzle to which the discussion here contributes is how such "powerless" courts are able to achieve significant impact and exert a measure of ideational and even material power over far more "powerful" states. These are questions that, as previously discussed, have been productively tackled by Alter, Gathii, Helfer, Ebobrah, and Sikkink and Finnemore, among many others. As Alter and Forbath have each noted or implied, it is also a question that is not necessarily unique to the study of international, as opposed to domestic, courts.[338]

Lastly, more research on the ECOWAS Court's impact on state and society within other ECOWAS member states is required before a more general theory on the court's domestic impact can be developed or offered. This Article—focused as it is on the court's domestic impact on the executive branch of the government of the country that steers the affairs of about fifty-percent of West Africa's population—has developed an important way-station along this much longer conceptual route.

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338. Alter, *supra* note 1, at 20; William E. Forbath et al., *Cultural Transformation, Deep Institutional Reform, and ESR Practice*, *in* Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty 52, 87 (Lucie White & Jeremy Perelman eds., 2010) (observing in relation to the South African Constitutional Court that "the policy-shaping and policy-changing work of the 2002 Constitutional Court decision on Nevirapine and PMTCT was largely done outside the Court via pressure, protests, proposals, and alliances, with reformers inside government, before the litigation even got under way").

Appendix A: Definition of Key Terms

ACHPR Phenomenon	"An ACHPR (African Charter on Human and Peoples' Rights) Phenomenon is best realized when local activist forces especially CSAs [i.e. civil society actors] lead a process of trans-judicial communication that involves the creation of a virtual network among the African system as well as the deployment by these activist forces of the norms and/or processes of the African system within key domestic institutions, such as the judiciary, the legislature, and the executive, in ways that can often enable previously unavailable arguments to become available and acquire even more persuasive power; increase the success rate of these arguments; and facilitate alterations in the logics of appropriateness, conceptions of interest, and self-understandings that had hitherto prevailed within the relevant domestic institutions."[339]
Activist Forces	"The expression 'activist forces' refers to the activist judges and civil society actors (CSAs) who openly . . . challenge . . . and continue to fight to ameliorate human rights violations in countries like Nigeria . . . While these groups are described . . . as activist because they tend to possess this 'resistance character,' it is worthwhile to note, even at the outset, that the activist orientation of any of these actors does not settle the question of the nature of its political ideology. While most of these activist forces will be considered by most observers as progressive rather than regressive elements, this cannot always be said for every such actor. To be clear, reference to CSAs . . . (as a subgroup of activist forces) are meant to include one or more of the following: self-professed human rights CSAs, activist lawyers, women's groups, faith-based groups, trade

339. Okafor, *supra* note 6, at 4.

	unionists, university students . . . professional groups (such as the Nigerian Bar Association), independent journalists and other actors."[340]
Advocacy networks	Networks "among domestic and transnational actors who manage to link up with international regimes, to alert Western public opinion and Western governments" and are purposive to the constitution of "necessary conditions for sustainable domestic changes in the human rights area."[341]
African Human Rights System	"The African Human Rights System refers to the main more general human rights system which is operational on the continent, and which was established by the African Charter on Human and Peoples' Rights in 1981 and physically set up in 1987. This more general African system consists in the main of the African Charter, the African Commission on Human and Peoples' Rights, the new Protocol on the Rights of Women in Africa, and the new African Court of Human and Peoples' Rights. As such, references in this work to the system includes reference to the African Charter (the treaty on which the system is founded and which iterates the system's goals and norms), to its Protocols (on the establishment of a Court and on women's rights), and to the African Commission (which was established by that treaty, inter alia, to monitor the observance of states with its provisions.)"[342]
Brainy relays	Brainy relays (or intelligent transmission-lines) between the African system, and various institutions and actors within Nigeria (such as courts, the executive, and the legislature), operate by transmitting and contributing actively to the development and

340. *Id.* at 3.
341. Risse & Sikkink, *supra* note 84, at 5.
342. *Id.* at 2.

	strengthening of both the Nigerian and African human rights systems,[343] or bridging a jurisdictional gap,[344] or easing the normative system's energy and values,[345] mediating the impact of the African Charter locally,[346] or helping to facilitate the percolation of the African system's norms into Nigeria's domestic sphere.
Compliance constituencies	Used in reference to "ever-changing groups of actors that for a variety of reasons may prefer policies that cohere with international law," which contribute in creating a variation dynamic in the ways international courts, acting on the delegated authority by States, "alter domestic and international outcomes."[347]
Constructivism	"Constructivist theorists view norms as shared understandings that reflect legitimate social purpose. According to the constructivist thesis, the study of the impact of international institutions must take very seriously the ways in which these institutions can shape, have shaped, and do constitute, the self-understandings, preferences, and interests of states."[348]
Correspondence	*Correspondence* refers to the "production of the desired kinds of thinking and action within key domestic institutions that is attributable, at least in part, to an [international human rights institution ("IHI")]. Such correspondence almost always occurs in the context of the significant deployment of IHIs on the domestic level by local agents."[349]
Engagement	This includes activities of influence, communication, strategy or collaboration as

343. Okafor, *supra* note 6, at 94.
344. *Id.* at 128.
345. *Id.* at 164.
346. *Id*. at 167.
347. Alter, *supra* note 1, at 62.
348. *Id.* at 27.
349. Okafor, *supra* note 6, at 277–88.

	between activist forces, domestic institutions, individuals, institutions, and even states (including technical support, motivation, and funding).
Logic of appropriateness	"The logic of appropriateness is a perspective on how human action is to be interpreted. Action, policy making included, is seen as driven by rules of appropriate or exemplary behavior, organized into institutions. The appropriateness of rules includes both cognitive and normative components."[350] "Within the tradition of a logic of appropriateness, actions are seen as rule-based. Human actors are imagined to follow rules that associate particular identities to particular situations, approaching individual opportunities for action by assessing similarities between current identities and choice dilemmas and more general concepts of self and situations."[351]
Norm entrepreneurs	Actors who persuasively "attempt to convince a critical mass of states (norm leaders) to embrace new norms."[352]
Principled issue-networks	Networks that "are driven primarily by shared values or principled ideas—ideas about what is right and wrong—rather than shared causal ideas or instrumental goals."[353]
Quasi-Constructivism	This term is used to capture the work of several scholars who have applied or urged a synthesis of constructivist and rationalist schools of thought. Quasi-Constructivism, at least in part, is a recognition of the existence of a gap in the constructivist account of the impact of international institutions that has led several scholars to seek to rethink aspects of constructivism, and propose revised and

350. James G. March & Johan P. Olsen, *The logic of appropriateness* 3 (ARENA Ctr. Eur. Stud. U. of Oslo, Working Papers WP 04/09).

351. James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 Int'l Org. 943, 951 (1998).

352. Finnemore & Sikkink, *supra* note 80, at 895.

353. Sikkink, *supra* note 83, at 412.

	eclectic forms of that analytical framework.[354]
Transnational-advocacy networks	"Networks of activists, distinguishable largely by the centrality of principled ideas or values in motivating their formation."[355]
Trans-judicial communication	This refers to the "brokered transnational transmission of norms, ideas, or knowledge between the African system (which in reality functions in a kind of quasi-judicial mode) and the key domestic institutions of some states parties to that system. This transmission of norms has been brokered and facilitated by the activist forces, especially human rights CSAs which operate within these states."[356] This expression has also been used to describe the phenomenon of "communication among courts—whether national or supranational—across borders."[357]

354. Okafor, *supra* note 6, at 277–88.
355. Keck & Sikkink, *supra* note 85, at 1.
356. Okafor, *supra* note 6, at 3.
357. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. Rich. L. Rev. 99, 101 (1994).

Appendix B: Interview Reference List

The Authors conducted a number of interviews in Nigeria or over email. Those referenced in this Article are provided below. Information regarding each interview has been partially redacted to protect the identities and anonymity of those interviewed.

Interview	**Location**	**Position**	**Organization**
Interviewee 1	Abuja	Lawyer	Private Legal Practice
Interviewee 2	Abuja	Official	Foreign Ministry of Nigeria
Interviewee 3	Abuja	*N/A*	ECOWAS Court
Interviewee 4	Abuja	Human Rights Activist	Civil Society Legislative Advocacy Centre (CISLAC)
Interviewee 5	Abuja	Human Rights Activist	CISLAC
Interviewee 6	Abuja	Human Rights Activist	CISLAC
Interviewee 7	Lagos	Human Rights Activist and Lawyer	Human Rights Ambassadors, Private Legal Practice
Interviewee 8	Lagos	Human Rights Activist	Media Rights Agenda
Interviewee 9	Lagos	Activist and Lawyer	Sickle Cell Aid Foundation, Private Legal Practice
Interviewee 10	Lagos	Human Rights Activist and Lawyer	Social and Economic Rights Action Centre
Interviewee 11	Lagos	Human Rights Activist	Civil Society Network Against Corruption
Interviewee 12	Lagos	Human Rights Lawyer	Private Legal Practice
Interviewee 13	Lagos	Human Rights Activist and Lawyer	Institute for Human Rights and Development in Africa

Interview	Location	Position	Organization
Interviewee 14	Lagos	Human Rights Activist	Centre for Anti-Corruption Open Leadership
Interviewee 15	*N/A*	Senior Human Rights Activist and Lawyer	Legal Defence and Assistance Project
Interviewee 16	Abuja	Former Judge	ECOWAS Court
Interviewee 17	Abuja	Judge	ECOWAS Court
Interviewee 18	Abuja	Judge	ECOWAS Court
Interviewee 19	Abuja	Official	ECOWAS Court
Interviewee 20	Abuja	Official	ECOWAS Court
Interviewee 21	Abuja	Activist	Dorothy Njemanze Foundation
Interviewee 22	Lagos	Lawyer	Private Legal Practice
Interviewee 23	*Email Interview*	Official	National Human Rights Commission (NHRC)
Interviewee 24	Lagos	Human Rights Activist	Joint Initiative for Development
Interviewee 25	Abuja	Human Rights Activist	Cleen Foundation
Interviewee 26	Abuja	Human Rights Activist	Yar'Dua Foundation
Interviewee 27	Lagos	Activist	African Youth Alliance for Democratic Dividends
Interviewee 39E	*Email Interview*	Senior Official	Ministry of Justice of Nigeria
Interviewee 40X	Abuja	Human Rights Activist	Global Rights
Interviewee 64	Abuja	Former Official	National Assembly of Nigeria
Interviewee 67E	*Email Interview*	Human Rights Lawyer	Private Legal Practice
Interviewee 77E	*Email Interview*	Official	NHRC

Interview	**Location**	**Position**	**Organization**
Interviewee 91T	*Email Interview*	Senior Official	NHRC
Interviewee 199E	*Email Interview*	Senior Official	NHRC