Protecting intellectual property through a human rights approach: jurisprudential missteps and missed opportunities in the ECOWAS Court's decision in *Solomon Ekolama v Nigeria*

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ABSTRACT: This article critically analyses the ECOWAS Court of Justice's 2025 judgment in *Solomon Ekolama v Nigeria*, a landmark case concerning the protection of intellectual property as a human right. It argues that the Court missed a rare opportunity to develop a coherent framework on the intersection of intellectual property and the human right to property under the African Charter on Human and Peoples' Rights. Through a holistic review of the decision, the article identifies a number of shortcomings. First, it critiques the Court's narrow jurisdictional analysis, which failed to consider the Berne Convention and WIPO Copyright Treaty as interpretative aids for the right to property under article 14 of the African Charter, thereby overlooking the principle of systemic integration. Next, the article deconstructs the Court's analysis of the merits. It shows that the Court misinterpreted the claim presented when it deemed it a criminal complaint of intellectual property 'theft' outside of its remit, rather than a violation of property rights. It also demonstrates that the Court failed to properly conceptualise a violation of the right to property under article 14 of the African Charter, an interpretative error that affected its conclusions. Finally, the article highlights the Court's procedural failure to utilise expert evidence which prevented a technically informed assessment of the intellectual property claim presented in the case.

TITRE ET RÉSUMÉ EN FRANÇAIS

La protection de la propriété intellectuelle par une approche fondée sur les droits de l'homme: errements jurisprudentiels et opportunités manquées dans l'arrêt de la Cour de justice de la CEDEAO *Solomon Ekolama c. Nigeria*

RÉSUMÉ: La présente contribution propose une analyse critique de l'arrêt rendu en 2025 par la Cour de justice de la CEDEAO dans l'affaire *Solomon Ekolama c. Nigeria*, décision emblématique relative à la protection de la propriété intellectuelle en tant que droit de l'homme. Il soutient que cette décision a raté une rare opportunité de développer un cadre cohérent à l'intersection de la propriété intellectuelle et du droit de propriété, tel que garanti par l'article 14 de la Charte africaine des droits de l'homme et des peuples. À travers un examen global et systématique de la décision, la contribution met en évidence plusieurs insuffisances majeures. Premièrement, elle critique l'analyse restrictive de la compétence de la Cour, laquelle n'a pas envisagé la Convention de Berne et le Traité de l'OMPI sur le droit d'auteur comme instruments d'interprétation du droit de propriété consacré à l'article 14 de la Charte africaine,

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méconnaissant ainsi le principe d'intégration systémique. Deuxièmement, elle déconstruit l'examen du fond opéré par la Cour. La contribution démontre que celle-ci a procédé à une qualification erronée de la demande en la considérant comme une plainte pénale relative à un «vol» de propriété intellectuelle échappant à sa compétence, plutôt que comme une allégation de violation du droit de propriété. Elle établit en outre que la Cour n'a pas correctement conceptualisé la violation alléguée du droit de propriété au sens de l'article 14 de la Charte africaine, erreur interprétative qui a vicié l'ensemble de son raisonnement et de ses conclusions. Enfin, elle met en lumière une défaillance procédurale significative, tenant à l'absence de recours à une expertise technique, laquelle a empêché la Cour de procéder à une évaluation juridiquement et techniquement éclairée de la revendication en matière de propriété intellectuelle soumise à son appréciation.

TÍTULO E RESUMO EM PORTUGUÊS

Proteger a propriedade intelectual através de uma abordagem aos direitos humanos: erros jurisprudenciais e oportunidades perdidas na decisão do Tribunal da CEDEAO no caso *Solomon Ekolama v Nigéria*

RESUMO: Este artigo analisa criticamente a decisão do Tribunal de Justiça da CEDEAO em 2025 no caso *Solomon Ekolama v Nigéria*, um caso emblemático relativo à proteção da propriedade intelectual como um direito humano. Argumenta que o Tribunal perdeu uma rara oportunidade de desenvolver um quadro coerente sobre a interseção entre propriedade intelectual e o direito humano à propriedade ao abrigo da Carta Africana dos Direitos Humanos e dos Povos. Através de uma revisão holística da decisão, o artigo identifica várias falhas. Em primeiro lugar, critica a análise jurisdicional restrita do Tribunal, que não considerou a Convenção de Berna e o Tratado de Direitos de Autor da OMPI como auxílios interpretativos para o direito à propriedade ao abrigo do artigo 14 da Carta Africana, ignorando assim o princípio da integração sistémica. De seguida, o artigo desconstrói a análise do mérito do Tribunal. Mostra que este pode ter interpretado de forma equivocada a alegação apresentada ao considerá-la uma queixa criminal de 'roubo' de propriedade intelectual fora do seu âmbito, e não uma violação dos direitos de propriedade. Demonstra também que o Tribunal falhou em conceptualizar devidamente uma violação do direito à propriedade ao abrigo do artigo 14 da Carta Africana, um erro interpretativo que afetou as suas conclusões. Por fim, o artigo destaca a falha processual do Tribunal em utilizar provas periciais que impediram uma avaliação tecnicamente informada da alegação de propriedade intelectual apresentada no caso.

KEY WORDS: ECOWAS Court of Justice; *Solomon Ekolama v Nigeria*; intellectual property rights; right to property; African Charter on Human and Peoples' Rights

CONTENT:

1 INTRODUCTION

On 12 May 2025, the Court of Justice of the Economic Community of West African States (ECOWAS Court) delivered judgment in *Solomon Ekolama v Nigeria*,[1] a case that presented a rare and unique opportunity for an African sub-regional or regional court to consider the extent to which intellectual property rights may be conceived as human rights and protected under the African Charter on Human and Peoples' Rights 1981 (African Charter). In an Application filed with the ECOWAS Court on 20 November 2019 against Nigeria, Mr Ekolama and his partner company, Far-Reaching Technologies Ltd, alleged that the Nigerian government infringed the copyright in a software Mr Ekolama had created when Nigeria's Ministry of Interior developed an application that copied the concept, features and functionality of his software.[2] They contended that since intellectual property is a form of property, the Nigerian government's conduct violated their right to property under article 14 of the African Charter.

The Court ruled that it had jurisdiction in the matter to the extent that the claims were anchored on the African Charter and other human rights instruments. However, it determined that it had no jurisdiction to consider the Berne Convention for the Protection of Literary and Artistic Works 1967 and the WIPO Copyright Treaty 1996 which the applicants invoked as part of the sources of law to be applied.[3] On the merits, the Court recognised that intellectual property including copyrights may be protected under article 14 of the African Charter which guarantees the right to property. However, the Court ultimately dismissed the applicants' claim of copyright infringement and, by extension, property right violation under article 14 of the African Charter. The Court reasoned that a violation of article 14 of the African Charter must be 'a deprivation of property by the respondent'.[4] In its view, since the alleged copying of the first applicant's software fell 'short of divesting' the applicant of his 'proprietary interest' in the software, Nigeria did not violate his right to property under article 14 of the African Charter.[5]

In this article, we review the decision in *Ekolama*. We argue, among others, that the Court made a mistake in its jurisdictional analysis on the Berne Convention and the WIPO Treaty, misinterpreted the claim of the applicants, and failed to correctly theorise a violation of the right to property under article 14 of the African Charter. The article is organised into four parts, including this introduction. Part 2 provides an overview of the facts, legal arguments and decision of the Court in *Ekolama*. In part 3 we undertake a critical review of the reasoning of the Court, touching on the Court's jurisdictional analysis of the Berne

1 *Solomon Ekolama & Another v Nigeria* [ECW/CCJ/JUD/24/25] ECOWAS Court of Justice, 12 May 2025 (*Ekloama*).

2 As above.

3 As above.

4 As above.

5 As above.

Convention and the WIPO Treaty, the Court's characterisation of the applicants' claim, its conception of a right to property violation, and the missed opportunity to obtain expert testimony. Part 4 summarises and concludes the article.

2 THE FACTS AND DECISION IN *EKOLAMA*

2.1 Facts and legal argument of the parties

The case was initiated by Mr Solomon Ekolama, a registered engineer, and Far-Reaching Technologies Ltd, a company of which Mr Ekolama was the lead software engineer. According to the applicants, Mr Ekolama developed a sophisticated security software named the 'Nigerian Community Safety and Security Software Infrastructure', or simply the 'Nigeria Secure Portal' (NSP). The function of the NSP was to enable the swift reporting of criminal activities to security services to elicit a prompt response. The software was legally registered in the name of Mr Ekolama, for which he obtained certificate LW1785 from the Nigerian Copyright Commission on 7 September 2016. Following the NSP's creation and registration, Mr Ekolama partnered with Far-Reaching Technologies Ltd for its advanced development and real-world application. With the view to seeking a partnership with the Nigerian government for further development of the software and its roll-out for national security and law enforcement purposes, the applicants presented a proposal to the National Information Technology Development Agency (NITDA), an agency of Nigeria's Ministry of Communications. This led to a series of meetings and presentations during which the applicants disclosed the technical details and operational framework of the NSP. The applicants had similar engagements with two agencies of Nigeria's Ministry of Science and Technology, namely, the National Board for Technology Incubation (NBTI) and the National Office for Technology Acquisition and Promotion (NOTAP). Finally, a proposal was also submitted to the office of the President.

Subsequent to these interactions, the applicants discovered a new application available on the Google Play Store under the name 'Nigeria Internal Security and Public Safety Alert System (NISPAS)'. Upon investigation, they concluded that NISPAS, owned and operated by Nigeria's Ministry of Interior, was a direct copy of their software, the NSP, as it had replicated the core concept, features and functionality of the NSP. Believing that their intellectual property had been stolen and wrongfully appropriated by the Nigerian government, the applicants initiated proceedings before the ECOWAS Court, claiming a violation of their fundamental rights.

The applicants argued that the respondent, acting through its agents, had committed 'theft' of their intellectual property, thereby infringing upon their intellectual property rights. According to them, the respondent's action of copying their software and launching it as its own constituted a violation of their right to property, as guaranteed by article 14 of the African Charter and, also, a violation of article 26 of the

International Covenant on Civil and Political Rights 1966 (ICCPR), which guarantees equality before the law. The applicants also relied upon international intellectual property law citing the Berne Convention for the Protection of Literary and Artistic Works 1967 and the WIPO Copyright Treaty 1996 which Nigeria has ratified.

Consequently, they sought a declaration of the violation of their right to property under article 14 of the African Charter, an order compelling the respondent to hand over the NISPAS application to them, and an order prohibiting the respondent from further developing a similar software. They also requested nearly $2 million as compensation for the costs incurred in developing the NSP and for the infringement of their intellectual property rights in the NSP.

The respondent, the Federal Republic of Nigeria, denied all allegations of wrongdoing. It countered that its NISPSAS application was not a copy of the applicants' software. It had been developed independently and that any similarities with the Applicants' software were purely coincidental. The respondent also argued that it never entered into a contractual relationship with the applicants to develop any software, and that whatever work they did, including any presentations or demonstrations to government agencies, was done of their own volition. In a direct challenge to the Court's authority, the respondent further contended that a claim of intellectual property theft was a matter for Nigeria's national courts, not an international human rights court. The respondent characterised the application as frivolous and an attempt to distract the government, and urged the Court to dismiss the case in its entirety.

2.2 The findings and conclusions of the Court

The Court structured its decision around the core judicial inquiries of jurisdiction, admissibility and merits. Regarding jurisdiction, the Court affirmed its competence to hear claims concerning human rights violations under article 14 of the African Charter and article 26 of ICCPR. However, it drew a firm line regarding the other legal instruments cited by the applicants. In particular, the Court declared that it lacked jurisdiction over claims based on the Berne Convention and the WIPO Copyright Treaty. Thus, it underscored that its subject-matter jurisdiction was strictly defined by its foundational protocols and did not extend to the broad corpus of international law.

Specifically, the Court stated:[6]

> The Berne Convention (supra) and its ancillary WIPO Treaty do not form part of the texts that guide its adjudication within its competence … It is needless to say that the Court's competence is derived by law; therefore, it cannot *suo motu* create a new arm of competence regardless of how exhaustively a claimant has pleaded his cause … For emphasis, the Court holds that the Berne Convention and its ancillary WIPO Treaty are

6 See *Ekolama* (n 1) paras 45-46.

> completely outside its competence and declares that it lacks the competence to adjudicate the claim in this regard.

On the question of admissibility, the Court found that the application was admissible with respect to the human rights claims of the applicants founded on the African Charter and ICCPR. It confirmed that the applicants had met the procedural requirements under article 10(d) of the Court's Protocol by properly identifying themselves and demonstrating that the case was not pending before another international court.[7]

In its analysis of the merits, the Court examined and ultimately dismissed the claims of the applicants. Concerning the meaning of property under article 14 of the African Charter, the Court broadly defined it to include tangible assets, such as land, and also intangible assets such as shares, claims to payment of money, and intellectual property rights. Therefore, it acknowledged that the first applicant's registered copyright in the NSP was indeed property within the meaning of article 14 of the African Charter. However, on the issue of whether the property rights of the applicants had been violated, the Court made two conceptual determinations. First, it drew a distinction between a human rights violation and a criminal act, stating that it had no competence to determine the latter. Second, it reasoned that a violation of the right to property under article 14 of the African Charter must be a deprivation or dispossession of an applicant's property by the respondent state.

Based on the foregoing, the Court concluded that the applicants' claim that the respondent had 'stolen' or engaged in 'theft' of the intellectual property in their software was 'not a violation of the right to property'.[8] Rather, it was a claim of a 'crime' or criminal conduct outside of its human rights competence under article 9(4) of the Court Protocol. The Court underscored that it is 'civil in character and does not have a mandate to adjudicate criminal matters'.[9] Yet, the facts and evidence the applicants had placed before it 'establish[ed] that the claim [was] a crime and not a violation as envisaged under article 14 of the African Charter'.[10] Accordingly, the Court concluded that the applicants' 'claim of theft' of their intellectual property[11] must be dismissed because it 'cannot determine a claim of theft clothed in a violation [of] human rights'.[12]

The Court went further in its analysis to suggest that the respondent's alleged copying and adaptation of the NSP as the NISPSAS (which is what the applicants described as stealing or theft) could not constitute a violation of the applicants' right to property under article 14 of the African Charter. According to the Court, a violation of the right to property under article 14 of the African Charter

7 *Ekolama* (n 1) paras 49-50.
8 *Ekolama* (n 1) para 63.
9 As above.
10 As above.
11 As above.
12 *Ekolama* (n 1) para 65.

is 'concerned with a deprivation of property occasioned by the respondent or its agent or subjecting a person's possession to control'.[13] Essentially, the 'owner must be divested of his proprietary rights for the act to qualify as a violation under article 14 of the Charter'.[14] Based on this logic, the Court stated that the 'allegations of the respondent copying the web application fall short of divesting the said applicants of their proprietary interest'.[15] Further, the fact that the applicants still have 'ownership of their web creation' under Nigerian law 'flaws the argument of a deprivation of ownership'.[16] Thus, ultimately, the Court concluded that since the proprietary interest in the NSP was still vested in the first applicant, it could not be said that the Nigerian government had breached article 14 of the African Charter.

Finally, the Court dismissed the applicants' claim under article 26 of ICCPR. The Court concluded that the claim of discrimination was frivolous, as the applicants did not present any facts or evidence to demonstrate how they were discriminated against or treated unequally compared to others in a similar situation.[17]

In summary, the Court declared that it had jurisdiction over the application to the extent that it was based on alleged violations of the African Charter and ICCPR, and not on the Berne Convention or the WIPO Treaty. It also found the application to be admissible under the requirements of article 10(d) of its Protocol (as amended) but proceeded to dismiss all the applicants' claims on the merits.

3 EVALUATION OF THE COURT'S REASONING IN *EKOLAMA*

In this part, we undertake a critical review of the Court's decision in *Ekolama*. However, consistent with the theme of the article, the scope of the discussion is limited to the Court's approach to, and determination of, the intellectual property rights issues. The applicants' claim of discrimination under article 26 of ICCPR is excluded from this analysis. Accordingly, the discussion focuses on the Court's jurisdictional analysis of the Berne Convention and the WIPO Treaty; its analysis and dismissal of the applicants' claim of an intellectual property rights violation under article 14 of the African Charter; and its failure to utilise the facility under its Rules of Procedure to obtain the assistance of an expert witness in the case.

13 *Ekolama* (n 1) 64.
14 As above.
15 As above.
16 As above.
17 *Ekolama* (n 1) paras 70-72.

3.1 A critique of the Court's jurisdictional analysis

The starting point for any critique of the *Ekolama* judgment must be the Court's approach to its own jurisdiction. An international court must always satisfy itself of its competence to hear a matter.[18] This is so crucial that the Court must do so on its own motion even if no party has raised a challenge to its jurisdiction.[19] That said, the ECOWAS Court's decision that it had no jurisdiction to consider the applicants' claims rooted in the Berne Convention and the WIPO Copyright Treaty reveals a fundamental misunderstanding of its status as an international court, albeit with limited reach, and the role it has within the broader corpus of public international law. The Court's reasoning, as laid out in paragraphs 43 to 46 of the judgment, is built on a simple, yet faulty syllogism. It begins by correctly noting that its subject-matter jurisdiction is guided by article 9(4) of its Protocol,[20] which confers upon it the power to determine cases of human rights violations that occur in ECOWAS member states. It then proceeds to create an exclusive, self-defined list of the human rights treaties that it considers to be within its purview. In paragraph 44, the Court enumerates the fundamental human rights treaties of the United Nations (UN) and the regional human rights treaty (that is, the African Charter on Human and Peoples' Rights) as the texts that inform its human rights jurisdiction. Having drawn this restrictive circle, its conclusion becomes inevitable when it states with definitive finality:[21]

> In the brief narration of texts that inform the subject-matter jurisdiction of the Court, the Berne Convention (supra) and its ancillary WIPO Treaty do not form part of the texts that guide its adjudication within its competence under article 9 of the Protocol of the Court as amended. It is needless to say that the Court's competence is derived by law; therefore, it cannot *suo motu* create a new arm of competence regardless of how exhaustively a claimant has pleaded his cause.

This conclusion, which the Court presents as a straightforward interpretation and application of its founding texts, has significant shortcomings. First, it runs counter to the approach the Court has adopted in past cases on the scope of its subject-matter jurisdiction under article 9(4) of the Protocol of the Court. The Court has maintained that its human rights jurisdiction is open-ended, encompassing any relevant international human rights instrument or source of law binding on the respondent state, since article 9(4) of the Protocol does not tie the Court's mandate to any particular human

18 *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA)* [1954] ICJ Reports 19 paras 27-33; *Mariam Kouma & Another v Mali* (2018) 2 AfCLR 237 paras 25-26; *Wanjara v Tanzania* (2020) 4 AfCLR 673 para 31.

19 *Isaac Mensah v Ghana* [ECW/CCJ/JUD/30/24] para 43.

20 *Ekolama* (n 1) para 43.

21 *Ekolama* (n 1) para 45.

rights instrument.[22] Thus, in a number of cases, the Court has laid down a general test for determining whether an instrument qualifies as a binding source of human rights obligations under article 9(4) of the Court's Protocol, rather than making a list that may constrain it in future cases.[23] In *Ekolama*, the Court's approach of adopting an exclusive, self-defined list of human rights instruments falling within its subject matter jurisdiction was the first of the analytical flaws or jurisprudential missteps in the judgment.

Closely tied to, or perhaps flowing from, the above was the Court's failure to appreciate the crucial distinction between the legal texts or sources that directly bear on claims within its subject matter jurisdiction and others which may serve as interpretative aids. The Court itself acknowledged, in paragraph 43 of the judgment, that article 20 of its Protocol (as amended) directs it to apply 'as necessary, the body of laws as contained in article 38 of the Statute of the International Court of Justice'.[24] Article 38(1) of the International Court of Justice (ICJ) Statute, of course, is the authoritative enumeration of the sources of international law, including 'international conventions, whether general or particular, establishing rules expressly recognised by the contesting states'.[25] Nigeria, the respondent state in *Ekolama*, is a party to both the Berne Convention and the WIPO Copyright Treaty.[26] These treaties, therefore, constitute binding international law for Nigeria and establish rules that were directly relevant to the subject matter of the dispute – the protection of a literary and artistic work in the form of a software programme.[27]

As the pleading of the applicants show, the ECOWAS Court was not being asked to act as a specialised intellectual property tribunal, directly enforcing the provisions of the Berne Convention as a primary cause of action.[28] Rather, it was being asked to interpret and apply the human rights to property, as guaranteed by article 14 of the African Charter, in light of the clear and specific rules of international law to which Nigeria has subscribed. The Berne Convention and the WIPO Treaty provide the essential context for understanding what constitutes 'property' in the intellectual sphere and what kind of protections such property is afforded under international law.[29]

22 *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* [2012] CCJELR 349 paras 27-29.

23 *Digital Rights Lawyers Initiative v Federal Republic of Nigeria* [ECW/CCJ/JUD/02/23] paras 25-30; *ASUTIC v Republic of Senegal* [ECW/CCJ/JUD/29/25] paras 27-30.

24 Protocol on the Community Court of Justice (A/P1/7/91) (adopted 6 July 1991, as amended) art 20.

25 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 art 38(1)(a).

26 World Intellectual Property Organiation 'WIPO-Administered Treaties', https://wipolex.wipo.int/en/treaties/ShowResults?country_id=129C (accessed 7 July 2025).

27 D Gervais *The TRIPS Agreement: drafting history and analysis* (2012) 245.

28 *Ekolama* (n 1) para 65.

29 D Gervais 'Intellectual property and human rights: learning to live together' in PL Torremans (ed) *Intellectual property and human rights* (2008) 3-23.

As Geiger has argued, intellectual property rights are not created in a vacuum; they are products of a detailed international legal framework that human rights courts cannot simply ignore.[30] The European Court of Human Rights (European Court), for instance, has consistently held that intellectual property, including patents, falls within the ambit of article 1 of Protocol 1 to the European Convention on Human Rights (European Convention), which protects individual's 'possessions' or property. Accordingly, in *Balan v Moldova*,[31] a photographer alleged that the Moldovan government had used one of his photographs on the nation's official identity cards without his permission or compensation. The European Court found that the copyright in the photograph was a possession and that the government's unauthorised use constituted an interference with the applicant's peaceful enjoyment of that possession, leading to a finding of a violation of article 1 of Protocol 1.[32]

In protecting intellectual property rights under article 1 of Protocol 1 to the European Convention, the European Court has not shied away from referencing the specific intellectual property conventions that define the content and scope of these rights.[33] The European Court's landmark decision in *Anheuser-Busch Inc v Portugal*[34] is instructive here. While the Court ultimately found no violation, it explicitly recognised that a trademark could constitute a possession and engaged in a detailed analysis that implicitly drew upon the principles of trademark law.[35] The ECOWAS Court's declination to consider the Berne Convention or the WIPO Treaty as interpretative aids stands in stark contrast to this more sophisticated and integrated approach. That decision, which ignored the broader legal context, weakened the Court's methodology and prevented a more holistic interpretation and progressive application of the law.

Ultimately, the Court's apparent compartmentalisation of legal regimes in its jurisdictional analysis showed a deficient appreciation of the principle of systemic integration, codified in article 31(3)(c) of the Vienna Convention on the Law of Treaties to guide treaty

30 C Geiger 'Intellectual property shall be protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: a mysterious provision with an unclear scope' (2009) 31 *European Intellectual Property Review* 113-117.

31 *Balan v Moldova* (ECtHR, App 19247/03) (28 January 2008).

32 See also *Smith Kline and French Laboratories Ltd v The Netherlands* (1990) 66 DR 70 (a case concerning a pharmaceutical patent, where the European Commission of Human Rights recognised the patent as a possession and determined that the state's grant of a compulsory licence to a competitor constituted a 'control of the use of property' under the second paragraph of article 1 of Protocol 1); *Anheuser-Busch Inc v Portugal* (2007) 44 EHRR 42 (where the Grand Chamber of the ECtHR expanded the of the concept of 'possessions' by finding that even a pending trademark *application* could qualify, provided the applicant had a 'legitimate expectation' of it being granted. This shows a sophisticated understanding that property interests can exist even before they are formally perfected).

33 *Sia Akka/Laa v Latvia* App 562/05 (12 July 2016); *Levola Hengelo BV v Smilde Foods BV* Case C-310/17 (13 November 2018).

34 *Anheuser-Busch Inc v Portugal* (2007) 44 EHRR 42.

35 *Anheuser-Busch* (n 34) paras 72-78.

interpretation.[36] As an analytical tool, the concept of systemic integration holds that any rule or branch of international law exists in a systemic relationship with the broader corpus of international law. As such, the interpretation and application of any rule, treaty provision or other legal instrument must take into account the normative environment in which it is situated.[37]

The African Charter, like any human rights treaty, does not operate in a hermetically sealed universe. It must be read as part of the broader fabric of international law. Therefore, the right to property in article 14 of the Charter cannot be defined *in vacuo*. Its meaning and scope, particularly when applied to intangible assets such as copyright, should necessarily be informed by other relevant international legal instruments.[38] By declining to consider the Berne Convention or the WIPO Treaty, the Court was not merely declining jurisdiction; it was declining to properly interpret the very human rights instrument that it admitted was within its competence. As Helfer argues, human rights and intellectual property law are increasingly intertwined, and to adjudicate one without reference to the other is to ignore the reality of modern legal practice.[39]

In conclusion, the Court's jurisdictional analysis in *Ekolama* created a paradox. It accepted jurisdiction over a claim for violation of the right to property but refrained from considering the very international legal instruments that define the specific property right in question. This dogmatic approach did a disservice to the applicants' case and to the development of a coherent jurisprudence on the intersection of international human rights and intellectual property. The Court should have found that while it may not have jurisdiction over the Berne Convention or the WIPO Treaty as stand-alone instruments, it was not only permitted but obligated to use them as essential interpretative tools to give content and meaning to the right to property under the African Charter. Its failure to do so was a fundamental, analytical misstep that led the Court onto a path of insularity at a moment that called for integration. By limiting itself to a defined list of legal texts contrary to its own precedents, the Court failed to avail itself of the instruments that could have illuminated the specialised nature of the matter raised in the application.

36 Vienna Convention on the Law of Treaties art 31(3)(c). See C McLachlan 'The principle of systemic integration and article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279.

37 International Law Commission Report of a Study Group on Fragmentation of International Law UN Doc A/CN.4/L.682 (13 April 2006) para 423; C Nyinevi 'The liability of foreign investors to project-affected local communities in international law' PhD thesis, Monash University, 2022 114.

38 PK Yu 'Intellectual property and the right to development' in DJ Gervais (ed) *Intellectual property, trade and development* (2014) 457.

39 LR Helfer 'Toward a human rights framework for intellectual property' (2007) 40 *UC Davis Law Review* 971, 975; PK Yu 'Intellectual property and human rights 2.0' (2019) 53 *University of Richmond Law Review* 1375-1453.

3.2 Analysis of the Court's decision on the right to property

The African Charter provides that '[t]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'[40] In previous cases, including *Dexter Oil Ltd v Liberia*[41] and *Algom Resources Ltd v Sierra Leone*,[42] the ECOWAS Court – relying on property rights jurisprudence of the European Court – had given article 14 of the African Charter a broad interpretation that implied the inclusion of intellectual property within its scope. In *Ekolama*, the Court was squarely faced with the issue. The Court started off by correctly outlining the tripartite structure of property rights protection, familiar from the jurisprudence of the European Court: the right to peaceful enjoyment of property, protection against deprivation of property, and the control of use.[43] It also rightly acknowledged that property includes intangible assets such as intellectual property rights.[44] Yet, having set out this sound legal framework, the Court inexplicably failed to apply it to the facts. Instead, it engaged in a rather unusual semantic analysis that misinterpreted the gist of the applicants' claim. The Court delivered itself as follows:[45]

> In this instance, therefore, the Court is concerned that the applicants are claiming theft of their proprietary interest, not a violation of the right to property … This Court is civil in character and does not have a mandate to adjudicate on criminal matters. Hence, in the instance of a claim of theft, which is a crime, the Court cannot develop competence outside that which the law has bestowed on it.

The Court's determination here rested on an invented distinction between the 'theft' of property and a violation of the right to property. This distinction, which has no sustainable basis in international law (including human rights law) or in its own precedents, allowed the Court to sidestep the substantive claim and effectively undermine the protection in article 14 of the African Charter. Going by the rules of state responsibility, a violation, breach or infringement of a fundamental human right can be said to have occurred when a conduct (whether an act or omission) attributable to a state is not in conformity with the requirements of an international human rights obligation of the state and, as a result, deprives an individual of the protection guaranteed by that obligation, in whole or in part.[46] Therefore, potentially, any conduct attributable to a state, whether classified as criminal or civil

40 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 14.

41 *Dexter Oil Ltd v Liberia*, [ECW/CCJ/JUD/03/19] paras 78-80.

42 *Algom Resources Ltd v Sierra Leone* [ECW/CCJ/JUD/03/23] paras 72 & 80.

43 *Ekolama* (n 1) para 61.

44 *Ekolama* (n 1) para 62.

45 *Ekolama* (n 1) para 63.

46 *Digital Rights Lawyers Initiative* (n 23); International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts (2001) art 12.

under domestic law, may constitute a violation of the state's human rights obligation so long as it does not conform to the requirements of that obligation. This explains why the International Law Commission (ILC) has noted that, as far as the responsibility of a state is concerned, no 'distinction exist[s] between the 'civil' and 'criminal' responsibility as is the case in internal legal systems'.[47]

In fact, in a previous case, *Registered Trustees of Gan Allah Fulani Development Association v Nigeria*,[48] the Court correctly addressed this issue in a manner that aligns with the ILC's guidance on the lack of distinction between criminal and civil liability in the context of the international responsibility of a state. Dismissing Nigeria's objection to jurisdiction on the ground that the application presented issues bordering on criminal conduct, the Court stated in the *Gan Allah Fulani* case as follows:

> (40) It is not uncommon for a conduct, an event, or incident to implicate different legal obligations, resulting in multiple liabilities for one or more persons. Thus, invariably, an action or omission that violates the fundamental human rights of an individual may also give rise to other liabilities including criminal penalties under municipal or international law. Nevertheless, it does not follow that merely because the underlying cause of an alleged human rights violation is or may be a crime, the Court is *ipso facto* deprived of its jurisdiction to adjudicate the human rights claim.
>
> (41) In a human rights action such as this one, it is the international obligation of the state to respect or protect the fundamental human rights of the victim of the wrongful conduct that is engaged. This is different from a criminal proceeding, whether domestic or international, where the purpose of the process is to hold persons who committed (or were complicit in) the underlying wrongful act personally and criminally liable.

Similarly, it can be fairly argued that although the applicants in *Ekolama* described the conduct of the Nigerian government as 'stealing' or 'theft' of their intellectual property, they were not, in fact, inviting the Court to hold Nigeria criminally liable. It was, for all intents and purposes, a metaphor used to describe how the Nigerian government had allegedly appropriated their software for its own use without their consent. Therefore, far from being a criminal complaint, the applicants had submitted a human rights application, with just a word or two painting a metaphorical image of criminal conduct. The Court's fixation on the language, rather than the substance of the claim, led it astray.

Indeed, even if it is granted that the applicants' use of the terms 'stealing' or 'theft' was not figurative, the Court – guided by the rules of state responsibility and its reasoning in *Gan Allah Fulani* – should still not have conflated a label that might be attached to an act under municipal law ('theft') with the characterisation of that same act under international human rights law (an unlawful interference with or deprivation of property). As earlier noted, a single act by a state agent

47 International Law Commission (n 46) art 12, commentary para 5.

48 *Gan Allah Fulani Development Association v Nigeria* [ECW/CCJ/JUD/06/23].

can constitute, and often does constitute, both a domestic (or international) crime and an international human rights violation.[49] Therefore, even if the alleged copying of the applicants' software by the respondent's agents were a crime under Nigerian law, the Court was approached in its capacity as a human rights court, and should have focused on the human rights claims presented to it. The Court's failure to do so creates an accountability vacuum that shields state-sponsored infringements of property rights from international human rights scrutiny. It gives a regrettable impression that a case alleging a property rights violation (and potentially other human rights violations) cannot succeed at the ECOWAS Court if the underlying conduct is, or may be, a crime. This is a setback for the protection of property and other rights in the sub-region, particularly in cases where the domestic legal remedies are ineffective, inadequate or inaccessible.

The Court compounded this error with an unusual conclusion that wrongly theorised a violation of the right to property under article 14 of the African Charter and reflected a misconception of the nature of intellectual property. It held that the applicants' rights in the NSP could not have been violated by the respondent's alleged copying and adaptation of the NSP as NISPSAS, since the first applicant still had his legal title to the software in the form of the copyright certificate. In the Court's words, 'the Applicant still possesses the ownership of their web creation, which flaws the argument of a deprivation of ownership'.[50]

At a conceptual level, the Court's reasoning represents a defective theory of a violation of the right to property. The Court suggests that a violation of the right to property occurs only when an individual is deprived or totally divested of their interest in a property. This proposition overlooks the characteristics or elements of the right to property and the extent to which they may be implicated by the adverse conduct of the state. In *African Commission v Kenya* (*Ogiek*), the African Court recognised that 'in its classical conception, the right to property usually refers to three elements namely: the right to use the thing that is the subject of the right (*usus*), the right to enjoy the fruit thereof (*fructus*) and the right to dispose of the thing, that is, the right to transfer it (*abusus*)'.[51] It follows that a determination of whether the right to property has been violated, in any instance, should involve considerations of (a) the element of the right to property implicated by the respondent's conduct; and (b) the impact of the respondent's conduct on that element.

It is entirely possible that an individual may still possess the legal title to a property, but the respondent's conduct may have either deprived or interfered with the individual's right to enjoy the economic benefits flowing from the property. In such a case, it would be incongruous to suggest that the right to property has not been violated within the meaning of article 14 of the African Charter merely because

49 A Cassese *International criminal law* (2013) 23.

50 *Ekolama* (n 1) para 64.

51 *African Commission on Human and Peoples' Rights v Kenya* (2017) 2 AfCLR 9 para 124 (*Ogiek*).

the individual has not been totally deprived or divested of the property or the legal title to it. Indirect or *de facto* expropriation describes those instances where elements of the right to property may be interfered with despite the formal title remaining with the owner.[52] Thus, the Inter-American Court of Human Rights has long recognised that the right to property under the American Convention on Human Rights protects not just the abstract title but also the 'use and enjoyment' of property, and that an interference with these can amount to a deprivation.[53] The European Court has similarly held that measures that substantially interfere with the economic viability of a property right can constitute a *de facto* expropriation requiring compensation, even without a formal transfer of title.[54]

The above discussion shows that the violation of a right, such as the right to property, is often graduated or a matter of degree. In other words, a violation of the right to property is not always a stark divide between total divestment of the property and no interference at all. Instead, it is, and should be, conceived as a spectrum. The fact that a violation may take the form of unlawful interference with use or enjoyment of the property (at the lower end of the scale) rather than total deprivation (at the higher end) does not mean that a violation has not occurred. The degree or extent of the interference may be a relevant factor in determining reparation, but not in deciding whether a violation has, in fact, occurred. Regrettably, in *Ekolama*, the Court's conceptualisation of a property rights violation lacked these insights and nuances.

Beyond the problematic conceptualisation of a violation of the right to property at the general level, the Court's reasoning also revealed a fundamental misunderstanding of the more specific issue of the nature of intellectual property. In fact, it may be said that the Court fell into a trap of 'tangible fallacy'. The Court concluded that no violation of the right to property could have occurred because Mr Ekolama was never divested of his ownership of the software; he still held the physical copyright certificate. This reasoning treats an intangible right as if it were a physical object like a parcel of land or a piece of machinery. It fundamentally misunderstands that the property in copyright is not the paper certificate, but the bundle of exclusive rights to control the use of the created work. In property law, there is clear distinction between tangible property (physical items) and intangible property (abstract rights) which include intellectual property. The value of an intellectual property right lies not in the piece of paper that certifies it, but in the bundle of exclusive rights it confers – the right to reproduce, to distribute, to adapt, and to prevent others from doing so.[55]

52 SRF Plater 'The takings issue in a natural setting: floodlines and the police power' (1974) 52 *Texas Law Review* 201, 210.

53 *Ivcher Bronstein v Peru* Inter-Am Ct HR Series C 74 (6 February 2001) paras 120-122.

54 *Papamichalopoulos & Others v Greece* [1993] 16 EHRR 440 paras 37-46.

55 See Berne Convention for the Protection of Literary and Artistic Works (adopted 14 July 1967, entered into force 29 January 1970) 828 UNTS 221 arts 8, 9, 11 & 12; S Dusollier 'Intellectual property and the bundle-of-rights metaphor' in P Drahos and others (eds) *Essays on intellectual property* (2020) 146-179.

Accordingly, the essence of copyright is the author's exclusive right to authorise or prohibit actions such as reproduction, public performance, and adaptation of their work. An infringement – the unauthorised reproduction and deployment of the software, as alleged by the applicants – is an act that strikes at the heart of this property right. It interferes with the peaceful enjoyment of the property by destroying its exclusivity and diminishing, if not eliminating, its economic value. Accordingly, by focusing on the symbol of the right rather than its substance, the Court rendered the protection of article 14 of the African Charter effectively meaningless for the owner or holder of an intangible asset such as intellectual property rights.

In our view, the Court should have addressed two pertinent questions: First, did the actions of the Nigerian government and/or its agents constitute an interference with the applicants' property, specifically their copyright in the software? If the answer is yes, then the second question should have been whether this interference was justified under the second sentence of article 14 of the African Charter; that is, whether the interference was in the public interest and in accordance with law. The Court's failure to ask and address these basic questions and undertake a more nuanced analysis led to a profound misreading of the right to property under the African Charter.

3.3 The procedural vacillation on expert evidence

While the Court's ultimate dismissal of the claim on the merits is noteworthy, the procedural history of the case, specifically the Court's vacillation and, ultimately, abortive engagement with expert evidence warrants some comment. The judgment reveals a seeming indecision over the need for expert evidence that unfolded over several months. The process began in December 2023 when the Court itself, after the case had been scheduled for judgment, first identified 'the need to invite an expert to submit a technical report before judgment can be delivered'.[56] This was followed by a reversal just ten days later when the Court 'waived the need for an expert witness'.[57] In another about-face in February 2024, the Court, acting *suo motu* under article 45 of its Rules, again determined that an expert was essential and ordered the chief registrar to appoint one.[58] After an expert had been appointed, the applicants objected to the choice, and rather than resolving the objection or appointing a different expert, the Court simply 'withdrew the file for judgment',[59] and proceeded into deliberations without the benefit of the expert report it had, on two different occasions, deemed necessary.

The Court's management of this issue is fraught with problems that have significant implications for its jurisprudence and the

56 *Ekolama* (n 1) para 13.
57 *Ekolama* (n 1) para 14.
58 *Ekolama* (n 1) para 17.
59 *Ekolama* (n 1) para 20.

administration of justice. A most glaring problem is the Court's apparent indecisiveness and the resulting procedural inconsistency. The oscillation between requiring an expert report, waiving it, and then requiring it again projects an image of judicial uncertainty. This procedural vacillation is problematic. First, it creates doubts for the litigants, who may be left unsure of the evidentiary standards the Court is applying. Second, it undermines the authority of the Court's own procedural orders. By deeming an expert report essential for the delivery of a judgment and then proceeding without one, the Court effectively vitiated its *suo motu* order of 29 February 2024 without any clear justification(s).

The judgment provides no reasons for these shifts, leaving observers to speculate whether the changes were due to logistical difficulties, judicial convenience, or a shifting understanding of the case's requirements. Furthermore, the judgment reveals a discomforting failure in transparency regarding the expert witness appointment process. The Court notes the applicant's objection to the appointed expert but fails to articulate the grounds for this objection in the judgment.[60] Thus, it remains unclear in the judgment whether the objection was based on a perceived conflict of interest, a lack of requisite qualifications or some other procedural impropriety. The Court's silence on this is concerning. A transparent judicial process would require articulating the nature of the objection and the Court's reasons for either upholding or dismissing it. By simply noting the objection and abandoning the entire expert appointment process, the Court sidestepped its responsibility to ensure and demonstrate the integrity of its own procedure under article 45 of the Rules of the Court. This opacity in the judgment does little to build confidence in the Court's ability to manage complex evidentiary processes fairly.

Ultimately, the failure to procure and consider expert evidence had a negative impact on the Court's analysis of the merits of the case. The core of the applicants' claim was that the respondent's software (NISPAS) was a functional copy of their own (the NSP), constituting an infringement of their property rights. This was not a question that could be resolved by a mere visual inspection of a copyright certificate; it required a deep technical comparison of software architecture, source code, functionality and user interface. The Court, deprived of expert guidance, resolved the case on a narrow and formalistic legal distinction. It reasoned that because the applicants still held the copyright certificate, they had not been 'divested of [their] proprietary rights'.[61] This reasoning is problematic because it fails to appreciate the nature of intellectual property in the digital age. The value of a software

60 *Ekolama* (n 1) para 20. According to the pleadings filed, the applicants contended that the appointed expert, while possessing a background in the tech industry, did not demonstrate the requisite specialisation in intellectual property (IP) consistent with the WIPO Expert Determination Rules. They also had concerns about the ability of any Nigerian expert, including the expert appointed by the Court, to offer a truly independent opinion in a case against the Federal Republic of Nigeria without any repercussions. The Court, however, did not state these in the judgment.

61 *Ekolama* (n 1) para 64.

application does not lie merely in the legal title, but in its economic value and the exclusive right to exploit it. An expert report could have established whether the respondent's application was a 'direct lifting' of the concept and core features of the applicants' software,[62] thereby constituting a *de facto* deprivation or interference with the economic value of their intellectual property. Such an act of appropriation, if established, could certainly be construed as an encroachment on the right to property under article 14 of the African Charter, even if it does not extinguish the formal legal title. By avoiding the expert evidence, the Court foreclosed a more nuanced and informed analysis of the issue, settling instead for a superficial interpretation that arguably failed to deliver justice in the context of the alleged wrong.

4 CONCLUSION

The *Ekolama* decision is a regrettable instance of jurisprudential missteps and missed opportunities that allowed the rare chance to develop a coherent human rights framework for intellectual property protection under the African Charter to slip by the ECOWAS Court. In its reasoning, the Court unwittingly erected a wall between human rights law and intellectual property law, chose a path of legal insularity over systemic integration, and embraced a notion that renders the African Charter's property protections ineffective for innovators and creators. The Court's statement – 'the applicant still possesses the ownership of their web creation, which flaws the argument of a deprivation of ownership'[63] – represents a fundamental misconception of intellectual property protection. By taking this narrow path, the Court diverged from the progressive and coherent jurisprudence of its peer institutions, including the European Court of Human Rights and the African Court on Human and Peoples' Rights. These courts have long recognised that protecting property in the twenty-first century requires a sophisticated understanding of intangible rights and a willingness to interpret human rights instruments as living documents that adapt to new economic and technological realities. The *Ekolama* judgment marks a departure from this international consensus.

The Court's handling of expert evidence in *Ekolama* was also a significant missed opportunity. The procedural inconsistency and ultimate failure to follow through on its own determination that an expert was necessary created a 'process-integrity' challenge. Crucially, it also prevented a full and substantive examination of the applicants' claim. In an era where human rights disputes increasingly involve complex scientific, technological and economic questions, the ability of international courts to effectively manage and integrate expert evidence is paramount. For future cases, the Court needs to develop a more robust, consistent and transparent methodology for engaging

62 This was a key claim of the applicants' case before the Court. See *Ekolama* (n 1) para 23.

63 *Ekolama* (n 1) para 64.

with expert evidence, lest it be seen as shying away from the technical complexities that define contemporary human rights litigation.

Overall, the *Ekolama* decision may be said to represent a shot in the arm for proponents of an appellate chamber of the ECOWAS Court. The shortcomings of the judgment discussed in this essay would be potential issues for appellate review, if there were such a chamber of the Court. In its absence, it is to be hoped that this judgment remains a rare anomaly – one that will be corrected at the earliest opportunity to reaffirm the Court's vital role as a guardian of human rights in the ECOWAS community.