"Let the NetWork" ♣: The Role of African Sub-Regional Courts in Protecting Internet Access and Human Rights in the Digital Environment

Christopher Yaw Nyinevi and Yohannes Eneyew Ayalew***

Abstract

Regional economic communities (RECs) in Africa are sub-regional intergovernmental organizations of African states established primarily for economic integration. However, in the last two decades, two of these RECs, namely — the Economic Community of West African States (ECOWAS) and the East African Community (EAC), have become active forums for human rights protection. In addition to their core jurisdiction in trade, investment and other economic matters, the Courts of these economic communities have also obtained the jurisdiction to adjudicate human rights claims. In this Article, we highlight how the ECOWAS Court, and the East African Community Court of Justice (EACJ) are protecting Internet access and the enjoyment of human rights in the digital environment on a continent that is gaining notoriety for 'Internet blackouts.'

♣ This sub-title is taken from the popular social media hashtag called #LetTheNetWork – which is used to fight internet shutdowns the world over.

* Christopher Yaw Nyinevi is a PhD Candidate at the Faculty of Law, Monash University (Australia). He has an LLM in International Law and Justice from Fordham University (United States) and LLB from Kwame Nkrumah University of Science and Technology (Ghana).

** Yohannes Eneyew Ayalew is a PhD Candidate at the Faculty of Law, Monash University (Australia). He holds an LLM in International Human Rights Law from the University of Groningen (The Netherlands); LLM in Public International Law from Addis Ababa University (Ethiopia) and LLB from Wollo University (Ethiopia). The authors wish to thank participants and discussants of the symposium titled 'The Digitalizing Continent' held virtually on July 13, 2022— jointly organised by AfronomicsLaw and University of St. Gallen where part of this Article was initially presented.

I. Introduction

Human rights protection in Africa has traditionally consisted of two layers: the regional human rights system hinged on the African Charter on Human and Peoples Rights 1981 ("the African Charter") and national human rights mechanisms of individual African states. A third layer has emerged at the sub-regional level through the repurposing of some sub-regional economic community regimes (mainly courts or tribunals) to determine claims of human rights violations.[1] An important area in which these sub-regional human rights systems are making inroads is the protection of access to the internet and the enjoyment of human rights online.

Following the lead of the UN Human Rights Council, the African Commission adopted its Resolution on Freedom of Information and Expression on the Internet 2016.[2] The Resolution mandates African States to respect and protect freedom of expression on the Internet including by adopting legislative measures. Most recently, the African Commission adopted a 'normative equivalency' approach where the same rights people have offline must be protected online in its landmark Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019.[3] Despite this, digital authoritarianism through Internet shutdowns, restriction of access to social media during elections, and arbitrary electronic surveillance of journalists, opposition politicians or other persons considered threats to ruling governments are rife.[4] Sub-regional courts are rising to the challenge by pushing back on these threats to human rights on the Internet in Africa.[5]

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1 FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 469-514 (2nd ed. 2012); Solomon T Ebobrah, *Human Rights Developments in Sub-regional Courts in Africa During* 2008, 9 AFR. HUM. RTS. L.J. 312 (2009); THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE (James Thuo Gathii ed., 2020).

2 Afr. Comm'n Hum. & Peoples' Rts. [ACHPR] Res. 362 (LIX), Resolution on the Right to Freedom of Information and Expression on the Internet in Africa (Nov. 4, 2016).

3 Afr. Comm'n Hum. & Peoples' Rts. [ACHPR], Declaration of Principles on Freedom of Expression and Access to Information in Africa (Nov. 2019); *see also* Dafna Dror-Shpoliansky & Yuval Shany, *It's the End of the (Offline) World as We Know It: From Human Rights to Digital Human Rights – A Proposed Typology,* 32 EUR. J. INT'L L. 1249 (2021).

4 Admire Mare, *State-Ordered Internet Shutdowns and Digital Authoritarianism in Zimbabwe,* 14 INT'L J. COMMC'N 4244 (2020); Yohannes Eneyew Ayalew, *From Digital Authoritarianism to Platforms' Leviathan Power: Freedom of Expression in the Digital Age Under Siege in Africa,* 15 MIZAN L. REV. 455 (2021); see also EVGENY MOROZOV, THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM (2012).

5 *See* Amnesty Int'l Togo v. Togolese Republic, JUD No. ECW/CCJ/JUD/09/20, Judgment, Community Ct. of J. of the Economic Community of W. Afr. States (ECOWAS) (June 25, 2020); In re Registered Trs. of the Socio-Econ. Rts. & Accountability Project (SERAP) v. Fed. Republic of Nigeria, Application No: ECW/CCJ/APP/23; 24;26&29/21 Judgment No: ECW/CCJ/JUD/40/22, Judgment, Community Ct. of J. of the Economic Community of W. Afr. States (ECOWAS) (July 14, 2022).

In this Article, we highlight how the human rights mechanisms of African sub-regional economic organisations are blazing the trail in protecting internet access and the enjoyment of human rights online. Using the doctrinal and case study approaches, we contextualise the discussions around the ECOWAS Court of Justice ('ECOWAS Court') and East African Court of Justice ('EACJ'). Our choice is informed by two main reasons. First, generally the ECOWAS Court and the EACJ are the leading sub-regional courts as far as human rights protection is concerned. Secondly, and more importantly, they are the courts that have had the opportunity to decide cases and issue publicly available judgments relevant to the topic.

The Article is organised into six parts including this introduction which counts as Part I. In Part II, we examine the nature and development of the human rights jurisdiction of African sub-regional courts, focusing on the ECOWAS Court and the EACJ. Part III then zooms in on the role of the ECOWAS Court in protecting internet access and the exercise of human rights online while Part IV examines the EACJ's jurisprudence relevant to the protection of human rights online. Part V assesses the performance and effectiveness of sub-regional courts particularly the normative contributions of the ECOWAS Court and the EACJ to the protection of human rights online. Part VI concludes the Article.

II. African Regional Economic Communities And Human Rights Protection

A. The Layers of Human Rights Protection in Africa

Africa is one of three regions of the world with a regional human rights system.[6] The African Charter on Human and Peoples' Rights, the constitutive instrument of the African human rights system, provides for a catalogue of human and peoples' rights as well as duties of the individual. The Charter creates the African Commission as the primary body for the promotion and protection of human rights on the continent.[7] However, since the establishment of the African Court of Human and Peoples Rights in 2006, the jurisdiction to interpret, apply and enforce provisions of the African Charter in cases alleging human rights violations ('the protective mandate') is now shared between the Commission and the Court.8 Nevertheless, because an

6 *See* THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: 30 YEARS AFTER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (Manisuli Ssenyonjo ed., 2011).

7 Organization of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter") art. 45, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

international human rights mechanism is subsidiary and complementary to national jurisdiction, African states still retain the primary mandate to protect human rights. This is evident in their obligation to take all measures (whether legislative, judicial or administrative) to implement the rights in the African Charter; and the requirement for individuals to exhaust local remedies before seizing the Commission or the Court.[9]

A third layer of human rights protection has since emerged at the sub-regional level. Subregional groupings of African states are typically for economic integration purposes. Indeed, under the roadmap for the creation of the African Economic Community (AEC) in the Abuja Treaty 1991, the AEC is to be established in six stages using Regional Economic Communities (RECs) as the building blocks.[10] For this purpose, the African Union has officially recognised eight RECs, namely, the Economic Community of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS), the Southern African Development Community (SADC), the Intergovernmental Authority on Development (IGAD), the Arab Maghreb Union/Union du Maghreb Arabe (UMA), the Community of Sahel-Saharan States (CEN-SAD), and the East African Community (EAC).[11]

Given their economic outlook, the human rights dimensions of RECs are not always appreciated. Yet, the ultimate objective of any integration project is to improve the socioeconomic wellbeing of the peoples of the integrating states. Thus, at the very least, an integration project has an implied objective to promote socioeconomic rights like the rights to health, education, work, and an adequate standard of living. Similarly, gross, widespread or systematic violation of human rights in one or more of the integrating states can cause political instability that will destabilise the whole region and by extension the integration agenda. Given this connection between economic integration and human rights protection and their mutually reinforcing roles, RECs typically indicate the recognition, promotion and protection of human rights among their core objectives or principles.[12] Within some of the RECs there are

8 *See* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 2, Jan. 25 2004 [hereinafter Protocol to the African Charter]; Afr. Comm'n Hum. & Peoples' Rts., Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020 Rule 128, Mar. 4, 2020.

9 Protocol to the African Charter, supra note 8, arts. 1 and 56; see also RACHEL MURRAY, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMMENTARY 17 (2019).

10 Org. of African Unity [OAU],Treaty Establishing the African Economic Community art. 6, June 3, 1991 [hereinafter Abuja Treaty].

11 *Decision on the Moratorium on the Recognition of Regional Economic Communities* (RECs), Assembly of the African Union, Seventh Ordinary Session, DOC. EX.CL/278 (IX) (July 1, 2006).

actual mechanisms for the protection of human rights in the form of jurisdiction of Community courts to adjudicate complaints of human rights violations.

However, since these RECs were not originally nor primarily established for human rights protection, they have had to take on that mandate along the way. They have done this by repurposing existing Community institutions (in this case, their Community courts or tribunals) to adjudicate claims of human rights violations.[13] Following the abolition of the SADC Tribunal's human rights jurisdiction in 2014 after it upheld a challenge to Zimbabwe's land reform program,[14] the ECOWAS Court and the EACJ are currently the only sub-regional courts with active human rights jurisdiction.

B. The Human Rights Mandate of the ECOWAS Court

By the Lagos Treaty of 1975, states in the West African sub-region created the Economic Community of West African States (ECOWAS) to promote economic development and cooperation and raise the standard of living of their peoples.[15] The Lagos Treaty made no mention of human rights. The closest it had to a human rights reference was a carveout permitting the implementation of measures to protect human, animal or plant life[16] that was modelled on a similar clause in the GATT 1947.[17]

However, beginning in 1989 a series of political and legal developments culminated in ECOWAS pivoting to human rights protection. First, the outbreak of civil wars in Liberia (1989) and Sierra Leone (1991) which led to serious human rights violations and humanitarian crises compelled ECOWAS to take on a more political role in the

12 *See* Economic Community of West African States (ECOWAS) Revised Treaty art. 4(g), July 24, 1993 [hereinafter ECOWAS Revised Treaty]; Treaty for the Establishment of the East African Community arts. 6(d) and 72, Nov. 30, 1999 [hereinafter EAC Treaty]; Treaty of the South African Development Community art. 4(c), Aug. 17, 1992; Treaty Establishing the Common Market for Eastern and Southern Africa art. 6(e), 1993; Agreement Establishing the Inter-governmental Authority on Development (IGAD) art. 6A(f), Mar. 21, 1996, IGAD/SUM-96/AGRE-Doc.; Community of Sahel–Saharan States Revised Treaty art. 4(e), Feb. 16, 2013.

13 Obiora C. Okafor & Okechukwu J. Effoduh, *The ECOWAS Court as a (Promising) Resource for Pro-Poor Activist Forces: Sovereign Hurdles, Brain Relays, and "Flipped Strategic Social Constructivism",* in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE 113 (James Thuo Gathii ed., 2020); Olabisi D. Akinkugbe, *Towards an Analyses of the Mega-Political Jurisprudence of the ECOWAS Community Court of Justice,* in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE 158 (James Thuo Gathii ed., 2020).

14 The SADC Tribunal issued a ruling in a landmark case involving a land dispute between the Government of Zimbabwe and 78 white farmers. The Tribunal ruled in favour of the farmers, who had petitioned the court to issue an order barring the Government of Zimbabwe from taking over their farms without compensation. The Tribunal found the measure constituted discrimination based on race and that it was conducted without due process; *see Mike Campbell (Pvt) Ltd. v. Republic of Zimbabwe* 2008 Case No. 2/2007, SADC (T) (S. Afr.).

15 Treaty of the Economic Community of West African States (ECOWAS) art. 2, May 28, 1975, 1010 U.N.T.S. 14843 [hereinafter Lagos Treaty].

16 *Id.* art. 18(3)(c).

17 *See* General Agreement on Tariffs and Trade art. XX(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

subregion. It deployed peace keeping forces to the conflict areas under the ECOMOG initiative and adopted the *ECOWAS Declaration of Political Principles 1991.* The Declaration was a blueprint for how ECOWAS would promote peace, stability, and democracy based on a culture of political pluralism and human rights.[18] It showed the resolve of ECOWAS to centre human rights in its agenda. ECOWAS members pledged, under the Declaration, to respect and promote the full range of internationally recognised civil and political rights; economic, social and cultural rights, and any other rights inherent in the dignity of the human person.[19] Just about the same time, the Treaty Establishing the African Economic Community ('the Abuja Treaty') had been adopted in June 1991. The AEC was to be established in six stages using (sub)-regional economic communities including ECOWAS as the building blocks. The objectives of the AEC contained in the Abuja Treaty included the recognition, promotion, and protection of human rights consistent with the African Charter.[20]

To revitalize ECOWAS to better achieve its economic objectives and deal with the socio-political challenges of the sub-region, the ECOWAS Authority commissioned legal reforms that led to the repeal and replacement of the Lagos Treaty with the ECOWAS Revised Treaty 1993. Following the example of the Abuja Treaty and mindful of the situation in the sub-region that had necessitated the *ECOWAS Declaration of Political Principles,* the Revised Treaty made the recognition and respect of human rights one of its pillars. Consequently, under Article 4(g) of the Treaty, member states 'solemnly affirm and declare their adherence' to the 'recognition, promotion and protection of human and people's rights' in accordance with the African Charter.[21] To give effect to their commitment to respect and protect human rights, member states amended the ECOWAS Court Protocol in 2005 to grant the Court jurisdiction to determine cases of human rights violation that occur in any member state.[22] The Court's human rights mandate is additional to its core functions as the Community Court of Justice, the Community Administrative Court and the Community Arbitration Tribunal all of which serve ECOWAS' primary purpose as a REC.

As far as the sources of human rights law are concerned, the Court's jurisdiction is not necessarily tied to one human rights treaty. The Court may apply any human rights instrument ratified by the respondent state that is relevant to the case before it as well as any human rights norms of general international law binding on the state. However, the African Charter is essentially the primary source of human rights law for

18 ECOWAS, *Declaration of Political Principles,* Fourteenth Session, A/DCL.1/7/91 (Jul. 4-6, 1991).

19 *Id.* at ¶¶ 4-5.

20 Abuja Treaty, supra note 10, at art. 3(g).

21 ECOWAS Revised Treaty, supra note 12, at art. 4(g).

22 ECOWAS, Protocol on the Community Court of Justice art. 9(4), A/P.I/7/91 (Jul. 6, 1991).

the ECOWAS Court. This is because all ECOWAS members are parties to the African Charter and have also bound themselves by Article 4(g) of the ECOWAS Revised Treaty to respect, promote and protect human rights within ECOWAS in accordance with the African Charter.

C. The Human Rights Mandate of the East African Community Court of Justice

The re-purposing of the ECOWAS Court for human rights protection differs from how the EACJ attained its human rights mandate.[23] While the ECOWAS Court is specifically granted the jurisdiction for human rights cases under the 2005 Supplementary Protocol, the EACJ took on that role through an expansive interpretation of its jurisdiction under the EAC Treaty.

The East African sub-region has had a long history of integration efforts dating back to colonial times.[24] In 1967 Kenya, Uganda and Tanzania, as independent states, created the first East African Community under the Treaty for East African Co-operation 1967. However, this immediate post-colonial attempt at integration failed for reasons including lack of political will, lack of private sector participation and concerns around unequal distribution of the benefits of integration.[25] Accordingly, the first EAC was formally dissolved in 1977.[26] After experimenting with various cooperation arrangements since the 1977 dissolution,[27] the new East African Community (EAC) currently comprising Kenya, Tanzania, Uganda, Burundi, DRC and South Sudan was established in 2000 under the EAC Treaty 1999.[28] The overarching objective of the EAC as specified in the EAC Treaty is to develop policies and programs to deepen mutually beneficial cooperation among the Partner States in matters relating to politics, economics, security, culture, legal and judicial affairs.[29]

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23 James Thuo Gathii & Harrison Otieno Mbori, *Reference Guide to Africa's International Courts: An Introduction, in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE 302 (James Thuo Gathii ed., 2020).

24 *See* the construction of the Kenya Uganda Railway 1897-1901 and the creation of various regional institutions in subsequent years including the East Africa Customs Collection Centre 1900, the East African Currency Board 1905, the East Africa Postal Union 1905, the Court of Appeal for Eastern Africa 1909, the East Africa Customs Union 1919, the East African Governors Conference 1926, the East African Income Tax Board 1940, and the Joint Economic Council 1940.

25 *See* Abuja Treaty, *supra* note 10, at Preamble.

26 *Id.*

27 *See* Wilbert T.K. Kaahwa, East African Community (EAC), in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW 10 (Last updated Jan. 2013).

28 *Id.* (Kenya, Uganda and Tanzania recreated the EAC in 2000 and are therefore the original parties to the EAC Treaty 1999. Burundi and Rwanda acceded to the EAC Treaty on June 18, 2007 and became full partner states from Jul. 1, 2007).

29 EAC Treaty, *supra* note 12, at art. 5(1).

The EAC Treaty creates the Summit of Heads of State, the Council of Ministers, the East African Legislative Assembly and the EAC Secretariat as the key political organs of the Community while establishing the East African Court of Justice, as the principal judicial organ. The Court was originally established as a one-chamber court. However, by a 2007 amendment to the EAC Treaty, an appellate division of the Court was created making it a two-chamber court.[31] Based in Arusha, Tanzania, the EACJ's mandate is to interpret, apply and enforce the EAC Treaty.[32] The Court's jurisdiction may be exercised in contentious matters where the conduct, decision or regulation of a partner state or an organ of the Community is challenged for breaching the EAC Treaty.[33] Access to the Court's contentious jurisdiction is open to partner states, the Secretary General of the EAC and any person resident in any of the partner states.[34] Also, on the request of the Summit of Heads of State, the Council of Ministers or a Partner State, the Court may give an advisory opinion on any question of law arising from the Treaty that affects the Community.[35]

Under Article 27(2) of the EAC Treaty, the Court is intended to have an extended mandate including a human rights jurisdiction to be determined 'at a suitable subsequent date' and operationalized under a Protocol to the Treaty.[36] But despite the postponement of the human rights jurisdiction of the Court, the partner states undertake under Articles 6(d) and 7(2) of the EAC Treaty to abide by principles of good governance including the rule of law, democracy, and the recognition, promotion and protection of human rights consistent with the African Charter. Beginning with *Katabazi v Uganda,* the Court has held that it has jurisdiction to determine cases alleging human rights violations despite the postponement of its human rights jurisdiction under Article 27(2) of the EAC Treaty. In that case, Uganda's security agencies frustrated the execution of a bail bond by the applicants by re-arresting and charging them for terrorism before a military court. Applicants were

30 *Id.*, art. 9.

31 *Id.*, art. 23; *see* also James Thuo Gathii, *International Courts as Coordination Devices for Opposition Parties: The Case of the East African Court of Justice, in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE 43 (James Thuo Gathii ed., 2020).

32 EAC Treaty, *supra* note 12, at art. 23.

33 *Id.*, arts. 28, 29 and 30.

34 *Id.*

35 *Id.*, art. 36(1); *see* also Kaahwa, *supra* note 27, para. 30.

36 EAC Treaty, *supra* note 12, art. 27(2). Despite this objective, the partner states excluded human rights jurisdiction from a 2014 Protocol adopted under Article 27(2) of the EAC Treaty. Among the reasons given were the fact that partner states were parties to the African Charter and therefore human rights claims may be submitted to the African Court. *See* Victor Lando, *The Domestic Impact of the Decisions of the East African Court of Justice,* 18 AFR. HUM. RTS. L. J. 463, 466-67 (2018).

not released despite an order of the Constitutional Court of Uganda declaring their re-arrest unlawful. Before the EACJ, applicants argued that Uganda's actions violated the good governance clause specifically the principle of rule of law. The respondent State argued that the case was a human rights claim over which the Court had no jurisdiction under Article 27(2) of the EAC Treaty. The Court disagreed, reasoning that Article 27(2) does not preclude its jurisdiction to interpret provisions of the EAC Treaty merely because the case implicates human rights.[37] It then interpreted the good governance clause, particularly, the rule of law element as requiring partner states to uphold judicial independence and respect court decisions. Based on this, it concluded that Uganda violated the fundamental principle of rule of law under the EAC Treaty by the actions of its security agencies.

Rather than directly determining whether applicants' human rights had been violated, the Court found a way around Article 27(2) by framing the issue as 'whether the state had violated the principle of the rule of law'.[38] This approach of indirectly determining human rights claims in light of principles contained in the good governance clauses of the EAC Treaty has become the basis of the EACJ's human rights jurisdiction. It is worth mentioning however, that in cases such as *Independent Medical Legal Unit and Plaxenda Rugumba* the First Instance Division of the Court has taken a more direct approach without necessarily linking the human rights claim to the rule of law or other principles of the good governance clause.[39] In the Plaxenda Rugumba case, for instance, the First Instance Division held that the Court's existing jurisdiction to interpret and apply the EAC Treaty includes the determination of whether a partner state has promoted and protected human rights in accordance with the African Charter under the good governance clauses of Articles 6(d) and 7(2).[40] In the Division's view, the purpose of Article 27(2) of the EAC Treaty is to add to the Court's existing jurisdiction, but that existing jurisdiction already includes the power to interpret and apply the human rights clauses of the Treaty.[41] In other words, the First Instance Division was basically saying that to decide human rights claims, it need not link the cause of action to the rule of law or other concepts included in the good governance clause. Nevertheless, the Appellate Division of the Court has declined to go along with the more direct approach of the First Instance Division. In both the Independent

37 James Katabazi v. Sec'y Gen. of the E. Afr. Cmty., Ref. No. 1 of 2007, E. Afr. Ct. of J., ¶39, Judgment (Nov. 1, 2007).

38 Mihreteab Tsighe Taye, *The Role of the East African Court of Justice in the Advancement of Human Rights: Reflections on the Creation and Practice of the Court,* 27 AFR. J. INT'L & COMPAR. L. 359, 369 (2019).

39 *See* Indep. Med. Unit v. Att'y Gen. of Republic of Kenya, Ref. No. 3 of 2010, Judgment, E. Afr. Ct. of J. (June 29, 2011); Plaxeda Rugumba v. Sec'y Gen. of the E. Afr. Cmty., Ref. No. 8 of 2010, Judgment, E. Afr. Ct. of J. First Instance Div., ¶23 (Dec. 1, 2011).

40 Rugumba, Ref. No. 8 of 2010, ¶23.

41 *Id.*

Medical Legal Unit and Rugumba cases, it differed from the First Instance Division by holding that the Court may only deal with a human rights issue if it is part of another legal claim under the EAC Treaty on which the Court can peg its jurisdiction.[42]

III. The Ecowas Court's Protection of Internet Access and Human Rights on Digital Platforms

As noted above, economic integration and human rights protection are interconnected and mutually reinforcing. Accordingly, protecting human rights is not only a moral or political issue, but also an essential factor in economic development. For instance, the freedom of movement including the right of persons to freely leave and return to their countries is essential for economic integration. Cross-border trade and business will be severely affected without the guarantee and protection of such a right. But in our current globalised world that is so interconnected by information communication technologies, many of the things people needed to physically meet to do can now be done virtually. Teaching and learning, trade in goods and services, social interactions, business meetings, and even political gatherings are now done online without the need for people to travel or meet in a physical location. It is in this broader conception of the indispensability of the Internet to our social, political and economic lives that attempts to frame access to the internet as a human right must be viewed.[43] The ECOWAS Court has decided four cases dealing with the human rights implications of access to the internet and services provided over the internet. *These are Amnesty International et al v Togo; Incorporated Trustees of Laws and Rights Awareness Initiatives v. Nigeria; Festus Ogwuche v. Nigeria; and SERAP and Others v Nigeria (Twitter Ban Case).*

Amnesty International et al v. Togo came on the back of popular protests in the country in 2017 that called for constitutional reforms to impose a presidential term limit. The government responded by shutting down access to the Internet and arresting and detaining protesters. Applicants contended that the internet shutdown affected their work (including as journalists) and violated Article 9 of the African Charter and Article 19 of the International Covenant on Civil and Political Rights 1966 (ICCPR)

42 See Indep. Med. Unit, Ref. No. 3 of 2010, at 10-11; see also Plaxeda Rugumba, Ref. No. 8 of 2010, at ¶24.

43 See Daniel Joyce, Internet Freedom and Human Rights, 26 EUR. J. INT'L L. 493 (2015); Lawrence Mute, Report of the African Commission's Special Rapporteur on Freedom of Expression and Access to Information in Africa 2019 (2019), ¶¶ 34-36 [hereinafter Lawrence Mute Report].

both of which guarantee freedom of expression. The Court held that strictly speaking access to the internet, in and of itself, is not a fundamental human right.[44] However, since internet access facilitates or enhances freedom of expression by individuals, it should be considered a derivative right that is a component of freedom of expression. Thus, the Court concluded that because internet access is closely linked to freedom of expression and complements the enjoyment of the right, both must be treated as human rights that require legal protection and remedies for their violation.[45] The Court found that while the national security reasons for which the government decided to shut down the internet would ordinarily be valid grounds for derogating from a human right, such a limitation or derogation must be in accordance with law. But since the internet shutdown was not authorized by law, the government violated Articles 9 and 19 respectively of the African Charter and the ICCPR.

Incorporated Trustees of Laws and Rights Awareness Initiatives v Nigeria concerned a Nigerian law that imposed criminal penalties for offensive online speech. Under section 24 of Nigeria' Cybercrimes Act 2015, a person committed an offence if they knowingly or intentionally published a speech or information through a computer system or network that was grossly offensive, indecent, or pornographic. Section 24 also criminalized false information intentionally or knowingly published via a computer network or system to cause annoyance, inconvenience, insult, enmity, ill-will, or needless anxiety to another person. Penalties ranged from five to ten years imprisonment or fines of 700,000 to 25 million naira or both. Several persons were arrested and detained in Nigeria under the law for allegedly making offensive or annoying social media posts about politicians. Applicants contended that Section 24 of the Cybercrimes Act violated the freedom of speech under the African Charter and the ICCPR, for among others, being overly broad, vague, and disproportionately restrictive of free speech.

The Court concluded that although Section 24 of the Cybercrimes Act may have been enacted for a legitimate objective,[46] it failed the test of being a necessary, proportionate and least restrictive means of restricting freedom of expression.[47] The Court noted

44 Amnesty Int'l Togo v. Togolese Republic, JUD No. ECW/CCJ/JUD/09/20, Judgment, Community Ct. of J. of the Economic Community of W. Afr. States (ECOWAS), ¶ 38 (June 25, 2020). This view is consistent with the earlier debate whether internet access is considered a human right. For example, American Internet pioneer Vinton Cerf, also known as, the 'the father of the Internet' argues that internet access is not a human right. He contends that "technology is an enabler of rights, not a right itself." Vinton G. Cerf, *Internet Access Is Not a Human Right*, N.Y. TIMES (Jan. 4, 2012), https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html.

45 Amnesty Int'l Togo, JUD No. ECW/CCJ/JUD/09/20, at ¶ 45.

46 Inc. Trs. of L. & Rts. Awareness Initiatives v. Fed. Republic of Nigeria, SUIT No ECW/CCJ/APP/53/2018 JUDGEMENT No ECW/CCJ/JUD/16/20, Judgement, Community Ct. of J. of the Economic Community of W. Afr. States (ECOWAS), ¶¶137- 141 (July 10, 2020).

47 *Id.* at ¶161.

that generally 'laws that criminally penalize defamation, insult, false news, etc., disproportionately violate the right to freedom of expression'.[48] But independent of that presumption, the Court found that the penalties under Section 24 were disproportionately high. On that basis, the Court concluded that Nigeria violated Article 9 of the African Charter and Article 19 of the ICCPR.

In *Festus Ogwuche v. Nigeria,* the question was whether the government's directive requiring prior vetting of political programs before they are broadcast on traditional media or streamed online (in order to prevent divisive, inciteful or hateful speech) violated freedom of expression. The Court held that it was. It reasoned that while freedom of expression may be restricted on grounds including national security, the government failed to prove that there was sufficient threat to national security or public order to justify the overly excessive burden it sought to impose on media freedoms under the directive.

In *SERAP and Others v Nigeria,* applicants challenged the government's ban of access to Twitter on 4 June 2021 on grounds that Twitter was undermining the corporate existence of Nigeria. Applicants argued that the ban or suspension of Twitter (without basis in a law or order of a court) violated freedom of expression, the right to information and freedom of the media contrary to the African Charter and other human rights treaties binding on Nigeria.[49] The case produced two judgements, a ruling on a preliminary objection of Nigeria to the Court's jurisdiction and the judgment on the merits of the case.

Nigeria argued that the Court had no jurisdiction because the Twitter ban did not implicate human rights. However, the Court held, relying on *Amnesty International v Togo,* that because access to the internet facilitates freedom of expression, 'denial of access to the internet or services provided via the internet… operates as denial of the right to freedom of expression and to receive information.'[50] The Court therefore concluded that it had jurisdiction to hear the case given the implications of the Twitter ban for people's ability to freely express themselves.

On the merits of the case, the Court held that freedom of expression under Article 9 of the African Charter and Article 19 of the International Covenant on Civil and Political Rights (ICCPR) include the complementary right to access information.[51]

48 *Id.*

49 In re Registered Trs. of the Socio-Econ. Rts. & Accountability Project (SERAP) v. Fed. Republic of Nigeria, Judgement, Application No: ECW/CCJ/APP/23; 24;26&29/21 Judgment No: ECW/CCJ/JUD/40/22, Community Ct. of J. of the Economic Community of W. Afr. States (ECOWAS), ¶ ¶30, 37 (July 14, 2022).

50 *Id.* at ¶ 22.

51 *Id.* at ¶ 67.

Since access to social media including Twitter is essential for exercising freedom of expression and its derivative rights to impart and receive information, the Court held that access to Twitter is complementary to freedom of expression.[52] According to the Court, access to social media like Twitter should be regarded is a component of freedom of expression and the right to receive or impact information with the result that their restriction must have a basis in law or an order of a court.[53] Because respondent State failed to show that its ban or suspension of Twitter was based on a law or order of a court, the Court concluded that it violated Articles 9 and 19 respectively of the African Charter and the ICCPR.[54]

It is significant that the ECOWAS Court has recognised access to the Internet as a human rights issue that has implications for the enjoyment of rights such as freedom of expression. While access to the internet in these two cases were litigated and determined within the context of freedom of expression, they are important precedents that may be applied by analogy in future cases to other human rights enjoyed or exercised on the Internet. But on a more conceptual level, one could view the Court's pushback against restrictions of access to the Internet as exemplifying the mutually reinforcing roles of human rights protection and economic integration. Given the crucial importance of Internet access for trade in goods, provision of services, running of businesses and other economic purposes, protecting access to the Internet as a human right will have a multiplier effect that contributes to the economic integration agenda of ECOWAS. Therefore, the Court's role in human rights protection generally, and in the protection of access to the Internet in particular, is not a deviation from ECOWAS' core objective of economic integration. If anything, it is an integral part of it.

IV. The East African Court of Justice and Human Rights in The Digital Environment

Like ECOWAS, the EAC has no human rights protocol or a human rights chapter in its Treaty. The EAC Treaty only refers to human rights in general terms mainly under its 'good governance clause' and 'rule of law clause'[55] specifically Articles 6(d) and 7(2). Article 6(d) provides:

> The fundamental principles that shall govern the achievement of the objectives of the Community by the partner states shall include: … (d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities,

52 *Id.* at ¶ 68.

53 *Id.* at ¶¶ 68-71.

54 *Id.* at ¶¶86 - 89.

55 *See* EAC Treaty, *supra* note 12, arts. 6(d), 3(3)(b), 7(2), 27(2) and 123(3)(c).

> gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Similarly, the good governance clause of Article 7(2) of the EAC Treaty requires partner states "to abide by the principles of rule of law, democracy, social justice and the maintenance of universally accepted standards of human rights." As discussed in Part II, the presence of these provisions and the jurisdiction of the EACJ to interpret and apply the EAC Treaty has enabled the Court to creatively assert a limited human rights jurisdiction despite Article 27(2) of the EAC treaty.[56] As a result, cases involving claims of human rights violations, including violations of (digital) human rights, have often been referred to the Court. Relevant in this regard are *Burundian Journalists' Union v. Attorney General of Burundi*[57] and *Media Council of Tanzania v. Attorney General of Tanzania.*[58]

The case of *Burundian Journalists' Union v Burundi* involved allegations of online and offline media freedom violations that was decided by the EACJ in 2015.[59] Applicant challenged Burundi's newly enacted Press Law No.1/11 (2013) on grounds that it imposed undue restrictions on press freedom. Applicants claimed that these restrictions included a requirement for journalists to disseminate only "balanced information"; a prohibition of publications that insult the head of state; a requirement for film makers to obtain prior permission; and other restrictive regulation of content in both the print and online media.[60] Applicants argued that a free press is a cornerstone of democracy, the rule of law, accountability, transparency, and good governance; therefore, the media should be able to freely disseminate information on public matters including information critical of the government. Applicant argued that by unduly restricting freedom of expression both offline and online,[61] Burundi had violated the good governance values embodied in Articles 6(d) and 7(2) of the EAC Treaty.[62]

The Court had to determine whether the impugned provisions of the Press Law violated Articles 6(d) and 7(2) of the EAC Treaty. The court observed that democracy must necessarily include adherence to press freedom as provided under Articles 6(d)

56 *See* James Katabazi v. Sec'y Gen. of the E. Afr. Cmty., Ref. No. 1 of 2007, Judgment, E. Afr. Ct. of J., ¶16 (Nov. 1, 2007) ; Taye, *supra* note 38.

57 Burundian Journalists Union v. Att'y Gen. of the Republic of Burundi, Ref. No. 7 of 2013, Judgment, E. Afr. Ct. of J. First Instance Div., ¶¶ 99-102 (May 15, 2015).

58 Media Council of Tanz. v. Att'y Gen. of the United Rep. of Tanz., Case No. 2 of 2017, Judgement, E. Afr. Ct. of J. First Instance Div., ¶¶ 70-72 (Mar. 28, 2019).

59 Burundian Journalists Union, Ref. No. 7 of 2013, ¶¶ 99-102.

60 *Id.* at ¶¶ 10, 17.

61 *Id.* at ¶ 50.

62 *Id.* at ¶ ¶ 9-10.

and 7(2) of the Treaty.[63] That, also, a free press goes hand in hand with the principles of accountability and transparency entrenched in Articles 6(d) and 7(2) of EAC Treaty. Citing its previous decision in *Mohochi v Attorney General of Uganda,* the Court emphasised that these principles are binding on Partner States and are not merely aspirational.[64] For these reasons, the Court found that Article 19 of the Press Law which prohibited journalists from publishing information about stability of the currency, information that may harm the credit of the State and its national economy, and information about diplomatic activities, among others, was inconsistent with the good governance standards of the EAC Treaty.[65] The Court also concluded that the requirement under Article 20 of the Law for journalists to reveal their sources on matters of public order or national security violated the Treaty. It reasoned that the watchdog role of journalists in a democratic society would be seriously undermined if they are forced to disclose their confidential sources.[66] Accordingly, the Court held that the requirement to disclose confidential sources did not 'meet the expectations of democracy' and hence violated Articles 6(d) and 7(2) of the EAC Treaty.[67]

Generally, the *Burundian Journalists Union* case makes an important contribution to media freedom. However, regrettably, the Court did not seize the opportunity to elaborate on the scope of freedom of expression including its dimension in the digital ecosystem.[68]

In *Media Council of Tanzania and Others v Attorney General of Tanzania,* applicants challenged various provisions of Tanzania's Media Services Act 2016, particularly section 7(3) of the Act.[69] That provision required media houses to ensure that they do not publish information that will—

(a) undermine national security or a lawful investigation by law enforcement;
(b) impede due process of law or endanger the safety of any person;
(c) constitute hateful speech;
(d) disclose cabinet proceedings;
(e) facilitate the commission of a crime; or
(f) involve unwarranted invasion of individual privacy.

63 *Id.* at ¶ 82.

64 *Id.* at ¶ 74.

65 *Id.* at ¶¶ 99-102.

66 *Id.* at ¶¶ 108-109.

67 *Id.* at ¶ 111.

68 Nani Jansen Reventlow & Ségnonna Horace Adjolohoun, *Will Konaté Set African Journalists Free? Interrogating the Promises of an Emerging Press Freedom Jurisprudence in African Regional Courts,* 2 AFR. HUM. RTS. Y.B. 427 (2018).

69 Media Council of Tanz. v. Att'y Gen. of the United Rep. of Tanz., Case No. 2 of 2017, Judgement, E. Afr. Ct. of J. First Instance Div., ¶2 (Mar. 28, 2019).

The applicants argued that these provisions imposed restrictions on the type or content of news that media houses may publish. Accordingly, they were unjustified restrictions on the freedom of expression and a violation of the principles of democracy, rule of law, accountability, and transparency contained in the good governance clauses of the EAC Treaty.[70] The respondent counter-argued that freedom of expression is not absolute and that the restrictions imposed by the Act were in the national interest and consistent with the Constitution of Tanzania as well as the EAC Treaty.[71]

Applying the conventional tripartite test for limiting human rights, namely, legality, legitimacy, and necessity and proportionality, the Court concluded that the impugned provisions violated international human rights law standards.[72] Specifically, the Court found terms such as "undermine" and "impede" employed in section 7(3) of the Act to be vague. Also, respondent State failed to demonstrate why the restrictions under the Act were necessary or appropriate means of achieving legitimate state or national interests.[73] For these reasons, the Court held that the impugned provisions of Tanzania's Media Services Act, particularly section 7(3), violated freedom of expression and freedom of the press. By extension, they also violated the fundamental principles contained in the good governance clauses of Articles 6(d) and 7(2) of the EAC Treaty.[74]

While these cases of the EACJ protecting media freedoms were mainly decided within traditional media contexts, they nonetheless provide standards that are applicable to enjoyment of media rights on the Internet. In any event, because journalism is now practised mainly through digital or online mediums, there is a strong basis to extend the Court's jurisprudence to the digital environment using the 'normative equivalency approach' which advances the view that the same rights people have offline must be protected online.[75] Accordingly, although the EACJ has yet to specifically address the issue of Internet access and its implications for enjoyment of human rights, one can predict based on its current jurisprudence that it will not hesitate to protect Internet access and human rights within the digital ecosystem.

70 *Id.* at ¶¶ 5, 6.

71 *Id.* at ¶ 15.

72 *Id.* at ¶ 66.

73 *Id.* at ¶ 72.

74 *Id.* at ¶¶ 73, 112.

75 *See generally* Dror-Shpoliansky & Shany, *supra* note 3.

V. The Effectiveness and Normative Contributions of Sub-Regional Courts to Human Rights in The Digital Environment

The performance and effectiveness of international courts (including human rights bodies) are considered to be a function of 'the compliance rates of their decisions, their usage rates, as well as their overall success or lack thereof'.[76] For some scholars, the effectiveness or impact of a court is best measured by the rate at which governments comply with its decisions. This approach is quantitative in nature,[77] and essentially translates to 'the number of complied-with judgments divided by the total number of judgments.'[78] By this approach, a court is effective 'if states comply with its judgments' and do so at a high rate.[79] On the other hand, if its decisions are mostly ignored, then the Court is not effective by reason of low compliance with its decisions.[80] But, this approach has its own flaws. For example, compliance can be hard to observe as states may sometimes ignore a judgment or comply with it after years if not decades.[81]

For this reason, there are those who approach the effectiveness of an international court by focusing less on the quantitative indicators, and rather prioritize the normative contributions of court decisions.[82] A court is considered effective if there are observable and desired changes in the behaviour of states in the normative direction of the court's judgments.[83] This approach acknowledges that international courts exist for different roles and purposes, and thus, a quantitative approach is ill-suited for measuring all of them.[84] Besides, there may be ambiguity about which goals should be the benchmark

76 THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS, *supra* note 1, at 2.

77 *See generally* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals,* 93 CAL. L. REV. 1 (2005).

78 *Id*. at 28.

79 *Id*.

80 THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS, *supra* note 1, at 2.

81 Posner & Yoo, *supra* note 77, at 28.

82 THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS, *supra* note 1, at 3; see also Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation,* 32 CASE W. RSRV. J. INT'L L. 387, 393 (2000).

83 Raustiala, supra note 82, at 393–94; see also Laurence R. Helfer, *The Effectiveness of International Adjudicators,* in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464-76 (Cesare P.R. Romano et al. eds., 2013). He identifies at least four methodological approaches to measuring the effectiveness of international courts: (i) case-specific effectiveness (under which a state changes behaviour as a result of a ruling by an international court); (ii) *erga omnes* effectiveness (which measures the effectiveness of international court rulings on a broad range of constituencies); (iii) embeddedness effectiveness (under which international court adjudi¬cation is unnecessary because domestic courts are sufficient); and (iv) norm-development effective¬ness (under which effectiveness is measured by how an international court helps to build a body of jurisprudence and develop international law). Id. at 466.

84 THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS, *supra* note 1, at 3; see also Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo,* 93 CAL. L. REV. 899, 917-18 (2005); Daniel Abebe, *Does International Human Rights Law in African Courts Make a Difference?,* 56 VA. J. INT'L L. 527, 537-61 (2016).

for assessing the performance of an international court.[85] Thus, while strict compliance with judgments may indicate effectiveness, such quantitative indicators alone do not measure how such decisions create 'normative consequences and ripples.'[86]

Assessing the performance and effectiveness of African sub-regional courts under the above approaches produces a mixed bag of results. Under the rate of compliance scorecard, they score quite low. With the ECOWAS Court, for instance, the rate at which state parties have complied with its judgments has been poor. Indeed, the President of the Court has lamented that 'the poor rate of compliance with judgments of the Court, which currently stands at about 30 per cent' is of grave concern.[87] Article 24 of the ECOWAS Court's Protocol makes provisions for implementing the Court's decisions. Yet, most member states have failed to domesticate the Court's Protocol or its relevant provisions on execution of judgments to enable their domestic courts enforce decisions of the ECOWAS Court.[88] Also, out of the 15 members, only six have complied with their duty to appoint or designate a competent national authority to process judgments of the Court.[89] Many of the states 'do not all-too-often respect the decisions of their own domestic courts' and seem to approach the ECOWAS Court with the same attitude.[90]

85 *See* Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach,* 106 AM. J. INT'L L. 225, 233 (2012); Tom Gerald Daly, *The Alchemists: Courts as Democracy-Builders in Contemporary Thought,* 6 GLOB. CONSTITUTIONALISM 101, 108 (2017). International courts serve various purposes including vindicating rights, constraining arbitrary exercise of state power, and addressing the validity of transitional justice processes. Mere quantitative measurement of the rate of compliance cannot sufficiently measure the effectiveness of the Court on all these indicators.

86 THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS, *supra* note 1, at 4. In its 2021 activity report the African Court highlight its influence and impact in the continent as follows:

> The jurisprudence established by the [African] Court from these cases deals with a wide range of human rights issues shaping the socio-economic and political landscape of the continent, including issues of elections, good governance, freedom of expression, rights of indigenous peoples . . . .[It] reinforces the widely held principles of indivisibility, interrelatedness and interdependency of human rights, and the view that respect for human rights provides a foundation upon which rests the political structures of human freedoms, the achievement of human freedoms . . . .

Activity Report, *infra* note 95, ¶ 34.

87 Ifeanyi Emeka, *Only 6 Countries Respect ECOWAS Court Rulings- Justice Asante,* BLUEPRINT NEWSPAPER (Nov. 22, 2021), https://www.blueprint.ng/only-6-countries-respect-ecowas-court-rulings-justice-asante/ (quoting Amoako Asante in a speech delivered at the International Conference of the ECOWAS Court of Justice in Lomé, Togo in November 2021).

88 *See* Richard Frimpong Oppong, *The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment,* 25 AFR. J. INT'L COMPAR. L. 127 (2017).

89 *See 9 W/African Countries Disregard ECOWAS Court Rulings-Judge,* VANGUARD (Nov. 22, 2021), https://www.vanguardngr.com/2021/11/heifer-in-talks-with-diaspora-investors-for-livestock-productio/. These are Guinea, Nigeria, Mali, Burkina Faso, Togo and Ghana. The rest, namely, Benin, Cape Verde, Côte D'ivoire, The Gambia, Guinea Bissau, Liberia, Niger, Senegal and Sierra Leone are yet to do so. Id.

90 Okafor & Effoduh, *supra* note 13, at 109.

Turning to the EACJ, the nature of its human rights jurisdiction makes the dynamics of compliance slightly different from what obtains in the ECOWAS Court. The ECOWAS Court is specifically mandated to adjudicate human rights claims and provide relief to victims, making its jurisdiction protective or executory.[91] In other words, it has powers to issue binding and executable orders that require compliance by states. By contrast, the EACJ's indirect and largely interpretative human rights jurisdiction does not allow for direct adjudication of human rights claims and issuance of mandatory orders. Consequently, the rulings of the EACJ are often "declara¬tory" in nature with no imme¬diate and direct compliance consequences for states.[92] For example, in *Burundian Journalists Union v. Attorney General of Burundi,* the Court de¬clared sections of Burundi's Press Law as inconsistent with the EAC Treaty but declined to make any consequential orders compelling amendment of the Law.[93]

Nevertheless, this does not mean that judgments of the EACJ, even if declaratory, are without effect. Consistent with the principle that a state must implement its international obligations in good faith, and in accordance with Article 38(3) of the EAC Treaty, a partner state has the obligation to take necessary measures to implement judgments of the Court without delay. In the case of a declaratory judgement, the measures to be taken would obviously not be directed by the Court. However, the state is not absolved from responsibility merely because of that. It must on its own initiative take appropriate measures to bring its conduct in conformity with the outcome of the judgement. Despite this understanding of their obligation, EAC partner states routinely fail to implement judgments of the EACJ making non-compliance a continuing challenge in the EAC as well.[94]

Expectedly, the trend is no different at the regional level. The compliance rate of African Court on Human and Peoples' Rights remains at a meagre 7% of its total judgements.[95] According to the 2021 activity report of the African Court, of the over 100 judgements on merits and orders for provisional measures rendered by the court, only two states parties (Burkina Faso and Côte d'Ivoire) have fully complied with the judgments of the court.[96]

91 *See* Solomon T. Ebobrah & Victor Lando, *Africa's Sub-Regional Courts as Back-Up Custodians of Constitutional Justice: Beyond the Compliance Question, in* THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS: USING LITIGATION FOR POLITICAL, LEGAL, AND SOCIAL CHANGE 192 (James Thuo Gathii ed., 2020).

92 Id.

93 Burundian Journalists Union v. Att'y Gen. of the Republic of Burundi, Ref. No. 7 of 2013, Judgment, E. Afr. Ct. of J. First Instance Div., ¶ 121 (May 15, 2015).

94 Ebobrah & Lando, supra note 91, at 192.

95 *Activity Report of the African Court on Human and Peoples' Rights (AfCHPR): 1 January – 31 December, 2020,* Executive Council, Thirty-Eight Ordinary Session, EX.CL/1258(XXXVIII), ¶ 37 (Feb. 3-4, 2021).

96 *Id.*

That said, beyond the discouraging rates of compliance, the ECOWAS Court and the EACJ are contributing significantly to African human rights jurisprudence. On the human rights implications of Internet access and the enjoyment of human rights within the digital environment, the decisions of the ECOWAS Court and EACJ are setting standards of acceptable conduct for African states and galvanizing activists and ordinary citizens to demand better from their governments.[97] For instance, regardless of their compliance status, the ECOWAS Court decisions in *Amnesty International v. Togo and SERAP v Nigeria (Twitter Ban Case)* are ground-breaking precedents that set a normative standard that arbitrary deprivation of access to the Internet or services provided over the internet are human rights violations.[98] These cases and others will provide guidance to other courts (whether national or international) faced with similar questions, inform the content of national regulations on internet services and social media, and provide a reference point for civic engagement by human rights NGOs and other civil society organisations.

Undoubtedly, compliance with court decisions is an important indicator of effectiveness, and every effort should be made to ensure that African states comply with judgments of the Courts they themselves have set up. But at the same time, it is important that we do not fixate on quantitative measurements of effectiveness and lose sight of other indicators such as normative development, vindication of rights and the name-and-shame effects of international court judgments. While these may not have the immediate and visible impact of compliance, they contribute in no small measure towards building a culture of acceptable normative behavior of states.[99]

97 See Natalia Krapiva, ECOWAS Togo Court Decision: Internet Access is a Right That Requires Protection of the Law ACCESSNOW (Jul. 14, 2020), https://www.accessnow.org/ecowas-togo-court-decision/ (last updated Jan. 13, 2023) ("The ECOWAS Court ruling in the favour of the Togolese people is not only a victory for those affected by the 2017 internet shutdowns, it sets a precedent to all other governments that they will be held accountable for their actions").

98 In consonance with this view, James Gathii observes that 'opposition politicians and parties bring strategic litigation to Africa's international courts as one venue, among others, for mobilising support for the promotion of and defence of political freedom.' By filing cases in international courts, including African Court, opposition parties, politicians, and litigants articulate their grievances and in so doing preserve oppositional norms and values in countries where political opposition survival faces repressive control by authoritarian states. In so doing, these opposition politicians and political parties seek to build, maintain, and de¬fend social and political movements. For example, political dissidents like Ingabire Umuhoza from Rwanda and the Tanzanian politician, the late Christopher Mtikila, used litigation to advance their causes before the African Court. See James Thuo Gathii & Jacquelene Wangui Mwangi, The African Court of Human and Peoples' Rights as an Opportunity Structure, in THE PERFORMANCE OF AFRICA'S INTERNATIONAL COURTS SOCIAL CHANGE 212-13 (James Thuo Gathii ed., 2020).

99 Victor Ayeni, Beyond Compliance: Do Decisions of Regional Human Rights Tribunals in Africa Make a Difference?, in COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA: ESSAYS IN HONOUR OF FRANS VILJOEN 55 (Aderomola Adeola ed., 2022).

VI. Conclusion

Sub-regional courts such as the ECOWAS Court and East Africa Court of Justice are assuming crucial roles in protecting human rights on the Internet. Their contributions can be seen in generally expanding the institutional protection of human rights, flagging online human rights violations, fostering digital rights norms and setting the boundaries of acceptable behaviour for states on access to the Internet. While their normative and institutional capability to foster human rights on the Internet cannot be gainsaid, compliance and enforcement of judgments continues to be the Achilles heel of sub-regional courts in Africa.[100] Within ECOWAS for instance, most member states have failed to domesticate the Court's Protocol or its relevant provisions on execution of judgments to enable their domestic courts enforce decisions of the ECOWAS Court.

Given that the rate of compliance with a court's decisions is an important way of measuring its effectiveness, low compliance is always concerning. However, effectiveness may also be assessed by focusing less on the quantitative indicators (i.e., rate of compliance), and rather looking to whether overall, the decisions of a court are effective in setting standards, influencing a change in the behaviour of states and generally aiding in normative development.[101] Going by this alternative approach, we argue that despite low compliance rates with their judgments, sub-regional courts like the ECOWAS Court and the EACJ are making effective normative contributions towards curbing the authoritarian behaviour of African states within the digital environment.

100 *Id.*

101 *See generally* Obiora Chinedu Okafor et al., *On the Modest Impact of West Africa's International Human Rights Court on the Executive Branch of Government in Nigeria,* 35 HARV. HUM. RTS. J. 169 (2022).