AN APPRAISAL OF THE ROLE OF ECOWAS COURT OF JUSTICE IN THE PROTECTION OF HUMAN RIGHTS UNDER THE ECOWAS TREATY

BY

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BEING A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES , AHMADU BELLO UNIVERSITY ZARIA IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS DEGREE (LLM)

DEPARTMENT OF PUBLIC LAW
FACULTY OF LAW
AHMADU BELLO UNIVERSITY ZARIA

APRIL, 2012

DECLARATION

I hereby declare that the work in the dissertation entitled: 'AN APPRAISAL OF THE ROLE OF ECOWAS COURT OF JUSTICE IN THE PROTECTION OF HUMAN RIGHTS UNDER THE ECOWAS TREATY' has been performed by me under the supervision of Prof. M.T. Ladan.

The information derived from the literature has been duly acknowledged in the text and list of references provided. No part of this dissertation was previously presented for another degree or diploma at any university.

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CERTIFICATION

This dissertation entitled: “AN APPRAISAL OF THE ROLE OF ECOWAS COURT OF JUSTICE IN THE PROTECTION OF HUMAN RIGHTS UNDER THE ECOWAS TREATY” by **JOSHUA DANLADI EPHRAIM** meets the regulations governing the award of master degree in law (LLM) of Ahmadu Bello University, Zaria and it is approved for its contribution to knowledge and literary presentation.

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ACKNOWLEDGEMENTS

I strongly acknowledge the contributions of my first supervisor, Prof. M.T. Ladan of Public law department for his immense literary and academic scholarship towards the success of this thesis.

Also, my thanks go to my second supervisor, Dr. Yusuf Dankofa of the same department, Ahmadu Bello University, Zaria for his marvelous and temporal inspiration in every aspect of the work.

Perhaps, my acknowledgement will be incomplete without mentioning all members of my family who always urged me to speed up my master degree thesis against time.

My thanks and gratitude go to all academic and non academic staff members of Public law Department as well as all my colleagues of the postgraduate program in the faculty of law for their moral and academic support.

The administrative ingenuity of the Assistant Dean, Post Graduate, Dr (Mrs.) I. F. AKANDE of the law faculty, is specially acknowledged for processing the basic requirements of this thesis.

DEDICATION

This thesis is dedicated to my wife, Dinah Zankan and our children, Kushiyiyan, Kunaba, Amanta and Adamu for their patience and understanding throughout the time of doing this research.

LIST OF ABBREVIATIONS

A.D. B	-	African Development Bank
ACHPR	-	African Charter on Human and Peoples Rights
AUCRWC	-	African Union Charter on the Rights and Welfare of the Child.
A.P.C	-	African, Pacific and Caribbean Union
A. U.	-	African Union
C.A.M.A	-	Companies and Allied Matters Act
C. E. P	-	Committee of Eminent Persons
C. J.	-	Chief Justice
C.O.P	-	Commissioner of Police
E.C.O.W.A.S	-	Economic Community of West African States
ECOMOG	-	Economic Community Monitoring Group
E.F.C.C	-	Economic and Financial Crimes Commission
EEC	-	European Economic Community
E.U.	-	European Union
ECOSOC	-	Economic, Social and Cultural Council
F.C.T.	-	Federal Capital Territory
FCTC.	-	Common Wealth Fund for Technical Cooperation
E. C. J	-	ECOWAS Court of Justice
G.A.T.T.	-	General Agreement on Tariff and Trade
G. A.	-	General Assembly
I.C.P.C.	-	Independent Corrupt Practices Commission
I.M.F.	-	International Monetary Fund
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic Social & Cultural Rights

L.F.N	-	Laws of the Federation of Nigeria
M.A.N	-	Manufacturing Association of Nigeria
N.E.C.	-	National Economic Council
NGOS.	-	Non-governmental Organisations
N.S.W.	-	New South Wales
OAURC	-	OAU Refugee Convention
O.P.E.C.	-	Organization of Petroleum Exporting Countries
PACHPRE Rights	-	Protocol to African Charter on Human and Peoples
PACEAU	-	Protocol to the African Charter on the Establishment of African Union.
REC	-	Regional Economic Community
UNECA	-	United Nations Economic Commission for Africa
UDHR	-	Universal Declaration of Human Rights
U.K.	-	United Kingdom
U.N.C.T.A.D	-	United Nations Cooperation on Trade and Development
U.N.	-	United Nations
WAWA	-	West African Women Association

ABSTRACT

This study examined the role of the ECOWAS Community Court of Justice (ECCJ) in the protection of human rights in the West African sub-region specifically, under the ECOWAS Treaties of 1975 and the Revised Treaty of 1993.

The research focused on the ECOWAS treaties, Conventions and Protocols. However, references were made to similar international, regional and national treaties, conventions and protocols such as the United Nations Charter on Human Rights, European Economic Community and the African Charter on Human and Peoples' Rights etc.

The work examined the nature and scope of the ECOWAS mandate and its functions towards achieving the implementation of human rights in the ECOWAS Community Court of Justice.

In this premise, the ECOWAS organs responsible for the execution of the treaties, protocols and conventions were discussed with a view to understanding how human rights issues were adjudicated upon in the ECOWAS Community Court of Justice as well as how they solved any noticeable problems in the implementation of these treaties, conventions and protocols.

In this vein, a doctrinal method of research was adopted to achieve this goal by analyzing the nature and scope of not only the human rights concepts, but also examined the nature and scope of the jurisdiction of the ECOWAS Court of Justice. This was done by the use of both primary and secondary sources of information such as the

ECOWAS treaty of 1975, the revised treaty of 1993, ECOWAS protocols and conventions as well as other international and regional community laws as they applied to their respective regions.

Since we were studying the role of the ECOWAS Court of Justice in the protection of human rights under its treaty, we also considered the contributions made by academic scholars on the subject matter, such as in text books, journals, articles in magazines, newspapers and most importantly, some case law reports from the ECOWAS Community Court of Justice's decisions.

More significantly was the analysis undertaken in respect of the rules of procedure and evidence in the ECOWAS Court of justice and the access to justice for the citizens of the ECOWAS member states. That was why it was considered imperative to examine some of the selected case laws adjudicated by the ECOWAS Court of Justice.

It was based on the above that at conclusion of this work, we brought out the problems inherent in the implementation of the ECOWAS Treaty as it affected human rights protection with a view to solving them by making reasonable suggestions and recommendations. It was hope that this would also contribute to knowledge on this area on significantly benefit Researchers, students, human rights organization all ECOWAS member states, Africa and the world at large.

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CHAPTER ONE

1.0 GENERAL INTRODUCTION

1.1 BACKGROUND TO THE RESEARCH

The desire towards the establishment of ECOWAS Court of justice and an economic community embracing all the states of the West African region was initiated in the early sixties. The initiative was sought after most of these countries had gained independence from their former colonial powers such as the United Kingdom and France.

There are fifteen countries in West Africa that constitute what is called Economic Community of West African States, hereinafter called (ECOWAS) namely: Nigeria, Ghana, Burkina Faso, Mauritania, Togo, Cote d'voire, Mali, Senegal, Niger, Gambia, Sierra Leone, Liberia, Benin Republic, Chad and Cape Verde.[1]

ECOWAS was founded on 28th May, 1975 by the Treaty of Lagos. We shall divide the basic reasons for the establishment of ECOWAS into two which includes :

1. The remote reasons such as[2] :

a. Equality and inter-independence of member states;

b. Solidarity and collective self reliance;

[1] Osita, C.E "The ECOWAS Treaty and the Movement of Aliens, Goods and Services Across Nigeria" Official Journal of ECOWAS (1979) , Vol. 1 pp. 55-60.
[2] Articles 3 and 4 of ECOWAS Revised Treaty, 1993

c. Interstate cooperation, harmonization of policies and integration of programs;
d. Promotion of harmonious development of economic activities among member states;
e. Observance of the legal system of the community;
f. Peaceful settlement of disputes among member states, active cooperation, accountability, economic justice and popular participation in development[3]

ECOWAS is a regional body which has its basis under Article xxiv of the General Agreement on Tariffs and Trades (GATT). This means that all ECOWAS member states are also members of GATT automatically.

This Article provides for the promotion of economic, social and cultural development and the integration of economies of the States in order to increase economic self reliance and promote indigenous and self reliant development.[4]

2. The immediate reasons which now fall within the aims and objectives of ECOWAS arise because of series of political conflicts, hunger and natural disasters. The ECOWAS mandate or role was extended to include the issues of human rights, maintenance of regional peace and

[3] Article 4 ibid
[4] Article xxiv GATT Treaty.

security. The current revised Treaty of ECOWAS made provisions in respect of human rights and maintenance of regional peace and security.[5]

Hence, in their nascent rise, most of the ECOWAS states focused their attention on consolidating their independence and upholding their national sovereignty tenaciously. Closely linked to this is the unusual suspicion as well as political and ideological differences among the West African States. These however, threatened cordial inter-state relationship among the member States. Hence, this informed the need for the formation of ECOWAS so as to forge closer ties among the countries. As the world gradually reduces into a "global village" due to the various scientific and technological developments, smaller economic blocs in form of small countries are becoming more and more inefficient in relation to resource control. There is the need therefore for the smaller nations to form alliances in order to build economic strength.

Also, small economic blocs in some regions are not in a formidable position to compete internationally with larger nation states. Thus, it presents a formidable challenge to create a regional organization such as the ECOWAS.

[5] Section 3 and 4 of ECOWAS Revised Treaty, 1993.

The ECOWAS which was originally formed exclusively, as an economic organization was later expanded to include human rights issues, in addition to the economic integration issues, such as the harmonization and coordination of their national economic policies as well as:

i. the promotion and integration of socio-economic and political programs, projects and activities which include transportation, information, education policies, culture, science, tourism, environmental health and legal matters.[6]

ii. The establishment of ECOWAS common market, protection of the environment, joint production enterprises, liberalization of trade and distribution of tariffs, promotion of balanced development, and establishment of a fund for cooperation, compensation and development.[7]

1.2 STATEMENT OF THE RESEARCH PROBLEM

The problems of ECOWAS began with the political groupings and their orientation which culminated to lack of commitment to its policy implementation particularly between the Anglo-phone and Franco-phone countries. Some of these problems are highlighted below.

[6] Ibid sections 3-4 of the Treaty
[7] Ibid

1.2.1 Problem of lack of development

The basic problem of ECOWAS includes corruption leading to lack of economic development in the sub-region.

The issues of extortion at the border crossings by the personnel of the agencies concerned such as the customs, immigration officials, coastal guards and police etc, is creating a stumbling block to achieving the desired ends of abolishing the trade obstacles within ECOWAS regional trading relationships.

But, West African (WA) countries are yet to attain the economic maturity attained by most European countries in economic development. There is about three hundred years difference between the economic take off of most European countries and West African countries, most of which are even yet to take off economically. Examples abound in countries like Togo, Burkina Faso, Gambia, Chad, Liberia and Mauritania, to mention but few.

However, it was thought by the leaders of ECOWAS countries that, if the region is to be developed, the countries in it must develop together in unison. It was believed that no country of ECOWAS can develop without the others. The necessity of the world economic order today requires neighboring countries to cooperate in order to develop together. For

example, Nigeria cannot develop meaningfully and sustainably if other neighbouring countries remain poor. The impact of those non developed neighbouring countries could have a profound effect on the development of Nigeria in a negative way.

The adage is that, no individual is an island, ipso facto, no country is an island. All ECOWAS countries need one another in order to develop economically, and meaningfully. It was the popular view that the formation of a regional group, like ECOWAS, is the solution to the problem of economic under development of the member countries of ECOWAS. If it were so, how is it that since the establishment of the ECOWAS in1975 there has been no solution to the economic and legal development of most of the countries that formed ECOWAS? This is the problem that we will struggle to find out later in this work.

1.2.2 The Problem of colonialism and the practical application of the Treaty

A serious problem of ECOWAS is how to eradicate all forms of colonialism and defend the countries sovereignty and territorial integrity.

This problem of colonial legacy left by Britain and France, the former colonial rulers of ECOWAS member States constitutes a fundamental drawback to ECOWAS integration. For instance, while Britain practiced the

direct and indirect rule, France on the other hand, practiced the policy of assimilation where in all Franco-phone states' citizens were made to behave like African Frenchmen in all ramifications. This had devastating effects on ECOWAS legal integration policy. Also there is the problem in the application of economic legal provisions of the ECOWAS Treaty into a working instrument that will achieve results similar to those achieved by similar provisions of the European Union Treaty. An example is how the legal provisions of the ECOWAS Treaty could be amended to suit all member countries. In fact, this was part of the reason the ECOWAS Treaty of 1975 was revised in 1993.

The European Economic Union (E.U) Treaty, which ECOWAS followed suit and reproduced, reflects substantially, the economic realities of Europe and this has made the E. U to succeed largely. How can the ECOWAS Treaty which reflects the African continent's reality be made to work in an environment that is different from Europe? This is another problem of this research.

To further elaborate on the problem, how can there be efficient application of the ECOWAS legal and Economic Treaty, in a situation where no single country within the organization has the common basic legal and economic needs which the others don't have?

For instance, if Ghana can manufacture cars, televisions and fridges etc, whereas, Nigeria or any other member of the ECOWAS states cannot but, they go and buy from Ghana. This will stimulate economic integration. Unfortunately, none of these countries manufactures any of the essential and basic needs of the other countries. This impedes the practical application of the ECOWAS Treaty and its realization.

1.2.3 Lack of legal and political cohesion in most ECOWAS Countries

There is the problem of legal and political uniformity among ECOWAS member countries. This is shown in the series of political crises that engulfed some of the ECOWAS countries such as Liberia and Sierra Leone where they were faced with civil strives. There were also the Nigeria and Cameroon conflicts over the Bakasi peninsular, and the Ivorian civil conflicts among others. Since the ECOWAS countries are not politically peaceful and united, it became very difficult for them to achieve the legal objectives of the ECOWAS Treaty? This is a serious problem confronting this research. Can the instrumentality of law be employed to bring about the political integration and harmony which is a precursor for economic development of ECOWAS member states?

1.2.4 Socio-cultural and religious differences

Another problem has to do with the lack of socio-cultural cohesion. Most of the ECOWAS states were either colonized by the United Kingdom or France. As such, their norms and values differed considerably, even though they were all West African states. For example, the differences in languages spoken such as English and French, posed serious problem touching on cohesion, repositioning of confidence, fraternity and brother-hood hence, constituted a source of division.

Secondly, there are differences due to the existence of numerous indigenous West African languages and legal systems, even though efforts are being made to bridge the language barrier however, the differences remain. For example, due to the numerous languages spoken in the region, English and French were chosen as languages of trade and communication of ECOWAS.

Thirdly, the numerous numbers of European countries that colonized West Africa brought with them various cultures and languages eg; Italian, Belgian, English, French and Spanish etc.

The colonial upbringing between the Anglo- phone and the Franco-phone countries as colonial heritages are quite at variance with each other in terms of language, bureaucracy, dressing, living style, egoism and

elitism etc. This wilts down wholesome implementation of the ECOWAS Treaty.

Also, the problem of religion is not only a national one but, a global issue transcending all ECOWAS states and the world at large. The question of which sets of religious beliefs member states should attest to, for instance, whether Christian, Muslim, or animist, plays a serious role in the ECOWAS integration efforts and this must be addressed.

1.2.5 **Problem of conflicts and insecurity leading to human rights abuses**

In most countries of ECOWAS, there are persistent and pervasive abuses of human rights by governments and leaders in the most ignoble manners. This includes political and economic disenfranchisement, lack of provision of adequate public amenities such as health care, water, education, electricity, as well as lack of transparency in governance, including ethnic cleansing, corruption and general victimization of opposition groups etc. These are evidently witnessed in Sierra Leone, Liberia under Charles Taylor, Mauritania and Cote d'voire to mention but a few.[8] All these led to wars and human rights abuses in most member states of ECOWAS.

Human rights abuses resulting from political and economic instabilities led to unemployment, poverty, women and child trafficking,

[8] West African Times, Sunday 14, 2000. pp 3-6

trans-border migrations, and various crimes all constituting a stumbling block and challenges to ECOWAS economic integration. These examples are found in almost all ECOWAS countries particularly Liberia, Sierra Leone, Mauritania, Chad, Cote d'voire and even Nigeria.[9]

In most African countries, there are records of persistent human rights abuses by governments. For example, the attitudes of stay-put in power by many African leaders who do not want leadership change, including some leaders of ECOWAS countries such as Eyadema of Togo, and Paul Biya of Cameroon etc, leaves so much to be desired.[10] This gives room for the practice of single party systems, lack of democracy, poor governance, corruption and self perpetuation in power by leaders with tribal affiliations rather than national allegiance.[11]

1.2.6 Weak technological and scientific background

Most of the ECOWAS countries are not developed technologically. As such, all of them rely heavily on their former colonial masters in terms of all, if not most of their machineries for production and industrial growth and development. Some of these countries still rely on grants and aids from foreign donor countries and NGOS for their survival and development. Therefore, we may ask whether or not there can there be meaningful economic development without technological independence? Additionally

[9] M.T Ladan " Migration, Trafficking, Human Rights and Refugees Under International Law: A Case Study of Africa. Ahmadu Bello University Press Zaria, 2004 Caps. 1-6
[10] Daily Trust February 11, 2009 p. 12
[11] Ibid Daily Trust.

we ask, how can there be economic development without true political development? Hence, we make bold to state that without economic independence, there cannot be political independence. The two are interwoven. The complexities of ECOWAS countries can neither promote economic nor political independence. This is evident by complains made by business men and traders who ply the Lagos-Cotonou-Lome-Accra-Abijan axis of the highway of the high rate of extortion and intimidations at the borders on these routes.[12] When Nigeria took a bold step to end the carnage in Liberia through the ECOWAS Monitoring Group (ECOMOG), most member countries particularly, the Franco-phone states were bitter about the Nigerian role as Nigeria was seen as the financier.[13]

1.2.7 Tribal Affiliations and lack of regional peace and security

Most citizens of the ECOWAS member states attach political allegiance to their leaders who share the same tribe, or the same geographical identity with those citizens, rather than being just patriotic or nationalistic to their countries. This was brought to limelight particularly during the Liberian, Sierra Leone, Ivory Coast and Mauritanian crises.[14] These lead to internal and external conflicts that threaten regional peace and security such as the Sierra Leone /Liberian crises etc.[15]

[12] Ibid p. 13
[13] Ibid p. 12
[14] M.T Ladan op. cit. pp.101-114
[15] Ibid.

1.3 AIMS AND OBJECTIVES OF THE RESEARCH

This thesis aims at realizing the following objectives:

a. To find answers, or solutions to the problems as highlighted under paragraph 1.2 above. This will be done by analyzing the legal frame work provided in the ECOWAS community laws.

b. To examine the legal foundation for the human rights jurisdiction of the ECOWAS Court of justice.

c. To appraise selected human rights decisions of the court with a view to understanding better, the critical role of the court in human rights advancement for a meaningful regional integration in West Africa.

d. Finally, to conclude with some findings and recommendations.

1.4 SCOPE AND LIMITATION OF THE RESEARCH

The scope of this research is limited to the human rights jurisdiction of the ECOWAS Court of justice. Hence, the period of its establishment up to the year 2011 will be considered when most of the court's decisions were delivered on human rights matters.

Also, the scope of this research is determined by the aims and objectives of the research mentioned in paragraph 1.3 above. This study will be limited to the areas of common legal systems and market, protection of the environment, trade liberalization and distribution of tariffs, interstate

cooperation and harmonization of economic policies, as well as peaceful settlement of disputes among other things.

1.5 SIGNIFICANCE/JUSTIFICATIONS OF THE RESEARCH

The significance of this study lies in the fact that there is paucity of literature on the subject, and this study aims at contributing to knowledge in this area. The study therefore, is justified in the following ways:

1. The findings and recommendations will be useful to the ECOWAS Court in terms of improvement of its performance on human rights adjudication.

2. The contribution to knowledge on the subject will benefit other researchers, students and human rights organizations by enhancing their better understanding of the role of the ECOWAS Court in human rights protection in West Africa.

3. This research will be very useful to all the organs of governments, and authorities of all ECOWAS member countries. Other regional organizations, such as the African Union (AU), and European Union (E.U), etc would find the study refreshing and useful.

1.6 RESEARCH METHODOLOGY

The research methodology adopted for this research is doctrinal. That is, it is a library oriented research. By this research methodology, primary research materials will be sourced from treaties, protocols, conventions and other international legal instruments and case laws. Secondary research materials will be sourced from text books, journals, magazines and newspaper publications etc. From these documents, critical analysis would be made with a view to accomplishing the aims and objectives of the study.

1.7 LITERATURE REVIEW

Analysis of the regional community laws is largely a new area of research. There are few literatures compared with the literatures on European community laws. In other words, there are many aspects of the topic of this research which are yet to receive specific consideration but which this work is set to do. Notwithstanding this, there are some few academic expositions, written on ECOWAS, that will be considered as the foundation of this study.

One very significant text book ever written on this subject is by M.T Ladan titled: *"Introduction to ECOWAS Community Law and Practice: Integration, Migration, Human Rights, Access to Justice, Peace and*

Security."[16] In this book, the scholar analysed and discussed coherently several aspects of the legal frameworks of the ECOWAS community, especially on the issues of integration, migration, human rights, and access to justice, peace and security.[17] Infact, the academic contents of the learned scholar prompted the research in this area, particularly the area dealing with the role of ECOWAS court of justice in the protection of human rights under the ECOWAS treaty, so as to contribute to knowledge on this field.

Professor Tabiu and Professor M.T Ladan co-authoured a book titled: "*Individual's Right and Communal Responsibilities*".[18] In this book, they submitted that children, even more than adults are entitled to full human rights protection. They show that children are the most vulnerable segment of ECOWAS member states. This appears to be a reasonable presentation on some issues under discussion. They focused their attention on individuals and children's rights in ECOWAS countries, they did not delve into the issue of legal frame work of the ECOWAS Treaty. That is to say, though their research is on ECOWAS, it did not touch the subject matter of this work. There is therefore, a gap to be filled by this study.

[16] Published by Ahmadu Bello University Press ltd. Zaria (2009) Caps.1-5
[17] Ibid pp 5-20,169-180, 253-260 respectively.
[18] Published by the Human Rights Commission (Abuja) in 1998 PP. 33-35

Another work with a bearing on the subject matter of this work is the one written by Professor M.T Ladan.[19] In the book, the author argued that the weak political, economic, and socio-cultural conditions of most African countries (ECOWAS member states inclusive), led to hunger, starvation, unemployment, war, natural and artificial disasters, civil or religious conflicts, human rights violations, poverty, rape, child and women trafficking, prostitution within and outside Africa, as well as street begging, child soldiers conscription, and under development of Africa generally[20]. The book has actually highlighted some of the problems of ECOWAS legal and Economic integration difficulties. However, the author, a reknowned scholar, has over generalized the concept by his constant mentioning of the causes of women and children trafficking in the ECOWAS sub-region without considering the global issue on the subject matter.[21] This made him not to focus his attention more seriously on ECOWAS court of justice and the Treaty, the subject of this research.

This study will remedy the shortcoming by analyzing the ECOWAS Treaty vis-à-vis the ECOWAS Court of justice in respect to the above subject.

[19] 'Migration, Trafficking , Human Rights and Refugees Under International Law': A Case Study of Africa. A.B.U. Press Zaria, Nig. (2004) PP. 101-126
[20] Ibid pp101-126
[21] Ibid p.128

Another of such scholarly literature is *"The ECOWAS Treaty and the Movement of Aliens, Goods and Services Across Nigeria's International Boundaries*".[22] In this article, the writer tried to analyze the relationship of the ECOWAS Treaty and the freedom of trade and commerce, as well as the rights of ECOWAS members to move around their geographical boundaries to facilitate economic integration.[23] This is not clearly explained because mere mention of free trade and commerce is not justified without showing how it can be achieved. Also, the writer failed to examine the legal framework of ECOWAS Court of justice in the protection of human rights in achieving these objectives in an elaborate manner such as how to use the ECOWAS protocols in order to achieve better results.[24] Hence, this research will take care to cover these lapses.

Similarly, Professor Ajomo discussed on *"African Economic Community Treaty: Issues, Problems and Prospects".*[25] He tried to examine the tethering problems of ECOWAS and the way forward. It is a nice exposition on ECOWAS.[26] But, his failure to mention the legal repercussions of the ECOWAS Treaty on member states makes it rather inconclusive. For instance, he did not mention how the ECOWAS Treaty

[22] Osita C.E Published in the Official Journal of ECOWAS, Abuja Nig., (1979) VOL. 1. P.55-60
[23] Ibid Pp. 55- 60
[24] Ibid pp.60-61
[25] Nigerian Institute of Advanced Legal Studies, Lagos, (1993). Pp. 137-150
[26] Ibid p. 137-150

can be fully integrated within the member states by reason of the Treaty. He has created a legal lacuna. Hence, this research shall look at the basic aims and objectives of ECOWAS under the Treaty that will encourage the legal framework of ECOWAS court of justice in the protection of human rights and freedom of trade and commerce.

Bappa, A.I wrote in an article titled*: "An appraisal of the Framework of ECOWAS Treaty Towards A Common Labor Standard."*[27] In this article, he wrote about the need to create an enabling environment for citizens of member states to work and be employed in any ECOWAS country.[28]He also gave an insight on how ECOWAS can achieve labor integration under the Treaty.[29]There is a shortcoming on his article in the sense that, he limited the article to only labour integration without considering the legal implications of ECOWAS Court of justice for the protection of human rights and labour integration within the Treaty. It is for this reason that this study will further consider the actual legal implication of creating an enabling environment for the efficient working of ECOWAS Court of justice and movement of labour within the ECOWAS sub-region in the Treaty.

[27] Ahmadu Bello University Journal of Private and Comparative Law (2000) Vol. 1 no. 2, pp.56-66
[28] Ibid p. 67
[29] Ibid p. 56-66

Also, there is an article by Robert, R. titled: *"The Social Dimension of Regional Integration in ECOWAS".*[30] The writer postulated on the areas relating to social interaction towards ECOWAS integration[31]. For example, he opined that it is only when member states allow free movement of persons and goods from one member state to another with or without visa, there cannot be real integration.[32] His exposition falls short because, it is limited to only social integration. What about the role of ECOWAS Court of justice in the protection of human rights as well as the economic and political integration.? He did not dwell on this issue. There cannot be any economic cooperation and integration without political cohesion and integration since all ECOWAS members represent independent governments. Thus this study shall expatiate on the powers and functions of the administrative organs of ECOWAS in order to cover this lacuna.

In another book titled: *"The New ECOWAS Treaty in International Law and Politics: An African Perspective"*.[33] The writer gave a resume of ECOWAS Treaty and the international dimension it acquired.[34] He considered the areas of the Treaty that touch on the workability of economic and political aims and objectives on member states without

[30] Working paper no. 49 of the Policy Integration Department, International labour office, Geneva DEC. 2004 p. 6
[31] Ibid p. 7
[32] Supra.
[33] Oyebode A. Published by Bola publication, Lagos, 2003,p. 185
[34] Ibid p. 34

giving any plausible explanation as to how this can be achieved in the most appropriate manner within the provisions of the Treaty.[35]

As can be critically understood from the topic, the book covers some significant aspects of this study. The only area of divergence has to do with the basic legal framework of ECOWAS Court of justice in a legal perspective. It appears this writer is a social scientist because, his work did not extend to legal perspectives. Thus, it is prudent that this research must be undertaken to address the academic lapses observed above in the area of legal and economic regional integration of ECOWAS generally by examining the legal provisions under the Treaty in respect of ECOWAS role in international law and politics.

The most striking identifiable gaps discovered under the above literature review is the failure of these scholars to properly examine the role of the ECOWAS Court of justice in the protection of human rights in member states. Also, there is no proper study on the assessment and implementation of ECOWAS Community laws, treaties, protocols and conventions. Thus, this study will tackle these issues critically and advance solutions in such a way that it will contribute to knowledge on the subject matter.

[35] Ibid at p. 36

1.8 ORGANIZATIONAL LAYOUT

This research is divided into five chapters. Chapter one gives a general introduction. This includes the background to the research, problems of the research, aims and objectives of the research, scope and limitations of the research, its justification and significances, methodology, and literature review of the study, as well as the organizational layout.

Chapter two examines the conceptual clarification of key terms such as the nature and scope of ECOWAS, functions and mandate of ECOWAS, nature and scope of ECOWAS organs, and the concept of human rights.

Chapter three focuses on the nature and scope of the jurisdiction of ECOWAS Court of justice as well as rules and procedures of evidence of the court.

Chapter four considers the ECOWAS court of justice in the protection of human rights and selected case law on the subject matter.

Chapter five contains the conclusion, summary of the findings, suggestions and recommendations.

CHAPTER TWO

2.0 CONCEPTUAL CLARIFICATION OF KEY TERMS

2.1 Introduction

Under this topic, we shall examine some of the major key terms in this study as follows:

a. To examine the nature and scope of ECOWAS.

b. The functions and mandate of ECOWAS.

c. The nature and scope of ECOWAS' organs.

d. The nature and scope of human rights.

In this vein, critical analysis of the above issues shall be made to achieve this aims and objectives.

2.2 Nature and Scope of ECOWAS

The Economic Community of West African States (ECOWAS) was founded by treaty on 28th May, 1975 to advance regional economic integration in West Africa.[1] It comprises the 15 West African States of Benin Republic, Burkina Faso, Cape Verde, Cote D'ivoire, the Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. The main organs of the Organisation were a

[1] Treaty Establishing the Economic Community of West African States, May 28, 1975, UN Treaty series 1010,17; International Legal Material 14(1975), 1,200.

secretariat, which is hosted by Nigeria, a Ministerial Council, and the Authority of Heads of State and governments – the highest policy and decision-making organ of the Community which meets at least once annually.

At its creation, ECOWAS was mostly, if not exclusively, seen as a regional zone of preference allowed under Article XXIV of the General Agreement on Tariffs and Trade (GATT). The onset of the Liberian conflict at the beginning of the decade of the 1990s appears to have triggered a re-think of this narrow perception of ECOWAS and an expansion of the narrow perception of ECOWAS mandate to actively include human rights, the preservation of regional rights, peace and security. The change in context and mind-sets is aptly captured in the report of the Committee of Eminent Persons (CEP) which undertook the review of the 1975 Treaty as follows:-

> *Efforts towards the establishment of economic states of community embracing all the states of the West African region were initiated in the early sixties, not long after most of the countries had emerged from colonial domination into independence and statehood. In this formative state, the natural inclination of the countries was in the direction of consolidating their independence and preserving and enhancing national sovereignty. Additionally, interstate relations in the region were generally plagued by deep suspicion and political and ideological differences. Perceptions about national sovereignty and the principle of non-interference in the*

> *internal affairs of the states are now undergoing gradual transformation as the world shrinks more and into a 'global village' ... Gross abuse of human rights in a state, for example, now elicits prompt international reaction, often in the form of coercive and other measures. More and more countries are now opening their internal political processes, including the subjection of general elections to international observation in order to earn legitimacy for their governments.*[2]

This study seeks to provide a background of ECOWAS firstly, as the oldest Regional Economic Community (REC) in Africa and, within this context, describe, in an outline, the framework of the human rights treaty obligations which ECOWAS member states have undertaken in the Community. This thesis is, firstly, that the result of the revision of the ECOWAS Treaty in 1993, was the creation in ECOWAS of a composite regional economic and human rights framework. Secondly, the study will argue that the elevation of human rights to a central tenet of the community represents an acceptance by the ECOWAS member States of the indivisibility and inter-dependence of human rights as affirmed by the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights (14-25 June 1993). The principle of

[2] Economic Community of West African States (ECOWAS), Review of the ECOWAS Treat: Final Report by the Committee of Eminent Persons, 57-58 (1992).

indivisibility and interdependent human rights entails among other things that:[3]

All human rights are universal, indivisible, and inter-dependent and inter-related. Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. The World Conference on Human Rights reaffirms that least developed countries committed to the process of democratisation and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development.[4]

The study will further demonstrate that member States neglected to pay attention to their human rights obligations under ECOWAS treaty and its implementing protocols. By way of conclusion, the study will argue that under the Revised ECOWAS Treaty of 1993, there is significant scope for a unique civil society, and governmental partnership for the promotion and protection of human rights within both the ECOWAS sub-region and

[3] Vienna Declaration and Programme of Action, on, 25 June 1993, (World Conference on Human Rights), U. N. GAOR, 48th Sess., pt. 1, U. Doc. A/CONF. 157/2 3 (1993).

[4] It bears noting here that ECOWAS is currently a union of some of the Poorest countries in the world including among its ranks four of the five poorest countries according to the latest indicia, of human development See United Nations Development "Programme (UNDP), Human Development Report 1998,

ECOWAS as an international institution, which has to date remained both incapacitated and under-utilized.

In December 1989, there was an insurgency led by Charles Taylor, President of Liberia. On 25 August 1990. At the invitation of the then government of Liberia, ECOWAS deployed a temporary cease-fire monitoring Group known as the Economic Community Monitoring Group (ECOMOG), comprising military contingents contributed by respective member states of ECOWAS, to restore peace in Liberia.[5]

On 30 May 1990, shortly after the outbreak of hostilities in Liberia but, prior to the deployment of ECOMOG in Liberia, the authority of Heads of State and Governments of ECOWAS, the Community's highest decision-making organ decided, in the light of regional security concerns, to establish a Committee of Eminent Persons to review the 1975 treaty.[6] Each member of the community was entitled to nominate one person into the Committee of Eminent Persons.[7] Prominent among the members of the Committee which was chaired by General Yakubu Gowon, former military

[5] It would appear that the legal bases of the ECOMOG intervention in Liberia were the community Protocol on Non-Aggression (April 2. 1978) and the Protocol Relating to Mutual Assistance on Defence (May 29, 1981), See, Bruno Simma et al., The Charter of the United Nation A Commentary, Oxford University Press, 707 (1995).
[6] Decision A,/Dec. 10/5/90 of the Authority of Heads of States and Government of 30 May, 1990.
[7] Only Mauritania failed to take up its seat on this Committee.

ruler of Nigeria, were Professor Ibrahima Fall,[8] (Senegal) and Idee Oumarou (Niger), former Secretary-General of the OAU. The Committee also enlisted technical assistance from different sources; including the United Nations Economic Commission for Africa (UNECA), United Nations Conference on Trade and Development (UNCTAD), and the African Development Bank (ADB). The West African Women Association (WAWA) was the only non-governmental, civil organization that participated in the review process, which was mostly funded by the Ford Foundation, UNECA and the government of Nigeria.

Upon conclusion of its work in June 1992, the Committee proposed a new draft treaty with significant new amendments to the 1975 treaty.[9] In its conclusions and recommendations, the Committee urged ECOWAS, within a revised treaty, to 'shift from its exclusive focus on government to government, to involving people, NGOs, and the private sector'[10], and adopt 'provisions establishing organs such as the Parliament of the Community, composed of representatives elected by the peoples of the Member States, and Economic and Social Council (ECOSOC), comprising

[8] Professor Fall, a former Minister of Foreign Affairs in Senegal, later became the Under-Secretary-General of the United nations responsible, firstly, for human rights and, currently, for political affairs.

[9] Economic Community of West African States (ECOWAS), Review of the ECOWAS Treaty: final Report by the Committee of Eminent Persons, June 1992.

[10] Ibid., 25 (ii) (a)

social, and professional groups drawn from all sections and categories of the populations of the Member States.[11] The revised Treaty was adopted in Cotonou, Benin republic, in July 1993 and, together with the protocols adopted before and after 1993, it represents the constitutional framework for the Organization.

2.3 Functions and mandate of ECOWAS

The decision to introduce the principle of supranationality into the ECOWAS structure and operations was taken by the Heads of State and Governments during the review of the ECOWAS Treaty, which was with a view to removing the numerous impediments to efficacious regional cooperation and effective implementation of the many Community programmes.

The idea was to overcome the national egoisms whereby States stuck to the concept of sovereignty in decision-making and conduct of their activities.

It was a matter of actually-uniting all efforts at regional level and exercising sovereignty mutually, Supranationality has consequently been, naturally concretized, through the creation of national institutions invested

[11] Ibid., :27(b) (vii)

with powers to initiate and develop common policies, defined and managed by the Community.

At the time of the creation of ECOWAS, and during the long years thereafter, inter-State relations in the region were often characterized by deep- seated suspicions, fermented by the states' different policies, and ideologies. The States were only cautious and pragmatic on the question of supranationality, and ECOWAS as - an international organization, was not invested with the power to take decisions that could be enforced by the sovereign Member States either generally, or in specific areas of State activities. Under those conditions, the harmonization of policies became the principal ambition of ECOWAS.

The legal implications here are those of supranationality, which corresponds to the present state of development of the Community. It is obvious that ECOWAS' supranationality will become more pronounced and more visible as, and when, the organization evolve from a Community of independent States towards a Union of States with federal competence.

The ECOWAS Treaty of 28 May 1975 did not provide for the creation of supranational institutions to superintend the regional integration process. The prevailing trend then was for the States to consolidate their independence and preserve and strengthen their national sovereignty.

In the desire to rectify this weakness and omission which contributed in impeding progress towards the accelerated integration of the region, the ECOWAS Treaty, as revised, created institutions to which it entrusted supranational functions.

Thus, the Authority of Heads of State and Governments, defined by the Revised Treaty as being the supreme institution of the Community, "shall be responsible for determining the general policy and control of the Community and shall take all necessary measures to ensure its progressive development and the realization of its objective."[36] Other details in the definition of the function of the Authority leaves no doubt as to the will of the Heads of State and Governments to confer a supranational character on the Authority. As a matter of fact, the Revised Treaty instructed the Authority to "determine the general policy and major guidelines of the Community, give directive harmonize and co-ordinate the economic, scientific, technical, cultural and social policies of Member States"[37]

Similarly, the Council of Ministers which; under the sovereign authority of the Treaty of 28. May 1975, had neither its own power nor the

[36] Article 7, paragraph 2 of the Treaty as revised.

[37] (Article 7, Paragraph 3 a).

power of delegation, to issue directives to the Member States, has now been granted by the Authority, appropriate powers in some cases, to "issue directives on matters concerning co-ordination and harmonization of economic integration policies"[38] The ECOWAS Commission, which replaced the Executive Secretariat on 14 June 2006, has become the prime mover of the Community and the pivot around which all activities revolve. The Revised Treaty conferred on the, Commission the Power to undertake initiatives and activities to monitor the application of Community provisions and generally, achieve Community objectives through the formulation of programmes of activity.[39] To these responsibilities, the Revised Treaty added that of "convening, as and when necessary, meetings of sectoral Ministers to examine sectoral issues which promote the achievement of the objectives of the Community".[40]

The competence of the Community Court of Justice created by the Treaty of 28 May 1975 as a regional authority, to ensure the respect of law and of the principles of equity in the interpretation and application of the provisions of the Treaty, has been broadened to include the interpretation and application of Conventions and Protocols, Decisions, Regulations,

[38] (Article 10 paragraph 3c of the Treaty as revised).
[39] Article 19 paragraph 3d of the Revised Treaty).
[40] (Article 19 paragraph 3c of the Revised Treaty).

Directives and all other subsidiary legal instruments adopted in the framework of ECOWAS.

The competence of the Court has equally been broadened to include appraisal of the legality of the provisions, consideration of the Member States' breaches of their obligations to the Community, and consideration of cases of human rights violations in any Member State.[41] Similarly, the idea of ensuring grassroots involvement in the Community development process which was the principal factor in the creation of the Community Parliament by the Treaty of 28 May 1975, led to the involvement of the Parliament in the ECOWAS decision-making process, and to the conferment of a supranational character on it.[42] The supranational character of the ECOWAS Parliament was confirmed by Decision A /DEC/01/06 of 13 January 2006, on the procedure for an effective implementation of article 6 of the protocol on the community Parliament, which henceforth gives the Institution the power of legislative initiative, through which it may propose draft Community provisions.

The revised Treaty and its subsequent amendments have endowed the ECOWAS supranational institutions with supranational powers to meet

[41] Article 3 of Supplementary Protocol A/SP/01/05 of 19 January 2005).

[42] (Article 6 of the Protocol on the ECOWAS Parliament).

the principal political, economic and social challenges, which the Ministers of State are unable to meet individually.

Since the 28th of May 1975, until the entry into force of the Revised Treaty on 23rd August, 1995, Community decisions had been binding only on the Community Institution. Consequently, the Authority of Heads of State and Government and the Council of Ministers adopted for the States only resolutions and recommendations that were not binding on them.

Since the entry into force of the Revised Treaty, only the Authority decisions can commit the Community Institutions as well as Member States. These decisions are now binding and directly enforceable on member States.[43] Thus, an international organization i.e. a non-State entity such as ECOWAS can, concurrently or in parallel, ensure for its Member States, activities which were traditionally monopolized by the latter, especially quasi legislative, executive and judicial functions.

It must be pointed out that the decisions of the Authority of Heads of State and Governments have for several years, co-existed with the Protocols and Conventions which could not enter into force unless ratified by nine (9) Member States. Maintaining the Protocols and Conventions in the legal sequencing of the Community, until recently, has unfortunately

[43] (Article 9 paragraph 4of the revised Treaty).

entailed considerable delays in the implementation of these instruments, thereby limiting the scope of the decisions which, under the Revised Treaty, are binding on the Member States.

Indeed, most often, Community decisions adopted in the so-called areas of sovereignty were in the form of protocols, and there was considerable delay in their application owing to the slow pace of protocol ratification. By way of illustration, it is interesting to point out that, of the fifty-two (52) protocols signed since the creation of ECOWAS, seventeen (17) have not yet undergone the nine (9) ratifications required for their definitive entry into force.

It is regrettable that the Convention on extradition signed on 6 August 1994 came into force on 8 December 2005, i.e., over ten (10) years after signature.

The Protocol instituting a value-added tax in the Member States, signed on 27th, instituting July 1996, has unfortunately not entered into force, has not been ratified by nine (9) Member States, ten (10) long years after its signature.

The same goes for the Protocol on Democracy and Good Governance and the Protocol on the fight Against Corruption, both signed

on 21 December 2001, which are still awaiting ratification by nine (9) Member States in Order to enter into force.

Notwithstanding the repeated appeals and decisions of the Authority of Heads of State and Governments prescribing deadlines for the Member States to do so, there has not been any significant improvement in the level of ratifications as can be seen, until quite recently. The legal status of Community Acts bore the seeds of paralysis of the implementation of ECOWAS treaty.

Under such conditions, it is understandable that the Community decision-making bodies availed themselves of the opportunity of the transformation of the executive Secretariat into a Commission to adopt, on 14 June 2006, a new legal status that is consistent with that of regional integration organizations that have adopted a Commission-type organizational structure.

This new legal regime confered on the Community the power to enact binding legal instruments, conforming to the principles of “immediate and direct effect”, and enshrining the primacy of Community law over national legislations. “Immediate effect” obviates the need for the transformation of Community norms to the national level, and for any procedure involving their inclusion into national law.

‘Direct effect’ means that the rules of Community law must deploy their full effects in a uniform manner’ in all Member States, from their date of entry into force, and throughout the period of their validity.

The primacy of Community law over national legislation enjoins each Member State to apply the Community norm, notwithstanding any contrary national legislation before or after. In all cases, the Community law annuls and replaces all contrary national provisions.

The new legal regime of Community acts comprises binding and non-binding legal instruments. Binding acts are binding on all Member States and all Community institutions upon their entry into force at the date set by these acts.

Binding Acts include Supplementary Acts, Regulations, Directives, Decisions and Implementing Regulations.

Supplementary Acts are passed by the Authority of Heads of State and Governments to supplement the ECOWAS Treaty to which they form an integral part. They enter into force at a date fixed by them, and are directly applicable by the States.

Regulations are enacted by the Council of Ministers and they establish the same laws throughout the Community without taking account the existence of borders. They are applicable in all Member States and

need not be transformed into national laws, since they confer laws or directly impose duties on, community citizens just as national laws. The Member States, Administrative Institutions, and courts, are obliged to conform thereto just as they conform to national laws.

The Council of Ministers may, equally adopt Directives, which are binding on Member States. The Directives set the general objectives to be attained by the Member States but allow them the initiative to lay down the procedures for attaining them.

It is up to each Member State to promulgate new national ones, merge, or abrogate, existing laws with a view to making them consistent with the objectives set by the Directive, and of course taking due account, of local conditions. The Council will use Directive on Harmonization, for instance, to remove incoherencies, or iron out differences between national administrative rules.

Decisions are binding acts with individual scope taken by the Council of Ministers. They may be aimed at the States, or individuals.

Implementing Regulations are acts of the President of the Commission for the implementation of the acts of the Authority, or Council of Ministers. They may equally be enacted by the President of the

Commission in areas where the Council of Ministers delegates powers to the Commission.

Judgments of the Community Court of Justice are equally binding on Member States, Community Institutions, and natural, or legal persons.

Non binding legal instruments also have their place in the legal regime of the Community. They are; Council of Ministers' recommendations to the Authority of Heads of State and governments, recommendations and options of the Commission and specialized Technical Committees, as well as the opinions of the Community Court of Justice and the ECOWAS Parliament.

2.4 Nature and Scope of ECOWAS Organs

The Institutions of the Community as envisaged under the revised Treaty are:

(i) the Authority of Heads of state and Governments.

(ii) The Council of Ministers

(iii) the Community Parliament;

(iv) the Economic and Social Council;

(v) the Community Court of Justice

(vi) the Executive Secretariat

(vii) the Fund for Co-operation, compensation and development of specialized Technical Commissions; and

(viii) Any other institutions established by the authority under article 6(1).

Among the technical Commissions, is one on Political, Judicial and Legal Affairs. A technical body on regional security, and immigration now comprises a regular meeting of the Service, or representatives of the Service Chiefs of the member states of the Community. They are regularly joined by the Field Commander of ECOMOG, whose present operational base is in Freetown, Sierra Leone.

There is also provision for a Community Parliament and a Community Court of Justice. However, in 1991, ECOWAS adopted a Protocol on the Establishment of a Community Court of Justice under Protocol AP1/7/91 to be charged with supervising the implementation of the treaty, interpreting its provisions, adjudicating disputes arising under interpreting it and enforcing the rights of Community nationals under the treaty. This Protocol has now come into force and the community court of Justice has just been established.

Article 2 of the ECOWAS Treaty provides for the aims or objectives of the community which include the promotion of economic cooperation and development in all fields, particularly in trade, transport, industry,

telecommunications, agriculture, energy, natural resources, commerce, monetary and financial questions, social and cultural matters, all of which are for the purpose of raising economic, or standard of living of the West African people in particular, and Africa as a whole. The same article also provides for the machinery or modalities for the realization of the above stated objectives which also include:

a) The establishment of a customs union through the creation of a free trade area and the adoption of a common external tariff by gradually abolishing all customs duties and taxes of equivalent effect and quantitative and administrative restrictions on trade among the member states, as well as all other obstacles to the free movement of goods, services, capital and personnel.

b) The harmonization of policies and promotion of community projects in all the main socio-economic sectors, including transport, communications, agriculture, industry, natural resources, energy, social and cultural matters; and

c) The harmonization of monetary and financial policies of member states:

In order to achieve the above objectives, Article 4 of the ECOWAS Treaty, makes provision for institutional framework structurally arranged as follows:-

1) The Authority of Heads of State and Governments at the apex of the hierarchy and is responsible for policies formulation and binding general directives within the community. It meets at least once a year.

2) The Council of Ministers, which is next in the hierarchy, is composed of two Ministers from each of the Member States. It is responsible for supervision and executions of ECOWAS policies. It also prepares agenda for the meetings of the Authority of Heads of State and Governments; prepares budget to be forwarded to the Authority of Heads of State and Governments for approval under Article 6.

3) The Executive secretariat, which is headed by an Executive Secretary is charged with the day-to-day running of the community in Articles 7 & 8.

4) There is also a tribunal for ensuring the observance of Law and justice in the interpretation of the provisions of the Treaty. It is also responsible for settling of disputes referred to it by the parties concerned under Article II.

5) Another organ has been created to take care of the ECOWAS Fund for cooperation.

6) Article 50 of the Treaty created four ECOWAS specialized, or technical agencies to handle matters of technical and professional nature, to cover the areas of trade, custom, Immigration, Agriculture, Industry, Transport, Telecommunication, and other areas covered by Article 2. They are grouped under four major institutions as follows:-

i) Trade, Customs, Immigration, Monetary and Payments Commission.

ii) The Industry, Agriculture and Natural Resources Commission.

iii) The Transport, Telecommunications and Energy Commission; and

iv) Social and Cultural Affairs Commission. Each of the four commissions has a representative from each Member State.

The functions of the Commissions are many and they vary. They are essentially:

a) To provide compensation and other forms of assistance to member states which have suffered losses due to the application of the Treaty's provisions;

b) To provide compensation to Member-States which have suffered losses as a result of the location of community enterprises;

c) To provide grants for financing national, or community research development activities;

d) To grant- loans for feasibility studies and development projects in Member States;

e) To guarantee foreign investments made in Members States for enterprises established in pursuance of the Treaty's provisions on the harmonization of industrial policies;

f) To provide means to facilitate the sustained mobilization of internal and external financial resources for the Member States and the community; and

g) To promote development projects in the less developed Member States of the community.

The Fund has a Board of Directors for regulating and directing its activities and is made up of two representatives from each Member State, one of whom must be a member of the Council of Ministers,[44] while, the alternate Director must be a person of competence and experience in financial and banking operations.

Having examined the structure, powers, and functions of the Economic Community of West African States, it is not out of place to admit

[44] (Articles 24 & 25 of the Fourth protocol)

that the community is patterned after the European Economic Community (EEC) in all ramifications. But the problems of ECOWAS may not be the same with those of the European Economic Community, most especially when one considers the EEC is a regional economic organisation in an industrialized World, while ECOWAS as a sub-regional economic organisation in an under-developed world.

2.4.1 Authority of Heads of State and Governments

Article 7 establish the Authority of the Heads of State and Governments of member states, which is the supreme organ of the community. It is responsible for the general direction and control of the community and takes all measures to ensure the organisation's progressive development and the realisation of its objectives.

The authority, shall among other things, oversee the functioning of the Community Institutions and follow-up implementation of community objectives. It is also expected to refer, where it deems necessary, any matter to the community court of justice, when it confirms that a member state, or institution of the community, has failed to honour any of its obligations, or an institution of the community has acted beyond the limits of its authority, or has abused the powers conferred on it by the provisions of the treaty by a decision of the Authority, or a regulation of the council.

Article 9 insists that the decision of the Authority shall be binding on member states and institutions of the community without prejudice to the functions of the community court of justice set out by Article 15.

2.3.2 The Council of Ministers

The Council of Ministers is another organ set up by the treaty, by virtue of Article 10. The Council is empowered to make recommendations to the Authority, or any action, aimed at attaining the objectives of the Community.

2.4.3 Community Parliament

Article 13 sets up the Community Parliament whose election, composition, function, powers and organization are to be defined in a protocol relating thereto.

2.3.4 Economic and Social Council (ECOSOC)

The Economic and Social Council established by Article 14 whose composition shall include representatives of the various categories of Economic and Social Committee shall perform an advisory role.

2.4.5 Court of Justice, Arbitration Panel and Executive Secretariat

Articles 1*5,* 16 and 17 establish the Court of Justice, Arbitration Panel and the Executive Secretariat respectively, whose functions are to be set out in protocols relating thereto.

Having discussed the nature and scope of the organs of ECOWAS, we shall presently turn to a discussion on the historical development of human rights.

2.5 THE HISTORICAL DEVELOPMENT OF HUMAN RIGHTS

The expression "Human Rights" is relatively new, having come into everyday parlance only since the Second World War and the founding of the United Nations in 1945. It replaced the phrase "natural rights" which fell into disfavour in part, because the concept of natural law, to which it was closely linked, had become a matter of great controversy.

The philosophical foundations of human rights are traceable to the theories of natural law articulated by the early Greek philosophers that certain. principles of justice are "natural" i.e. rational and unalterable and that nature - not the state - has endowed man with certain rights and duties by virtue of the fact of his

being human and rational. This notion was also reflected in very early writings. For instance, as far back as 442 BC, Sophocles in the play Antigone dramatised about King Creon thus: "But all your strength is weakness against the immortal unrecorded laws of God". The laws of God, as the poet alluded, is higher in authority than the King's (positive) law. This was a direct reference to the natural law, the law of nature from where the rights of man emanated.

The notion of the rights of man (natural rights) later found expression in the writings of Spinoza, Montesquieu, and Kant. It was given further impetus through the writings of social contract theorists. Foremost among the proponents of natural rights doctrine was John Locke who argued that all individuals are endowed by nature with certain claims and rights, chief among which are the rights to life, liberty, freedom from arbitrary rule and property. Upon entering civil society pursuant to a "social contract", human kind surrendered to the state only the right to enforce these natural rights and not the rights themselves. The state's failure to secure these reserved natural rights gives rise to a right to responsible popular revolution.

This philosophy of natural rights or the rights of man played a key role in the late 18th and early 19th century struggles against political

absolutism. England had earlier on gone through its own internal revolts and revolutions leading to the Magna Carta (1215) and the Bill of Rights (1688) and a wave of revolutionary activities swept through America and France resulting in the American Declaration of Independence (1776) and the French Declaration of the rights of Man and the Citizen (1789) respectively.

While human rights were never articulated as a definable concept in African systems of customary law, it is worth noting that the underlying principles of human rights have long been recognised and accepted in Africa. Most Traditional societies of Africa (and elsewhere) had known and were based on structures that regulate the relationship between the individual, the family and the society in much the same manner which human rights do today.

The idea of human rights as natural rights did not however always enjoy universal support, and came under increasing assault during the 19th and early 20th centuries. Being frequently associated with religious orthodoxy, the doctrine of natural rights became less and less acceptable to philosophical and political liberals. Additionally, because they were conceived in essentially absolutist terms – "inalienable" "inviolable" "unalterable" – natural rights were found increasingly to come into conflict

with one another. Most importantly, the doctrine of natural rights came under powerful attack from the positivist school of thought which felt that the only law is 'the command of the sovereign," and that the only truth is that which can be established by verifiable experience. To writers such as Burke, Hume and Jeremy Bentham, natural law and natural rights were unreal, unverifiable metaphysical phenomena, In the famous words of Bentham:

> *From real law come real rights; but from imaginary laws, from the 'law of nature' comes imaginary rights ... Natural rights is simple nonsense; natural and imprescriptible rights rhetorical noise, nonsense upon stilts.*

Other philosophers such as Marx, while not entirely rejecting natural theories, felt that individual rights were egoistic and a bourgeois concept, designed to maintain and reinforce the pre- eminent position of the ruling class. Rights therefore are properly vested in the communities, or whole societies and nations, which might grant only such legal rights as were necessary to promote the transition to a communist society.

The idea of human rights nonetheless endured in one form or the other during this period as evidenced by developments in the area of diplomatic treatment of foreign nationals, the abolition of slavery, the

universal suffrage movement, the rise of trade unionism, the series of efforts aimed at protecting ethnic minorities etc. However, except for these few special situations, international law had little concern for citizens suffering from domestic persecution. The simple reason was that such cases fell within the purview of the domestic jurisdiction of the particular country, an enquiry which would encroach on its sovereignty. Moreover, since international law was emphatically a law of nations, only nations ... had either rights or duties under it, individuals being regarded as mere objects[45]. The league of nations which was established in 1919 did not formally recognise the rights of man, but nevertheless committed its members to various human rights goals including, for example, fair and humane working conditions and the just treatment of native colonial peoples. Active concern for human rights on an international scale therefore did not come until the rise and fall of Nazi Germany in the 1930s – 1940s. The law authorising the dispossession and extermination of the Jews and other minorities, the laws permitting arbitrary police search and seizure and the laws condoning imprisonment, torture and execution without public trial, brought about the realisation that laws cannot be grounded in purely utilitarian

[45] Oppenheim 11, International Law (8th ed., H. Lauterpacht, ed. 1955)

doctrine. It became clear that certain actions are wrong, no matter what end they are meant to serve and human beings are entitled to some basic protections.

Today, the vast majority of legal scholars, philosophers and moralists agree, irrespective of culture or civilization, that every human being is entitled at least, in theory, to some basic rights. To say that there is widespread acceptance of the principle of human tights is not to say that there is complete agreement about the nature of such rights or their substantive scope. These issues are dealt with in the next section.

2.5.1 The Internationalization of Human Rights

Prior to the Second World War, human rights were primarily a matter for the internal domestic jurisdiction of the different countries of the world. Human rights only began to develop in a coherent and systematic fashion after the atrocities of the Second World War, which outraged the conscience of mankind and led to the search for ways by which the intrinsic worth and dignity of man could be recognised and protected by law, on a universal basis. To this end, the Charter of the United Nations Organisation, which was formed in the aftermath of The Second World War reaffirms:

> *A faith in fundamental human rights, in the dignity and worth of the human person, in the*

> *equal rights of men and women and of nations large and small.*

The Charter also included, as one of its purposes in Article 1,

> *Promoting respect for human rights for all without distinctions as to race, sex, language and religion.*

Several other provisions of the Charter also refer to human rights in general terms. Since the Charter did not itself specify exactly what these rights were, one of the earliest undertakings of the United Nations, was the drafting of an international bill of rights that could serve as a standard against which nations might gauge their performance in upholding human rights.

2.5.2 The International Bill of Human Rights

The first segment of the Bill - the Universal Declaration of Human Rights was adopted by the United Nations General Assembly on 10th December 1948, without a single dissenting vote. The Declaration sets out the various rights and fundamental freedoms that are to be enjoyed by the 611 members of the human family. It contains both categories of human rights and freedoms.

Originally, the Universal Declaration was conceived as a statement of objectives, to serve as "the common standard of achievement for all peoples and all nations" and as such, was not part of binding international

law. However, the fact that it has been accepted by so many states has given it considerable moral weight. Its provisions have been cited as justification for numerous United Nations actions and have inspired, or been used in many international covenants and national constitutions. Today, it is generally agreed that the Declaration is an instrument of considerable juridical potency, although its precise legal status is still the subject of some debate.

After several years, the remaining instruments of the International Bill of Rights were completed. In 1966 the General Assembly approved two international covenants – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both Covenants came into force in 1976, but were acceded to by Nigeria in 1993. These Covenants recognise and define in more details most of the rights set out in the Universal Declaration and deal with some additional rights as well. They are legally binding treaties, whose ratifying states pledge themselves to observe the specific rights enumerated in the instruments. The Covenant on Civil and Political Rights also sets up a Human Rights Committee empowered to monitor and oversee how well State Parties are observing the Human Rights enshrined therein. As a way of improving the promotion

and protection of these rights this Covenant, two optional protocols have been added. These are the First and Second optional protocols. They provide for a right of petition to the Human Rights Committee by individual citizens of the States subscribing to it and for the abolition of the death penalty respectively. Both of the Covenants came into force in. 1976.

The significant difference between the two Covenants is that while the ICCPR provides that the protected rights will be immediately implemented, the ICESCR provides only that states should recognise the rights contained in the Covenant and should take steps to achieving progressively, the full realisation of these rights, subject to the maximum of their available resources. State Parties are however, obliged to report to the UN Committee on Economic, Social and Cultural Rights (ECOSOC) on the steps they have adopted and the progress they have made in achieving the realisation of the specified rights.

The International Bill of Human Rights marked a new era in the history of human rights. For the first time, States were bound before the International Community to promote their individual citizen's rights. For the first time they granted an international body authority to monitor their promises to observe those rights. For the first time also the victims of

human rights violations had a means of recourse outside the jurisdiction of the authorities who oppressed them.

2.5.3 Other Human Rights Treaties And Non-Binding Instruments

The documents making up the International Bill of Rights are by no means the only human rights treaties drafted and adopted under the auspices of the United Nations. Indeed there are so many that suffice it here to mention only a few of the more important ones, which include:

- The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. (Nigeria/88)
- The Convention on the Prevention and Punishment of the Crime of Genocide.
- The Convention Relating to the Status of Refugees.
- The International Convention on the Elimination of all Forms of Racial Discrimination (Nigeria/67).
- The Convention on the Elimination of all Forms of Discrimination Against Women (Nigeria/85).
- The Convention on the Rights of the Child (Nigeria/91)

By and large, the scope and content of these conventions address one of the other three broad concerns namely: the elimination of

discrimination, the protection of vulnerable groups and persons and the fight against inhuman practices.

There are in addition many international human rights instruments in the form of standards, declaration, bodies of principles, codes of ethics, guidelines etc which are not in the form of treaties. These instruments are adopted in the form of a resolution of the General Assembly, or some other UN organ, or body and are technically not binding on the member states in the same way as a treaty. They nevertheless, create strong expectation within the international community that the rules, or principles embodied therein will be observed by member nations. These instruments also serve as a useful tool through which member nations can ascertain the expectations of the international community and gauge their compliance with those expectations.

Some of these standards include:

- The UN Standard Minimum Rules for the Treatment of Prisoners.
- The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

- The UN Economic and Social Council Safeguards Guaranteeing the Protection of the Rights of Those facing the Death Penalty.
- Basic principles on the Independence of the Judiciary. Guidelines on the Role of Prosecutors
- Basic principles on the Role of Lawyers.
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
- Code of Conduct for Law Enforcement Officials.
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, etc.

2.6 NATURE OF HUMAN RIGHTS

Human Rights can generally be defined as those rights which are inherent in our nature and without which we can not live as human beings and without which no society is viable and able to survive.

In Ransome Kuti V. Attorney General of the Federation.[46] Kayode Eso JSC defined it thus:

> ...It *is a right which stands above the ordinary laws of the land and which in fact is antecedent to political society itself. It is a primary condition to a civilised existence.... and what has been done by our*

[46] (1965) 2 NWLR (Pt. 6) 211 at 230 (1980) AIR (S.C)

> *constitutions since independence... is to have these rights enshrined in the constitution so that the rights could be immutable to the extent of the non-immutability of the constitution itself.*

Paragraph one of the preamble to the Universal Declaration of Human Rights clearly defines the nature of human rights when it states that:

> *...recognition of the inherent dignity and of the equal and inalienable rights of members of the human family is the foundation for freedom, justice and peace in the world.*

The above is also reproduced in the preamble to the other human rights instruments constituting the International Bill of Rights, namely, the International Covenant on Civil and Political Rights and the International Covenant on economic, Social and Cultural Rights.

Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being receives equal respect and protection.

Several assertions have however been made about the nature of human rights which are not without controversy.

First, human rights are understood to represent individual and group demands for the shaping and sharing of power. Traditionally,

this was understood to mean that human rights act primarily as a limit on state power and human rights norms were not felt to have any application where acts were perpetrated by private individuals. In more recent times, it has come to be recognised that human rights law may be used to obligate States to use due diligence to prevent, investigate and punish systemic and egregious human rights violations between private actors. In such situations, the State's responsibility is found to arise not by commission of the act itself but by the failure to put in place the legal, judicial and administrative framework that would have prevented or provided an effective response to the act.

Thus, States have been held responsible for deaths and disappearances at the hands of paramilitary or right wing death squads, which though not carried out by the State, were not prevented, investigated or punished by it. Similarly, Human Rights advocates have pressed for the eradication of slavery or racial discrimination and segregation, even when these are conducted by non-governmental actors in private or are proclaimed as cultural traditions, as they once were, in the Southern United States and South Africa. Violence against women is another example where private actions have now been conceptualised in human rights terms. In 1994, the UN General Assembly (GA) adopted a

declaration on the Elimination of Violence Against Women in which it recognised that such violence constitutes a violation of the rights and freedom of women. The GA further reminded States that they could not avoid their obligations with respect to its elimination by invoking custom, tradition or religious considerations.

This brings us to the second assertion often made in the less Developed Countries that human rights must be looked at in the context of the social, religious and cultural beliefs prevailing in the community, rather than from a universal perspective. Practices that seem to violate human rights concerns in one part of the world may, therefore, be viewed differently elsewhere, or so the argument goes. Sensitivity to cultural arguments has thus often resulted in human rights discourse ignoring violations arising therefrom.

Human rights have been traditionally seen as focusing on the rights and freedoms of the individual, with the emphasis being on the corresponding obligations of the State. These obligations can be active in nature, entailing an obligation can be active in nature, entailing an obligation to provide something or allocate resources. They can also be passive, where the obligation is to refrain from taking action. However, there has been a growing recognition, especially in Africa, of the need to

look at the opposite situation as well, and to keep in mind that the individual also has obligations to his or her community.

The third assertion that is commonly made is that human rights are non-absolutist. Certain rights and freedom may therefore be limited but only for legitimate purposes, such as those enumerated in Section 41 of the 1979 Constitution of the Federal Republic of Nigeria (The 1979 Constitution). These include limitations-

a. in the interest of defence, public safety, public order, public morality or public health.
b. for the purpose of protecting the rights and freedoms of other persons, and
c. for justifiable reasons during periods of emergency.

However, there are a number of "core" human rights, which are considered non-derogable regardless of the circumstances. Under international customary law, these core rights (j*us cogens)* are defined to include the prohibition of slavery and torture, genocide, arbitrary detention and racial discrimination. The list of these rights is not closed and may change according to the evolution of customary international law.

Under the 1979 Constitution, non-derogable rights include freedom from arbitrary or unlawful deprivation of life, freedom from torture, inhuman and degrading treatment or punishment, freedom from slavery, forced servitude, the right to fair hearing, freedom

from discrimination, freedom from arbitrary deprivation of property and the right to compensation when property is legally and compulsorily acquired.

2.6.1 Universality Law and Cultural Relativism

Some commentators have opined that in the Third World, human rights must be looked at in the context of the social, religious and cultural customs and beliefs prevailing in a community, rather than from a universal perspective. Practices that seem to violate human rights concerns in one part of the world may, therefore be viewed differently elsewhere, or so the argument goes. Sensitivity to cultural arguments has thus often resulted in human rights discourse ignoring violations of the human rights of women in particular such as genital mutilation, for example, which occur within a cultural milieu.

The argument for cultural relativity overlooks the fact that culture is not, or a historical. It ignores the reality that culture is

dynamic and subject to forces of change such as, in Africa, the introduction of the modern nation state, cash economics, modern technology and industrialization, changing patterns of population consequent upon rural-urban migration, the influence of education and the media and the changing character of households and the family. All these changes have often undermined the security provided by "pure" traditional cultures: In any case there are substantive human rights limitations on even well established culture, the killing of twins and practices of slavery, were widely accepted practices in pre-colonial times in Igbo land, for example, but would be considered indefensible today.

Argument in favour of religious relativity are equally untenable as it is true that human rights law protects the right to freedom of religion and a conflict would appear to arise where the practices of that religion infringe upon other rights which are also protected by human rights law. In practice, however, restrictions on freedom of religion in order to protect the rights and freedoms of others are readily conceded to be justifiable. Thus, for example, nobody questions the abolition of the Osu caste system, which was intrinsically linked to the practices of traditional religion in Igbo society. Similarly, state intervention in cases where parents

refuse medical treatment to a child on the basis of religious belief is widely accepted.

In should also not be forgotten that many United Nations pronouncements emphasise the universality of human rights. For instance, Article 5 of the Vienna Declaration and Programme of Action (1993), states that, *"All human* rights are universal, indivisible, interdependent and interrelated."

What this basically means is that human rights are quintessentially universal in character. They are equally possessed by all human beings everywhere by virtue of being human. What follows from this is that human rights standards are internationally applicable, regardless of cultural or religious differences. However, at the same time as the core principles of human rights are considered to be universal, the actual application thereof must, to some extent, correlate to the context in which they are to operate. Therefore, some margin of interpretation must be given to define the precise extent and nature of each human rights concept without forgetting their universal character.

2.7 SCOPE OF HUMAN RIGHTS

In modern times certain debates have arisen over the content and legitimate scope of human rights and the priorities claimed among them. From these debates has arisen the notion of three generations of rights; the first generation of civil and political rights, the second generation of economic, social and cultural rights, and the third generation of collective or solidarity rights.

2.7.1 First Generation Rights

Civil and political rights are derived primarily from the reformist theories of the 17th/18th centuries noted above and are today recognised and protected in the constitutions of most modern nation states and in international treaties and covenants. These so-called first generation rights primarily serve to act as a protection to the individual from the overwhelming machinery of governmental power. They include the right to life, liberty and security of the person, freedom from discrimination, freedom from slavery or involuntary servitude, freedom from torture, inhuman or degrading treatment or punishment, freedom of thought, conscience or religion, freedom from arbitrary arrest, detention or exile, the right to fair hearing, freedom of movement and peaceful assembly, freedom of

expression, and freedom of association. Also included is the right to own property and not to be arbitrarily deprived of one's property.

Generally speaking, Civil and Political rights are conceived more in the negative ("freedoms from") than in the positive ("rights to") terms. They favour the abstention of government from the affairs of the individual or associations of individuals, rather than the intervention of government. Of course it is not possible to assert that all first generation rights are completely negative. The rights to life, free and fair trial and prison conditions that are not inhuman can only be assured on the basis of some positive action of government. They form the bulk of the rights which are protected and made justifiable by many, if not all national constitutions. In Nigeria, these rights are enshrined in Chapter 4 of the 1979 Constitution under the broad heading of Fundamental Human Rights.

2.7.2 Second Generation Rights

The subsequent emphasis on economic, social and cultural rights arose, in large part, in response to the abuses and misuses of capitalist development and its underlying essentially uncritical conception of individual liberty, that tolerated and even legitimated the exploitation of working classes and colonial peoples.

Justice P.N Bhagawatti of the Indian Supreme Court in the famous case of *Minerva Mills*[47] had this to say about the importance of these rights:

> *To the large majority of people who are living in almost sub-human existence in conditions of abject poverty and for whom life is one long, unbroken story of want and destitution, notions of individual freedom and liberation, though representing some of the most cherished values of a free society, would sound as empty words bandied about in the drawing rooms of the rich and well-to-do, and the only solution for making these rights meaningful to them was to re-make the material conditions and usher in a new social order where socio-economic justice will inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured.*

These so-called second generation rights which can be found in Articles 22-27 of the Universal Declaration of Human Rights include the right to livelihood, the right to work under just and favourable conditions and protection against unemployment, the right to form and join trade unions, the right to an adequate standard of living including food, clothing, shelter and leisure, the right to education and the right to adequate facilities for the protection of physical and mental health and for the enjoyment of social, religious and cultural life.

These rights are conceived more in positive ("rights to,) than negative ("freedoms from") terms. However, just as all the rights embraced

[47] See also para. 13 of the Proclamation of the Conference on Human Rights, Teheren and paras. 5 and 8 of the Vienna Declaration and Programme of Action (1993)

by the first generation of civil and political rights are not always negative rights, so too all the rights embraced by the second generation of economic, social and cultural rights cannot properly be labeled positive. The right to form and join trade unions or the right to freely participate in cultural life, for instance, do not necessarily require positive action on the part of the government to secure their enjoyment. Nevertheless, many of the second generation rights do necessitate state intervention in the allocation of resources for the purpose of ensuring their enjoyment.

Economic, Social and Cultural rights are often included in national constitutions, but in such a way as to render them non-justiciable. Chapter 2 of the 1979 Nigerian Constitution, for example, contains a broad array of such rights but treats them as non-justiciable "directive principles", distinct from fundamental rights which are legally enforceable. It has been argued that this is because ECS rights require positive resource, intensive intervention by the government, they can only be achieved progressively over a period of time as distinct from civil and political rights which have immediate effect, they are couched in vague terms and are unmanageably complex. For all these reasons, the traditional view has been that they are nom-justiciable and are to be regarded as aspirations or goals rather than legal rights. It is however,

questionable whether a clear distinction can be made between civil and political rights, and economic, social and cultural rights. At least there should be no misunderstanding that both Covenants entail Legal undertaking on the party of States Parties. The preambles of both Covenants underline the interdependence of both categories of human rights by explicitly recognising that:

> *in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic,* social *and cultural rights as well as his civil and political rights.*

Moreover, many United Nations pronouncements emphasise the indivisibility and interdependence of Human Rights. For instance, the Declaration on the Rights to Development (1966) states:

> *All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural right*[48]

Indeed, in some jurisdictions, despite the non-justiciability of directive principles in the national constitution, creative judiciaries have been able to interprete-fundamental rights provisions in such a way as to

[48] (1086) AIR (Sup.Ct) 180

give life and meaning to the directive principles. In India, for instance in the case of Olga *Tellis V. Bombay Municipal Corporation*[49] , the Supreme Court was presented with a suit by slum and pavement dwellers to prevent their eviction from their shelters without provision for alternative accommodation. They contended that their eviction would deprive them of their economic livelihood and hence their right to life under Article 21 of the India Constitution, because their shelters were the only place where they could reside in close proximity to their employment. The Supreme Court agreed and held:

> *The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away, as for example by the imposition and execution of the death sentence except according to a procedure established by law. An equally important facet of that right is the right to livelihood because no person can live without the means of living that is the means of livelihood. If the right to livelihood is not treated as part of the constitutional right to life the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live... Deprive a person of his right to livelihood and you shall have deprived him of his life.*

[49] See Francis Coralie v. Union Territory of Delhi(1981) (Sup. Ct.) 746

In another case with respect to prison conditions, the Indian Supreme Court has also held that the right to life includes the right to live with human dignity and all that goes with it, including the bare necessities of life, such adequate nutrition, clothing, shelter, facilities for reading, writing and expressing oneself in diverse forms, and free movement to mix and mingle with one's fellow human beings.[50]

2.7.3 Third Generation Rights

The third generation of collective or solidarity rights reflects the emergence of Third world nationalism and its demand for a global re-distribution of power, wealth and other important values. It includes:

- the right to political, economic, social and cultural self-determination,
- the right to economic and social development, and
- the right to participate in and benefit from the common heritage of mankind i.e scientific, and technical discoveries, cultural sites and monuments.

Three other generation rights – the right to peace, the right to a safe environment and the right to humanitarian disaster relief, reflect

[50] Article 2 Indian Constitution.

the perceived impotence or inefficiency of the individual nation state in certain critical respects.

All of these rights are collective in nature and depend upon international cooperation for their achievement. The fact that third generation rights are collective in nature does not mean that they should be regarded as less than real rights. Traditional concepts of rights emphasise their individualistic nature, some first generation and many second generation rights, are collective in nature and are nevertheless, recognised as positive rights. The fact however, that the third generation rights depend on international cooperation for implementation, has led some authors to assert that they are little more than aspirational goals, rather than enforceable rights. Others assert that the so-called third generation rights are superfluous, since bye and large, the problem which they seek to address are dealt with by existing human rights instruments.

These different generations of rights merely reflect various stages in modern history. They reflect evolving perceptions of which, at different times, stand most in need of encouragement and protection. The content of the rights embraced by one generation does not become outdated upon the ascendancy of another, but is expanded or supplemented

thereby. While some lawyers, political scientists, governments and even human rights activists have disagreed on the hierarchy, or priority ranking of these generations of rights, the United Nation,s as indicated above, has repeatedly confirmed that all human rights form an indivisible whole and that, all the sets of rights are interdependent and mutually supportive. Nothing in any of the international human rights instruments implies that any set of rights is subordinate or inferior to the other, except perhaps, in respect of those rights which are stipulated to be non-derogable. In today's inter-linked global community, any human rights orientation that supports the legitimacy and hierarchical superiority of one set of rights over another is, over the long term, likely to undermine the credibility of its proponents and provoke widespread skepticism.

But while conceptually, there may be no difference between the qualitative status of the various generations of rights, as a practical matter of implementation, it may be recognised that different societal conditions may demand the setting of different priorities with regard to these rights. This is not to say that certain rights may be regarded as less, or more, important than others, but rather, that in an imperfect world with an imperfect allocation of resources, the priorities within different states

may influence the allocation of resources and may thus affect the speed of -their implementation.

2.7.4 International Covenant On Civil And Political Rights

The International Covenant on Civil and Political Rights (ICCPR) enumerates a wide range of civil and political rights. Pursuant to the Covenant each state party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognised in the Covenant, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status[51]'. In this section, we shall consider, in some detail, those rights which primarily, have bearings on the administration of justice.

2.7.5 The Right To Life

The right to life enunciated in Article 6 of the Covenant is the supreme right from which no derogation is permitted even in times of public emergency which threatens the life of the nation[52] It is a right which should not be interpreted narrowly, only refers to issues surrounding the death penalty. The Human Rights Committee has noted that the expression

[51] Article 4 ICCPR
[52] Para. (1) ICCPR

"inherent right to life" cannot properly be understood in a restrictive manner and the protection of this right requires that measures be undertaken to reduce infant mortality, to increase life expectancy and to eliminate malnutrition and epidemics. The Committee also considers that the right to life includes a duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. In this respect, a connection should be noted between Article 6 and Article 20, which states that the law should prohibit any propaganda for war[53] or incitement to violence,[54] as therein described.

The protection against arbitrary deprivation of life must also be taken to refer to arbitrary killings by state security forces. The deprivation of life by the authorities of the State is a matter of utmost gravity and laws which specify the circumstances in which this is permissible, must be strictly interpreted.

While it follows from Article 6(2) to (6) that States Parties are not obliged to abolish the death penalty totally, they are obliged to limit its use and, in particular, to abolish it, for other than the "most serious crimes", an expression which must be read restrictively, to mean that the death penalty should be quite exceptional measure. It also

[53] Para. (2)
[54] General Comment 20 (13)

follows from express terms of Article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime, and not contrary to the Covenant. Even in circumstances where the death penalty is permissible., the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence. The UN Safeguard Guaranteeing Protection of the Rights of those Facing the Death Penalty embodies similar safeguards subject to the proviso that they should not be invoked to delay or prevent the abolition of capital punishment. It should also be noted that because of the importance of this right, under the Second Optional Protocol to the ICCPR, States Parties are prohibited from reintroducing the death penalty.

2.7.6 Freedom From Torture, Cruel, Inhuman Or Degrading Treatment Or Punishment

The aim of the provisions of Article 7 is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State

Party to afford everyone protection through legislative and other measures, as may be necessary against the acts prohibited by Article 7, whether inflicted by people, acting in their official capacity, outside their official capacity or in a private capacity[55]. In line with the status of these rights, as those which admits of no derogation, the Human rights committee had declared, in unequivocal terms, that the granting of amnesties to those who perpetrated these are generally incompatible with the duty of States to investigate such acts, to guarantee freedom from such acts within its jurisdiction and to ensure that they do not occur in the future[56] . The obligation of States Parties also include the giving of appropriate instructions and training to enforcement personnel, medical personnel, police officers and others involved in the custody and treatment of individuals subjected to any form of arrest, detention or imprisonment. The prohibition in Article 7 is implemented by the positive requirements of Article 10(1) of the covenant, which stipulates that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

The text of Article 7 allows of no limitation. The Human Rights Committee is of the view that even in situations of public emergency such

[55] General Comment 20 (15)
[56] General Comment 20 (3)

as those referred to in Article 4 of the Covenant, derogation from the provisions of Article 7 is allowed and its provisions must remain in force. The Committee likewise feels that justification, or extenueting circumstances, may be invoked to excuse a violation of Article 7 for any reasons, including those based on an order from a superior officer or public authority[57].

The Covenant does not contain any definition of the concepts covered by Article 7, nor is it necessary to draw up a list of prohibited acts, or to establish sharp distinctions between the different kinds of punishments, or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.

The prohibition in Article 7 relates not only to acts that use physical pain but also to acts that cause mental suffering to the victim. In the view of the Committee the prohibition must tend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasise in this regard that Article 7 protects, in particular, children, pupils and patients in teaching and medical institutions. Prolonged solitary confinement the detained or imprisoned person may

[57] Part of para. 2 and the whole of para. 3

also amount to acts prohibited by Article 7. Moreover, when the death penalty is applied by a State party for the most serious crimes, it must not be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering. States Parties must also not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, or expulsion.

The Human Rights Committee is of the view that to guarantee the effective protection of detained persons, provisions should be made for detainees to 'be held in places officially recognised as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be made available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. The protection of the detainee requires that prompt and regular access be given to doctors and lawyers

and, under appropriate supervision when the investigation so requires, to family members.

It is important for the discouragement of violations under Article 7 that admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment, should be prohibited. Those who violate Article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Conversely, those who have refused to obey orders which violate Article 7 must not be punished or subjected to any adverse treatment.

2.7.7 The Right To Liberty

Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood. It is in fact applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of Article 9[58] are only applicable to persons against whom criminal charges are brought. But the rest, and in particular, the important guarantee laid down in paragraph 4, i.e the right to determination by a court of the legality

[58] Para. 1

of the detention, applies to all persons deprived of their liberty whether *by* arrest or detention. In this respect, it should be noted that the term "court" in paragraph 4 signifies, not only a regular court, but a special court as well, including an administrative, constitutional or military court.

Paragraph 2 of Article 9 deals only with rights at arrest and has been interpreted to mean that the initial information supplied "at the time of arrest" may be limited to a general description of the reasons for arrest. Subsequent information which must be furnished as soon as possible or "promptly" must contain accusations in the legal sense. While an arrest warrant is not unconditionally required for a valid arrest its absence may in some give rise to a claim of arbitrary arrest.

Article 9(3) requires that in criminal cases any person arrested or detained has to be brought “promptly" before a judge or other officer authorised by law to exercise judicial power, more precise time-limits are fixed by law in most States parties and, delays must not exceed a few days. The total length of detention pending trial must not negate the defendants right to trial within a reasonable time or release. Pre-trial detention should be an exception and where it occurs it should be as short as Possible. Where for any reason trial cannot be commenced within a reasonable time, a detainee is by this provision

entitled to released subject, where necessary to guarantees to appear for trial.

Also, if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e it must not be arbitrary, and must be based on grounds and procedures established by law[59]. Information of the reasons must be given[60] and court control of the detention must be available[61], as well as, compensation in the case of a breach"[62]. And if, in addition, criminal charges are brought in such cases, the full protection of Article 9(2) and (3), as well as, Article 14, must also be granted.

2.7.8 Rights Of Persons Deprived Of Liberty

Article 10, paragraph 1, applies to all persons deprived of liberty under the law and authority of the state whether they are held in prisons, hospitals – particularly psychiatric hospitals –detention camps or correctional institutions or elsewhere. Paragraph 2 of this article deals with accused as distinct from convicted persons and paragraph 3 with convicted persons only.

[59] Para. 2
[60] Para. 4
[61] Para. 5
[62] Albert Mukong V. Cameroon, Communication No. 386/1989

State Parties are placed under a positive obligation to protect persons who are particularly vulnerable because of their status as persons deprived of liberty, and this complements the prohibition on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only must persons deprived of their liberty not to be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither must they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty, respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule, Consequently in the opinion of the Human Rights Committee, the application of this rule, as a minimum, can not be dependent on the material resources available in the State concerned[63] States are, therefore, obliged to provide detainees and prisoners with services that will

[63] Sub-para. (a)

satisfy their essential needs - food, clothing, medical care etc. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Various other relevant United Nations standards are also applicable to the treatment of prisoners including the Standard Minimum Rules for the Treatment of Prisoners, (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978), and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees, against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1982).

In order to properly safeguard the rights of persons deprived of their liberty, it is important that these rules are strictly adhered to by personnel who have authority over persons deprived of their liberty in the discharge of their duties. Arrested or detained persons must also have access to such information and have effective legal means enabling them to ensure that those rules are respected, to complain if the rules are ignored and to obtain adequate compensation in the event of a violation.

Article 10, paragraph 2(a), provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones. Such segregation is required in order to emphasise their status as unconvicted persons who, at the same time enjoy the right to be presumed innocent, as stated in Article 14(2).

Article 10 paragraph 2(b) calls for accused juvenile persons to be separated from adults and also provides that cases involving juveniles must be considered as speedily as possible. Article 10(3) further requires that convicted juvenile offenders should be segregated from adults and be accorded treatment appropriate to their age and legal status, with the aim of furthering their reformation and rehabilitation. Other relevant standards in this regard include the Standard Minimum Rules for the administration of Juvenile Justice (the Beijing. Rules) and the UN Rules for the Protection of Juveniles deprived of their Liberty. The provisions of paragraph 3 also require that States establish legal or administrative measures or take practical steps to promote the reformation and social rehabilitation of all prisoners, through, for example, education, vocational training and useful work. Allowing visits by family members is also an essential measure required for successful rehabilitation.

2.7.9 The Rights To a Fair Trial

Article 14 of the Covenant is of a complex nature and the different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and the tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Fair trial guarantees must be observed until the criminal proceedings including those on appeal, have been completed.

The competence of a tribunal refers to the appropriate personal, subject-matter, territorial or temporal jurisdiction of a court in a given case. The reference to the tribunal's establishment by law presupposes that the court as such, including the delineation of its competence, has been established by the normal law-making body of the legal system in question. The general aim of the provision is that criminal charges are heard by courts which are set up independently of a particular case rather than by courts established specifically for the offence involved.

2.7.10 Independent and Impartial Tribunals

In order to be independent, a tribunal must have been established to perform adjudicative functions. Independence also presupposes that the judiciary is independent of the executive and legislative branches and that judges are impartial and competent. In particular, this depends on factors such as the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office as well as the conditions governing promotion, transfer and cessation of their functions.

The provisions of Article 14 apply to all courts and tribunals within the scope of that article, whether ordinary or specialised. The Human Rights Committee has noted the existence in many countries, of military or special courts, which try civilians and is of the view that this could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of court, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under

conditions which genuinely afford the full guarantees stipulated in article 14. This interpretation is supported by paragraph 5 of the Basic Principles on the Independence of the Judiciary which provides that "Every one shall have the right to be tried by ordinary courts or tribunals using established legal procedures [emphasis supplied].

2.7.11 Public Hearings

The second sentence of article 14(1) provides that "everyone shall be entitled to a fair and public hearing". Paragraph 3 of the article elaborates on the requirements of a "fair hearing" in regard to the determination of criminal charges. However, it must always be borne in mind that the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required *by* paragraph 1.

The publicity of hearings is an important safeguard in the interest of the individual and of the society at large. To give practical effect to this right, the court, or tribunal is obliged to make information about the time and venue of the hearing available to the public and to provide adequate facilities (within reason), for attendance by interested members of the public. At the same time, Article 14(1), acknowledges that courts have

the power to exclude all, or part of the public, for reasons spelt out in that paragraph.

Moral grounds for the exclusion of the public are usually asserted in cases involving sexual offenders. The term "public order" in this particular context has been interpreted to relate primarily to order within the courtroom, while "national security" may be invoked so as to preserve military secrets. The "private lives of the parties" refers to family, parental and other relationships such as guardianship that might be prejudiced in public proceedings.

It would appear that the linking of some of these reasons to those which ought to obtain in a democratic society is a qualification which seeks to prevent arbitrariness in decisions to hold trials in camera and does not necessarily imply that nondemocratic State Parties are not held to the same standards. It should be noted that, apart from such exceptional circumstances, a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. Even in those cases in which the public is legitimately excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public. *A* judgement is considered to have been made public either when

it is orally pronounced in court, or when it is published. The primary consideration in this regard is the accessibility of the judgment.

2.7.12 Presumption Of Innocence

By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. The presumption of innocence must therefore be maintained, not only during the trial stage *vis-a-vis* the defendant, but also in relation to a suspect, or accused throughout the pre-trial phase. In particular, it is the duty of all officials involved in a case, as well as all public authorities, to refrain from prejudging the outcome of a trial.

2.7.13 Right to Be Informed Of Charge(s)

Among the minimum guarantees in criminal proceedings prescribed by paragraph 3, the first concerns the right of everyone to be informed in a language which he understands of the charge against him[64]. Article 14(3)(a) applies to all cases of criminal charges, including those of

[64] G.A. Res. 42/191 of 11 December 1987

persons not in detention. The right to be informed of the charge "promptly" requires that information is given in a manner described as soon as the charge is first made by a competent authority. This right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of sub-paragraph 3(a) may be met by stating the charge either orally or in writing, provided that the information indicates both the legal description of the offence ("nature") and the alleged facts ("cause") in which it is based. Article 14(3) is thus wider than the corresponding rights granted under Article 9(2) applicable to arrest, provides for a time lag between information on the cause of arrest and information on the legal charge. The rationale at this stage is that the information provided must be sufficient to allow ie preparation of a defence.

The point at which information can be deemed to have been promptly provided is subject to various interpretations, In general, however the information must coincide with the lodging of the charge or directly thereafter, or with the opening of the preliminary judicial investigation (in civil law jurisdiction) or with the setting of some other hearing that indicates clear official suspicion against a specific person.

2.7.14 Right to Time and Facilities for Preparation of Defence

Sub-paragraph 3(b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is adequate time depends on the circumstances of each case.

Factors to be taken into account are; the complexity of the case, the defendant's access to evidence, the time limits provided for in domestic law for certain actions in the proceedings and so on. The facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as, the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or is indigent, he should be able to have recourse to a lawyer provided by the State. Furthermore, this sub-paragraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel or represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter.

The right to communicate with counsel applies to all stages of the criminal proceedings and is particularly relevant in cases of pre-trial

detention. Thus, all arrested, detained, or imprisoned persons must be provided with adequate opportunities to be visited by, and to communicate with, a lawyer without delay, interception, or censorship, and in full confidentiality throughout the proceedings.

2.7.15 Right to Trial without Undue Delay

Sub-paragraph 38 provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end, and judgement rendered. All stages must take place "without undue delay". What amounts to "undue delay" again depends on the circumstances of the case such as its complexity, the conduct of the parties, whether the accused is in detention, and so on.

2.7.16 Right to Defence

Sub-paragraph 3(d) is a conglomerate of the following specific rights:

i. the right to be tried in one's presence

ii. to defend oneself in person

iii. to choose one's own counsel

iv. to be informed of the right to counsel

v. to receive free legal assistance

Whether or not the interest of justice requires the state to provide legal assistance depends primarily on the seriousness of the offence and the potential maximum punishment. According to prevailing interpretation, the right to counsel applies to all stages of criminal proceedings, including the preliminary investigation and pre-trial detention. The right to defend oneself means that the accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair.

2.7.17 Examination of Witnesses

Sub-paragraph 3(e) states that the accused shall be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. This also means that the prosecution must inform the defence of the witnesses it intends to call

to trial within a reasonable time prior to trial so that the defendants may have sufficient time to prepare his defence.

The defendant also has the right to be present during the testimony of a witness, except in those exceptional cases where it is considered that the witness reasonably fears reprisals by the defendant. Any such claim must be carefully considered by the court before the defendant is excluded, but in no case may a witness be examined in the absence of both the defendant and his counsel. The use of the testimony of anonymous witnesses would also amount to a violation of the defendant's right to properly prepare his defence and examine witnesses against him.

2.7.18 Right to an Interpreter

Sub-paragraph 3(f) provides that if the accused cannot understand or speak the language used in court, he is entitled to the assistance of an interpreter, free of any charge. This right is independent of the outcome of the proceedings and applies to aliens, as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding, may constitute a major obstacle to the right of defence. Although the provision would

appear to limit this right to proceedings in court, the view has consistently been held that the right to an interpreter includes the translation of all relevant documents. The right to an interpreter may also be claimed by a suspect, or an accused, being interrogated by the police in the pretrial phase.

2.7.19 Right to Silence

Sub-paragraph 3(g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard, the provisions of articles 7 and 10(1), should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently, methods which violate these provisions are used. Evidence provided by means of such methods or any other form of compulsion should be inadmissible. In addition, silence by the accused may not be used as evidence to prove guilt and no adverse inferences should be drawn from an accused's exercise of the right to remain silent.

In order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegation made of violations of the rights of the accused during any stage of the prosecution.

2.7.20 Juvenile Offenders

Article 14, paragraph 4, provides that in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. This means that special courts, the laws governing procedures against juveniles, and special arrangements, for juveniles must take account of "the desirability of promoting their rehabilitation". Juveniles are to enjoy at least the same guarantees and protections as are accorded to adults under Article 14.

2.7.21 Right to Appeal

Article 14, paragraph 5, provides that everyone convicted ' of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The right of appeal is aimed at ensuring at least two levels of judicial scrutiny in respect of criminal cases. The right is available to all convicted persons and does not depend on the severity of the offence or on the sentence pronounced in the first instance. All appellate proceedings must also observe the guarantees of a fair trial.

2.7.22 Right to Compensation for Miscarriage of Justice

Article 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein. Compensation for miscarriage of justice can only be granted in the following circumstances:

i. the conviction must have been final,

ii. a pardon or reversal of conviction must be based on an acknowledgement of a miscarriage of justice,

iii. the convicted person must have suffered punishment as a result of the conviction,

iv. the delayed disclosure of the pertinent facts which reveal a miscarriage of justice must not be attributable to the defendant.

The phrase "according to law" does not mean that States can ignore the right to compensate by simply not providing for it but rather that they are obliged to bring national Legislation in line with the provisions of the Covenant by providing a mechanism to grant compensation.

2.7.23 Double Jeopardy

Article 14, paragraph 7 provides for the principle of double jeopardy. This is aimed at preventing a person from being tried and punished twice for the same offence. According to the Human Right

Committee, the principle of double jeopardy only applies to prohibit a subsequent trial for the same offence within the jurisdiction of one State and is not operational where the second trial takes place in the national jurisdiction of another state. Thus, for example, the International Criminal Tribunals which have been established by the UN to try war crimes committed in the former Yugoslavia and Rwanda may validly re-try persons after the completion of proceedings in a national jurisdiction.

2.7.24 Non-Retroactivity

Article 15(1) embodies the principle of legality *mullum crimen sine lege* (a crime must be provided for by law). Although chronologically, this provision appears after article 14, in practical terms this is the initial point of departure in considering the fairness of any trial. The principle of legality obliges States to define criminal offences by law and is further aimed at prohibiting the retroactive application of substantive criminal laws which have been enacted. It is one of the few non-derogable rights provided for in article 4(2). It is important to note that the prohibition of retroactivity applies to all criminal offences, whether provided for in domestic legislation, or in international law.

Just as no one can be found guilty of a criminal offence which was not provided for by law at the time an act or omission took place, so also a penalty cannot be imposed if it was not provided for by law at the time the offence was committed *(mulla poena sine lege).* Further, a penalty heavier than the one that was applicable at the time when the offence was committed may not be imposed. On the other hand, article 15(1) also provides that states are obliged retroactively apply a lighter penalty, if it is subsequently provided for by law.

2.7.25 Equality before the Law

Article 26 not only entitles all persons to equality before the law as well equal protection of the law, it also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 2 also provides for a protection against discrimination, but while article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not include any such limitation. According to the Human Rights Committee, article 26 does not merely duplicate the guarantee

provided for in the article 2 but provides in itself an autonomous right. It prohibits discrimination in law, or fact, in any field regulated and protected by public authorities. Thus, when any legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.

It must be noted however, that equality before the law does not mean identical treatment in every instance. Thus, for example, article 6(5) prohibits the death sentence from being imposed on persons below 18 years of age or on pregnant women. Similarly, article 10(3) requires the segregation of juvenile offenders from adults. Provided the criteria for a differentiation of treatment is reasonable and objective and is aimed at achieving a purpose which is legitimate under the Covenant (e.g the protection of vulnerable groups), such differentiation will not constitute discrimination.

2.8 International Covenant on Economic, Social and Cultural Rights

As indicated earlier, the tendency by many has been to regard socio-economic rights as mere idealistic aspirations that fall outside the core human rights framework. One reason for this view is the concept of progressive realization of these rights. According to the Committee on

Economic, Social and Cultural Rights, the fact that realisation over a period of time is foreseen in the Covenant should not be seen as depriving the obligation of all meaningful content. On the one hand, it introduces a necessary flexibility reflecting the realities of the real world and the difficulties that may face any country in ensuring the full realisation of these rights. The phrase rather must be read in the light of the overall context of the Covenant which imposes clear obligations for State Parties to move as expeditiously and as effectively as possible towards that goal.

Another argument for the lesser status accorded to economic and social rights is that they are non-justiciable. This approach overlooks the fact that all human rights impose a complex multi-layered structure of obligations on the state. Legal scholars have broken-this down to reveal the obligations to respect a right, the obligation to protect it, the obligation to promote a right (i.e create conditions for its enjoyment) and the obligation to fulfill it or ensure its observance. It is true that the obligations to promote and ensure economic and social rights may be resource intensive and not immediately achievable of fulfillment. But on the other hand, obligations to respect and protect these rights are easily subject to adjudication. In this respect, the Committee of economic, social and Cultural Rights has identified several rights which would seem to be capable of

immediate application by the judiciary including Articles 3, 8 10(3), and 15(3). A more detailed examination of article 11 and the right to adequate housing is a particularly revealing example of how, what at first glance appears to be a resource intensive right only capable of progressive realisation, may in fact be subject to immediate protection, through the courts.

2.8.1 The Right to Adequate Housing

Pursuant to Article 11(1) of the Covenant, States Parties "recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

The human rights to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.

The right to adequate housing applies to everyone. While the reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-

headed households or other such groups. Thus, the concept of "family" must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with Article 2(2) of the Covenant, not be subject to any form of discrimination.

The Committee on Economic, Social and Cultural rights has also stated that the right to housing must not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head. Rather it should be seen as the right to live somewhere in security, peace and dignity. The provision in Article 11(1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlement and Global Strategy for shelter to the Year 2000 have stated: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost."[65]

The right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and

[65] Article 11

other applicable international instruments. Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination. In addition, the full enjoyment of other rights – such as the rights to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making – are indispensable if the right to adequate housing is to be realised and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.

Many component elements of the right to adequate housing are consistent with the provision of domestic legal remedies. Such areas which the courts might address might include, but are not limited to : (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions: (b) legal procedures seeking compensation following an illegal eviction: (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination: (d) allegations of any form of discrimination

in the allocation and availability of access to housing: and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems, it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.

In respect of evictions, it should be noted that instances of forced evictions are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.

2.9 **SUMMARY**

From the above logical presentation, we are able to establish and analyse the historical developments of human rights, the nature and scope of ECOWAS functions and mandate as it relates to issues of human rights which cumulatively gives us a clear picture of the basic key terms in this study. In the next topic, we shall examine the nature and scope of ECOWAS Community Court of Justice (ECCJ).

CHAPTER THREE

3.0 NATURE AND SCOPE OF THE JURISDICTION OF ECOWAS COMMUNITY COURT OF JUSTICE

3.1 Introduction

This chapter aims at providing a background analysis of the ECOWAS Community Court of Justice (ECCJ) and the nature and scope of its jurisdiction in respect of human rights matters.

The ECOWAS Community Court of Justice was established pursuant to the provisions of Articles 6 and 15 of the Revised Treaty of ECOWAS[66] relating to the Community Court of Justice which clearly states that the Court is the principal legal organ of ECOWAS with the main function of resolving disputes relating to the interpretation and application of the provisions of the Revised Treaty and the annexed Protocols and Conventions.

The primary objective of the administration of Justice is to render justice according to law. The Court is enjoined in Article 9.1 of its 1991 Protocol to ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty. The Protocol further enjoins the Court to establish its own Rules of Procedure.

[66] Protocol ASP1/7/91

3.2 Background to the ECOWAS Community Court of Justice

The Revised Treaty creates a Community Court of Justice as one of the principal organs of the Community. In 1991, the Community adopted a Protocol on the Establishment of a Community Court of Justice empowered to "ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty."[67] The ECOWAS Community Court of Justice is four courts in one: the judicial organ of the Community with composite treaty supervision and oversight functions; the administrative tribunal court of the ECOWAS Commission; pending the establishment of the Arbitration Tribunal provided for under Article 16 of the Revised Treaty, a Court of arbitration, and a human rights court for the sub-region. The Court comprises seven "independent" members elected by the Authority of Heads of State and Governments of ECOWAS for renewable terms of five years each.

Originally, access to the ECOWAS Community Court was restricted to States and Community Institutions. In its report, the Committee of Eminent Persons had recommended that this should be extended to individuals and non-State entities.[68] In 2001, the Member States of the Community agreed to extend the jurisdiction of the Court explicitly to cover

[67] Ibid
[68] ECOWAS Eminent persons Committee Report, August 21, 2000

human rights violations. This was implemented through a ratios of Supplementary Protocol adopted in January 2005.

Under the Protocol Relating to the Community Court of Justice as amended by this Supplementary Protocol, the Court has subject-matter jurisdiction over the interpretation and application of the Revised Treaty, Conventions, Protocols, Regulations, Directives, Decisions and other subsidiary legal instruments of the community. In particular, the Court has jurisdiction over cases of violation of human rights that occur in any Member State. Proceedings relating to the failure of Member States to fulfill their obligations can only be instituted by Member States or the Executive Secretary. In addition to Member States and the Executive Secretary, the Council of Ministers may also initiate proceedings to determine the legality of official action in relation to a Community instrument. Individuals and corporate bodies also have standing on cases to determine whether an act or omission of a Community official violates their rights.

Individuals may apply to the Court for relief for violation of their human rights. Cases in this last category must satisfy two conditions: they must not be anonymous, nor be initiated while the same matter is pending before another international court for adjudication. National Courts may also refer to the Court, questions of interpretation of ECOWAS instruments

that arise in domestic proceedings. These provisions confer on the ECOWAS Community Court of Justice, -Jurisdiction over "any violation of human rights in any Member States" brought before the Court by individuals.[69] The Court is presently located in Abuja, Nigeria. However, in December 2006, the Authority of Heads of State and Governments decided that its permanent Seat will be in Mali.

Notably, the admissibility conditions in Article 10(d) of the amended Community Court of Justice Protocol omit any reference to the exhaustion of domestic remedies. The ECOWAS Community Court has, thus, held that the Community legal order is mandatory and thereby dispensing with any requirement for exhaustion of domestic remedies as a pre - condition for initiating proceedings before the Court.

Appealing against the decision of the national court of Member States does not form part of the powers of the Court. The distinctive feature of the Community legal order of ECOWAS is that it sets forth a legal basis of first and last resort in Community law. The kind of relationship existing between the Community Court and these national courts of member States are not of a vertical nature between the Community and the Member States, but

[69]Article 10 of ECOWAS Court of Justice PROTOCOL, 2005

demands an integrated Community legal order. The ECOWAS Community Court of Justice is not a Court of Appeal, or a Court of Cessation.

This opinion confirms the supra-national effect of ECOWAS legal instruments and decisions. Its implications are quite far reaching. For litigators, there is now an additional forum with arguably more robust normative repertoire than national courts. However, this also saddles the Court with the Responsibility of being a forum of first instance and primary fact-finder in essentially international proceedings. The cost implications for litigators in cases with contested factual foundations may turn out to be quite significant. This may involve, in human rights cases, in particular, moving the court to the sites or locations of violations for ease of collection of evidence. Thirdly, however, the asserted monism of the Community legal order implies that to the extent that the ECOWAS Community Court of Justice is a Court of first and last resort, there is an inherent violation of the due process right to an appeal in the structure of the Community judicial system. This design flaw requires to be remedied urgently, even if doing so will add to the institutional costs of the Community and the costs of litigants in individual cases.

Protocol A/PI/7/91 relating to the ECOWAS Community Court of Justice sets out the status, composition, powers, procedure and other

issues concerning the Court.[70] The Protocol clearly states that the Court is the principal legal organ of ECOWAS with the main function of resolving disputes relating to the interpretation and application of the provisions of the Revised Treaty and the annexed Protocols and Conventions. The court was enjoined in Article 9.1 .of its 1991 Protocol to ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty. Although, the Court was established pursuant to Articles 6 and 15 of the Revised Treaty, it was only set up in 2001 following the swearing in of the Honourable Judges of the Court.

The Court is composed of seven (7) independent Judges selected and appointed by the Authority of Heads of State and Governments from nationals of member States, who are persons of high moral character, and possessing the qualification required in their respective countries for appointment to the highest judicial office, or are jurist-consults of recognized competence in international law, particularly in areas of Community law or regional integration law.[71]

The independence of the Court is guaranteed by Article 15.3 of the Revised Treaty, which clearly provides that the Court shall carry out the functions assigned to it independently of the Member States and the

[70] ECOWAS Protocol, 1991
[71] Article 3.1 of Supplementary Protocol A/SP/2/06/06

institutions of the Community. It should also be noted, that under Article 76 of the Revised Treaty, the decision of the Court is final and not subject to appeal. Under Article 15.4 of the Revised Treaty, Judgments of the Court, shall be binding on the Member States, the institutions of the Community, and on individuals and corporate bodies.

It is now commonly accepted in international human rights circles that human rights instruments give rise to duties of respect, protection, and fulfilment. These duties have also been categorised as obligations of conduct and obligations of result. They can further be classified as negative duties and positive duties. Generally, the duty to respect is a negative duty while the duties to protect and fulfill are positive duties. Both sets of duties can be found in all human rights in spite of previous classification of rights in terms of generations of rights. With respect to the human rights mandate of the ECCJ, the uncertainty in this regard lies in the question whether the term ‘violation’ as used in the empowering provision relates to both positive and negative duties of member states. Considering that the undertaking by states in article *5* of the revised ECOWAS Treaty reflects both positive and negative duties, should the ECCJ apply its mandate to both types of duties? Put differently, what is the nature of failure of state obligation that can activate the human rights jurisdiction of the ECCJ? This is a particularly

interesting inquiry when it is considered that resistance to judicial enforcement of social, economic and cultural rights in national systems is a reflection of feelings that courts ought not to interfere in the allocation of resources by finding violation of positive duties.

It goes without saying in that violation of negative duties are within the ambit of the ECCJ' s human rights mandate. The Court itself seems to look out for such violations in the inquiries it makes in cases already decided[72]. The scrutiny of violation of positive duties are however not so easy to justify. The difficulty would be linked to the fact that it is possible to argue that the ECCJ lacks political legitimacy and technical competence to determine how member states apply scarce national resources. This difficulty is apparent in the depth of the position taken by the African Commission in seeking to identify the nature of the positive duty imposed on Nigeria by social and economic rights provisions in the African Charter.[73] The relative ease that national courts would have in this area is evident in the robust decisions of the South African Constitutional Courts in actions imposing positive duties on government.[74] However, to the extent that it has found state violation for failure to protect rights from being

[72]See for e.g, the *Essien* case (Supra) where the Court's focus was on whether the state had failed to respect the right to equal pay for equal work.
[73]SERAC and Another v Nigeria, (2001) African Human Rights Law Reports (AHRLR) 60
[74] South African Constitutional Court is famous for its decisions in cases such as Grootbroom v South Africa (2000) 11 BCLR 1169 in which ESCRS were litigated upon.

violated by third parties, the ECCJ has effectively moved into the square of positive duties of member states.

In their assessment of EU human rights practice, some commentators have found an essentially negative approach to human rights protection in that regime.[75] The 'negative integration' approach has also been attributed to the ECJ's practice in the sense that the ECJ sees its role as merely to prevent European Community and national institutions, implementing common policies and legislation, from interfering with the enjoyment of recognised human rights.[76] It is argued however, that if the EU perceived itself to be bound by international human rights obligations, it would conceive its human rights duties in the tripartite classification to respect, protect and fulfill.[77] The attraction of the tripartite conception is that it gives room for the ECCJ to ensure that ECOWAS member states protect rights from third party violation. Constant reference to international human rights instruments in ECOWAS documents suggests that the ECOWAS Community sees itself as bound by international standards. It can safely be concluded in this regard that the ECCJ is on track in its combined approach to state duties and responsibilities in human rights cases.

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[75] Ahmed and Butler (2006) p. 794

[76] EF Defeis. 'Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights' (2000 -2001)19 *Dick International Law Journal* pp. 301, 313

[77] Ahmed and Butler (2006) p. 796

3.3 Scope of the jurisdiction of the ECOWAS Community Court of Justice

An intriguing aspect of the evolving human rights jurisdiction of the ECCJ is the fluidity that surrounds the mandate and its exercise. In a sense, the complexities that come out of the vagueness and consequent fluidity of the jurisdiction can both be constructive and destructive. Thus, an understanding of the unresolved issues that would make or mar the emerging system is vital to guide the response that the ECCJ and all concerned actors would make where these issues turn up for determination. There are at least five of such issues that can be identified. In considering these issues, it has to be borne in mind that the credibility of the system depends, to a large extent, on the ability of the ECCJ to act within the bounds of the powers conferred. This essentially requires a delicate balance between meeting the expectations of the citizenry touching on the effectiveness of the Court- and respecting the legal and legitimate bounds set by member states. This section of the study would examine these complexities.

Generally, the exercise of supranational legislative powers by international organisations is strictly confined to pre-determined issue-areas voluntarily ceded by the states that converge in such international

organisations.[78] Consequently, the powers of judicial review by the judicial or quasi-judicial bodies of such international organisations are also usually restricted to the areas over which the international organisation has been granted legislative competence. This rule may not apply with exactly the same level of rigidity in essentially intergovernmental organisations as the legislating powers in such intergovernmental arrangements effectively remains with the heads of states and governments of converging states. The level of resistance to the ceding of sovereign powers is even higher among African states for reasons beyond the scope of this paper. However, under the platform of ECOWAS, West African heads of states and governments have made moves to create a supranational organisation with powers to exercise direct jurisdiction (legislative and judicial) over the territories, nationals and institutions of the integrating states.[79]

Notwithstanding the rhetoric on the transformation of ECOWAS into a supranational organisation, it is noteworthy that the Authority of heads of states and governments remains the supreme organ of ECOWAS and thus, control and highest legislative competence resides in the Heads of state and governments. Another vital observation is that even in the field of

[78]See the Reparation case (supra)
[79]By the new legal regime of ECO WAS introduced in 2006/2007, it is intended that legislative instruments of ECOWAS should apply directly in member states without the necessity of protocols and treaties. This regime does not seem to have been commenced as at November 2008.

economic integration, ECOWAS does not seem to have clearly delineated the subjects that fall within the competence of the Community and those that remain with the states. In this regard, it is easy to point out the clear distribution of competence between the EC/EU. However, while it could be argued that the highest legislative competence in the EC/EU also remains with the European states to the extent that it resides in the EU Council of Ministers, the practice of majority voting in decision-making strengthens the quality of supranationality in the areas that fall within the legislative competence of the EC/EU. The relevance of this distinction to the present discourse is that whereas the ECJ's exercise of human rights jurisdiction revolves around the areas of EC/EU competence, it is not possible to clearly identify the boundaries of the human rights mandate of the ECCJ.

It is evident from the vast literature on the human rights practice of the ECJ that there are clear boundaries beyond which the ECJ would not seek to apply judicial competence. As the EU is a 'multi-layered institution' comprising of Community institutions and member states institutions, the powers of the ECJ spreads over internal acts and legislation (EC/EU) as well as acts and institutions of member state institutions.[80] In terms of EC/EU legislations and conduct, the human rights enquiries of the ECJ do

[80]Besson (2006) p. 353

not seem to apply to primary legislation of the Community/Union although it would apply to secondary legislations.[81] However, the ECJ monitors compliance with human rights when the EC/EU acts on its own competence through Community institutions.[82] In terms of member states legislations and actions, there are layers of jurisdiction issues. As a general rule, the human rights jurisdiction of the ECJ is 'essentially limited to matters within the fields of EU law… '[83] so that 'if member states were bound by EU fundamental rights, it was not in their own fields of competence and the EU had no business telling them how best to protect human rights in their national sphere of competence'.[84] Even within the competence of the EU, ECJ scrutiny of member states human rights compliance was initially restricted to situations where the member state in question acted in the execution of EU legislation, that is, in cases where the state acted as an agent of the EU.[85] Subsequently, ECJ scrutiny extended to cases arising from situations where member states derogate from the application of Community law.[86] Thus, effectively, insofar as member states are concerned, ECJ scrutiny for human rights compliance of legislation and

[81] TC Stever, 'Protecting Human Rights in the European Union: An Argument for Treaty Reform' (1996 -1997) p. 20 Fordham International Law Journal pp. 919, 941.
[82]Ahmed and Butler (2006) 773
[83]C Lyons, 'Human Rights Case Law of the European Court of Justice, January 2003 to October 2003' (2003) Human Rights Law Review, Vol. 3 No. 2 pp. 323, 344
[84]Besson (2006) p. 344
[85]J Kingston, 'Human Rights and the European Union — An Evolving System' in MC Lucey and C Keville (eds.) Irish Perspectives on EC Law (2003) Dublin: Round Hall p. 275
[86]Ibid. J Holmes, 'Human Rights protection in European Community Law: The Problem of Standards' in JF Beltran and N Mora (eds.) Politics and Morality: European perspectives II, Utlanssaml p. 160

action arises where states act as agents of the EU in making implementation legislation in an area of EC/EU competence or where state institutions execute EU legislation as agents of the EU, or where states legislate or act in derogation of EU law and in permissible exceptions from EU legislation.

On the part of the ECCJ, it is not possible to identify the boundaries of the Court's human rights jurisdiction. As previously noted, there are no clear demarcations between Community competence and states competence. The ECOWAS treaties basically refer to member states cooperation in specified field of actions. However, from a human rights perspective, it is possible to identify what can liberally be described as 'community treaty rules' in the areas of immigration, touching on the rights of free movement, residence and establishment.[87] It is around these economic freedoms that ECOWAS has made the most elaborate 'collective legislation' having binding effect on the member states. The Treaty provisions in these areas have been strengthened by protocols drafted in similar rights language. A survey of the cases already decided by the ECCJ however, demonstrates that the ECCJ does not restrict its scrutiny of human rights compliance to the economic freedoms: whether from the

[87]Art *59* of the 1993 revised ECO WAS Treaty. The article is drafted in rights language as against most other provisions which are statements that states agree to cooperate for set purposes.

perspective of Community institutions or member states' institutions.[88] Indeed, the provisions of new articles 9(4) and 10 of the 2006 Supplementary Protocol of the Court do not set any boundaries for the court in terms of competence partitioning. Thus, the ECCJ can and does exercise jurisdiction to scrutinise the human rights situation of member states insofar as there is an alleged violation.

From the view-point of a human rights lawyer, the fact that the ECCJ has no limitations whatsoever in its human rights mandate should be cause for celebration. This is especially so seeing that the ECCJ has emerged in a situation where most domestic courts have not lived up to the high expectations of human rights lawyers and activists alike. The supervisory institutions of the continent-wide African human rights system themselves have left so much to be desired. The African Commission comes under constant (though decreasing) attacks while the African Court of Human and Peoples' Rights is only just emerging.[89] In these circumstances, the emergence of a court with powers to make binding decisions at the transnational plane becomes an exciting prospect. In fact, the ECCJ has in a way even begun to justify the confidence and hopes of its admirers with

[88]See eg in the *Ugokwe* case, the violation alleged was fair hearing relating to national elections. In the *Keita* case, the violation alleged was on the bases of alleged refusal by the state party to compensate for damage to art work.

[89]The Protocol establishing the African Court of Human and Peoples Rights was adopted in 2004 but the rules of the court have only just appeared in 2008.

recent decisions finding violation of human rights for detention without trial of a Gambian journalist,[90] and for failure of a state to prevent the practice of slavery.[91] However, these positive aspects need not becloud constructive assessment of the possible consequences of the fluid jurisdiction of the ECCJ. The first point to note is that there is the likelihood of conflict between national courts of member states and the ECCJ on the one hand, and between the ECCJ and continent-wide supervisory institutions, on the other hand. Considering that the ECCJ can exercise jurisdiction on the same competence areas as the national courts, forum shopping is a present danger. With respect to the continent-wide institutions, the ECCJ now shares jurisdiction with the African Commission and the African Court, over the same instrument (the African Charter), the same territories, peoples and institutions, albeit, in a given part of the African continent. With the potential of conflicting decisions, fragmentation of the African international human rights is a risk that is unavoidable. Further, the realities of the manner in which African states jealously guard national sovereignty holds the danger of future state resistance to the unrestricted jurisdiction of the ECCJ to scrutinise their human rights conducts on issues perceived as

[90] *Chief Ebrimah Manneh v The Gambia,* Unreported Suit No. ECW/CCJ/APP/04/07
[91] Koraou *case* (Supra).

purely domestic concerns. These are some of the possible challenges that need to be addressed at some stage of the court's evolution.

Legitimacy of international courts vis-à-vis national courts:

There are two possible dimensions from which the relationship between the ECCJ and the domestic courts of member states of ECOWAS can be examined. First, linked to the discourse on demarcation of competence, is the question relating to which system should have the first opportunity to scrutinise alleged human rights violations that occur in the member states. Secondly, there is the question of hierarchy and status of the one system in the 'eyes' of the judges of the other system. These questions are essential against the fact that the decisions of the ECCJ (including in the field of human rights), have to be judicially enforced by the domestic courts in the member states.[92]

Owing to the nature of international law and international relations, international judicial practices that involve exercising jurisdiction directly over the territories, nationals and institutions, of sovereign states usually requires some form of coordinated relation between the post-national judicial system and the domestic legal system. Hence, it has been suggested that the European human rights convention system is 'based

[92]New art 24 of the Court Protocol (in art 6 of the 2006 Supplementary Protocol of the ECOWAS Community Court of Justice) provides that decisions of the ECCJ shall be submitted to the relevant member state for execution 'according to the rules of civil procedure of that Member state'.

upon a partnership between the national courts and the Strasbourg Court[93], Similarly, the development of the human rights jurisdiction of the ECJ under the EC/EU system has been attributed partly to the ECJ's reaction to national courts' challenge of the ECJ doctrine of supremacy of Community law.[94] Thus, it is possible to identify some sort of partnership between the ECJ and national courts in the EC/EU system. In the case of the ECCJ, despite the provisions that require the involvement of the national courts, there is no Treaty, or other ECOWAS legislative provisions, that 'speak to' the relations between the legal systems. In terms of practice, the ECCJ seems to have adopted an ostrich approach of avoiding the question. There are at least two cases to illustrate this point. In the *Ugokwe* case,[95] the ECCJ stressed that the 'relationship existing between the Community Court and these national courts of Member states are (sic) not of a vertical nature... but demands an integrated Community legal order[96] This was subsequent to stating that the ECCJ could not receive appeals against decisions of the national courts of member states.[97] If 'integrated' is understood to mean 'included' or 'incorporated', or it is understood to mean

[93] RCA White, 'The Strasbourg Perspective and its effect on the Court of Justice: Is Mutual Respect Enough?' in A Arnull, P Eeckhout and T Tridimas (eds.) *Continuily and Change in EU Law* (2008) Oxford: Oxford University Press p. 15
[94] A Tizzano, 'The Role of the ECJ in the Protection of Fundamental Rights' in Arnull *eta!* (2008) p. 126
[95] See footnotes 63 above.
[96] *Ugokwe* case, para 32.
[97] Ibid

'parts that work together', or even 'bringing dissimilar parts to work together', what rules would apply to determine where a prospective litigant should go first? Subsequently, in the *Kélta* case, the ECCJ reaffirmed that it is not a court of appeal.[98] It however, stated that within the context of article 10 of the Court's Protocol, it 'can only intervene when the courts or parties in litigation expressly so request it, within the strict context of the interpretation of the positive law of the Community.[99]

It comes out from the discussion above that the ECCJ seems to be avoiding conflicts with national courts of ECOWAS member states. However, in doing so, the ECCJ evades rather than tries to assert some form of authority, if only in the field of ECOWAS Community law. The result is that confusion is blown up with regards to when a matter should come before the ECCJ as visà-vis the national courts. In fact, it has to be stressed that the provision in article 10(f) of the Supplementary Court Protocol, on requests by national courts to the ECCJ, relates to references for interpretation, which the nationals are at liberty to decide, whether or not they want to. Thus, as it stands, the ECCJ shares jurisdiction with the national courts, insofar as a litigant decides to submit a case to the ECCJ without any prior reference to a national court. The practice of the ECCJ in

[98] *Keita* case, (Supra) para 31
[99] *Keita* case, (Supra) para 27

this regard, it is submitted, is not legally wrong, considering that there is no requirement for local remedies to be exhausted before a case alleging human rights violation is brought before the ECCJ.[100] The danger in this regime is that national courts, which are closest to the *loci,* may not be given the first opportunity to remedy the alleged wrongs. Such an overreaching practice could even ignite resistance by national courts, at least in the form of refusal to give domestic judicial backing to the decisions of the ECCJ. However, in a positive sense, the practice allows for easy access to the ECCJ without the complications of spending time and resources in pursuing domestic remedies.

The approach of the EU system to the present challenge, while not expressed in statements of hierarchical relation between the ECJ and the national courts of European states, can be found in the subsidiarity treaty principle, and in the jurisprudential assertion of supremacy of EU law by the ECJ. By the operation of the principle of subsidiarity, European Community powers are exercisable only where the objectives intended cannot be adequately achieved if action in the given area is taken by the member states[101]. The principle has also been interpreted to mean that 'decisions should always be taken at the level closest to the citizen at whom they can

[100] Ebobrah (2007) *p.* 316
[101] Art 3b of the EC Treaty, Shelton (2003) p. 135

be taken effectively'.[102] This, it is argued further, essentially creates a 'presumption in favour of action at the level of member states, except where exclusive Community competence has already been granted[103]. Applied to human rights, a common view is that member states are closest to the *loci* of alleged violation and are in a better position to protect rights. Hence, the principle has based opposition to EC/EU accession to the European Convention on Human Rights (ECHR) that could lead to making human rights a central theme of the EC/EU.[104] Thus, while in one breath, by ECJ jurisprudence, EU law primes over national laws, and the ECJ has positioned itself as the principal judicial organ of the Community, the national systems (therefore, the national courts), retain the right to deal with these issues, and the ECJ is basically a court of last resort, of sorts. However, it has to be noted that there are commentators who hold the view that any assumption that the principle of subsidiarity banishes matters of human rights to the national plane would be wrong, as such an assumption undermines the objectives of the principle.[105] From an ECOWAS perspective, this later view can be very attractive as the argument can be made that the 'turmoil' that human rights faces at the domestic level in most

[102] Alston and Weiler (1998) p. 683
[103] Ibid
[104] TC Stever (1996-1997) p. 989
[105] Alston and Weiler (1998) p. 683

states favours removing human rights litigation to the ECOWAS Community level. If it is considered that prior consideration of human rights matters does not shut out subsequent consideration at the Community level, the attractiveness of the argument is reduced. For as long as the question is not addressed, it hangs over the growth of the system.

The other uncertain aspect of the relation between the ECOWAS legal system and the national system with respect to human rights is the status that the ECCJ has before national courts. As already observed, article 10 of the ECOWAS Community Court Protocol allows national courts to refer issues relating to the interpretation of the ECOWAS Treaty and legislative provisions to the ECCJ, where such issues arise in cases before national courts. However, the provision makes use of the term ‘may’, which would imply that it is a permissive, rather than an obligatory requirement. In other words, where a case is brought before a national court and a claim for human rights linked to the ECOWAS instruments are included, the national court is not under any legal duty to refer such cases to the ECCJ. The mischief inherent in such a situation is that, as the ECCJ would generally not hear matters already decided by the national courts, the matter would never come before the ECCJ for determination. The other angle to the quandary relates to the perception of the ECCJ by national courts.

Considering that the ECCJ holds out itself as an equal partner in an integrated community legal order, in the common law jurisdictions especially, national courts would not be bound by the decisions of the ECCJ. At best, national courts can ignore the decisions and proceedings of the ECCJ. At the worst, national courts could give judgments that are parallel and conflicting with decisions of the ECCJ. At the very extreme, national courts could even hear cases challenging the legality or constitutionality of judgments of an international court not recognised under national law. In any of these scenarios, human rights protection by the ECCJ would be threatened. Thus, an approach which avoids dealing with these issues as if they would go away (the ostrich approach), is a danger in itself to the existence and growth of the system.

Indeterminacy in the human rights jurisdiction of the ECCJ has two aspects, one of which is specific to the ECCJ, and the other being the general character of human rights instruments. The usual effect of indeterminacy in legal discourse is that it raises questions of judicial discretion and hence, the remote challenge of judicial preparedness to exercise conferred or implied discretion. In the first place, in granting human rights competence to the ECCJ, the 2006 Supplementary Protocol of the ECOWAS Community Court does not specify what instruments are

applicable in the determination of human rights cases by the Court. This therefore leaves open the question whether only exclusively ECOWAS instruments such as the ECOWAS Treaty, Conventions, Protocols and other subsidiary instruments of the ECOWAS Community are applicable, or whether the ECCJ may rely on any other human rights instrument. The general indeterminacy is that which is associated with human rights instruments generally. Fortunately, the increasing jurisprudence of the ECCJ provides some guidance in these areas, and these would be constantly referred to in the discourse.

By the new article 9(4) of the ECOWAS Community Court Protocol, 'The Court has jurisdiction to determine cases of violation of human rights that occur in any member state'. Considering that ECOWAS is primarily a community for economic integration, and the original mandate of the ECCJ is to 'ensure the observance of law...in the interpretation and application of the provisions of the Treaty', the provisions of the new article 9(4) of the Court's Protocol leaves room for all kinds of interpretations. It is possible to put forth the argument that against the background of its original mandate, article 9(4) should be interpreted to mean that the ECCJ can only hear cases of violations of human rights contained in the 1993 revised ECOWAS Treaty, and in the conventions and protocols that form part of the Treaty. If

this were the case, the clear Treaty provisions in question would be the rights of free movement, residence and establishment contained in article 59 of the revised Treaty. Should a more liberal interpretation be adopted, human rights provisions in the Treaty could expand to include the undertaking to respect the right of access to information and to respect the rights of journalists.[106] These enumerated rights, it can be argued further, have direct links to the realisation of the economic objectives of ECOWAS, and therefore can be loosely classified as economic freedoms. However, such an approach would spark some of the controversies that surrounded the ECJ's human rights practice when the ECJ was seen as protecting economic freedoms to the detriment of wider human rights concerns.[107] Such a situation would invariably even restrict the enjoyment of rights protection under the regime to participation in the economic sphere. However, a teleological approach would lead to an interpretation of that statements in the agreement in the Treaty, to mean to cooperate for the purpose of realising the objectives of the African Charter which implies that human rights in that instrument form part of the human rights provisions of the Treaty.[108]

[106]Art 66 of the revised ECOWAS Treaty.
[107] MP Maduro, Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU' in P Alston (ed.) *The EU and Human Rights* (1999) Oxford: Oxford University Press p. 449.
[108] Art *56* of the 1993 revised ECOWAS Treaty.

As certain conventions, protocols and supplementary protocols of ECOWAS are deemed to form part of the Treaty, it is also possible to interprete the new article 9(4) of the ECOWAS Community Court Protocol to include rights contained in such instruments. In this context, certain ILO Conventions dealing with Migrant workers (incorporated by definition in some protocols of ECOWAS) can be included as part of what could found actions before the ECJ.[109] In fact, the ECCJ seems to have taken this sweeping understanding of Treaty, conventions and protocols in its interpretation of the mandate granted by the 2006 Supplementary Protocol of the Court. Hence, in the *Kélta* case, the ECCJ took the view that:[110]

> *….as regards material competence, the applicable texts are those produced by the Community for the needs of its functioning towards economic integration: the Revised Treaty, the Protocols, Conventions and subsidiary legal instruments adopted by the highest authorities of ECOWAS. It is therefore the non-observance of these texts which justifies the legal proceedings before the Court.*

The dicta of the ECCJ in the *Kélta* case can be read in several ways. It can be read to mean that only those rights relevant for the movement towards economic integration can base complaints of human rights violation. The dicta can also be read to mean that, insofar as a right, or group of rights,

[109] The challenge here would be that not all ECOWAS member states have ratified all the relevant ILO Conventions.
[110] *Keita* case, supra para 27.

are present in any of these instruments adopted for the functioning towards economic integration, they form part of ECOWAS legislation and can be applied. The latter understanding is better as the former would be unduly restrictive.

It is also possible to interprete article 9(4) of the ECOWAS Community Court Protocol to say that all human rights provisions contained in any human rights instrument directly, or remotely, referred to in the legislative instruments of ECOWAS can found an action for human rights protection before the ECCJ. From this perspective, references to human rights instruments in preambles and statements of fundamental principles of ECOWAS instruments would be sufficient to entrench such instruments as sources of human rights law in the ECOWAS context.

Thus, in the *Ugokwe* case, the ECCJ in trying to address the indeterminacy in its mandate, interpreted article 4(g) of the revised ECOWAS Treaty as requiring application of the African Charter in the context of articles 9 and 10 of the 2006 Supplementary Protocol of the Court. The ECCJ stated thus:

> *In articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloguing of various human rights but by the provisions of article 4 paragraph (g) of the Treaty of the Community, the Member States of the Economic Community of West African States (ECOWAS) are enjoined to adhere to the principles including 'the recognition, promotion and protection of*

human and peoples' rights in accordance with the provisions of the African Charter n Human and Peoples 'Rights'.
Even though there is no cataloguing of the rights that the individuals or citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter.[111]

While it provides reasoning for its use of the African Charter, the Court has not been so expressive of the reasons for its use of the UDHR. Yet, the UDHR has appeared frequently in proceedings before the ECCJ, either in the pleadings of litigants, or in the decisions of the Court itself. The ECCJ has placed unambiguous reliance on the UDHR in at least three of its decisions.[112] What is clear however, is that both the African Charter and the UDHR appear, in varying frequency in parts of ECOWAS legislative instruments and this strengthens the argument that article 9(4) of the Supplementary Protocol of the Court can be read to accommodate actions based on all such enumerated human rights instruments. This attitude to interpretation benefits litigants before the ECCJ.

Apart from the African Charter and the UDHR, other human rights instruments upon which actions before the ECCJ have been founded, and which the Court has referred to in judgments, include the International

[111] *Ugokwe* case, para 29.
[112] *Keita* case Supra *Professor Etim Moses Essien v The Gambia,* Unreported Suit No. ECW/CCJ/APP/05/05 and in the *Karaou* case, (Supra).

Covenant on Economic, Social and Cultural Rights (CESCR),[113] the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)[114], and the Slavery Conventions[115]. While CEDAW is mentioned in at least one ECOWAS legislative document,[116] the other two instruments are yet to be specifically mentioned or enumerated in the ECOWAS documents. To a lesser extent, provisions of national constitutions of the member states have also been relied on in actions before the ECCJ, although it is not clear whether the Court sees national constitutions as part of its sources of law. The fact cannot be denied that the liberal interpretation that the ECCJ has given to articles 9 and 10 of the Supplementary Protocol of the Court encourages robust human rights litigation. However, as already argued in this paper, the credibility of the ECCJ, (as, indeed, applies to all international courts with conferred powers), depends on the Court's ability to get results while acting within the legal and legitimate boundaries of its competence. This much is required by article 6(2) of the 1993 revised ECOWAS Treaty which limits the functioning of ECOWAS institutions to the powers expressly conferred by the Treaty and the Protocols of the Community. It will therefore be useful to

[113] *Essien* case as above.
[114] *Karaou* case as above.
[115] Ibid
[116] See for eg, the Supplementary Protocol on Democracy and Good Governance.

assess, whether or not the ECCJ has acted credibly in the exercise of the apparent discretion resulting from the indeterminacy of the provisions of the Supplementary Protocol of the Court.

It may appear contradictory to assert that indeterminacy grants a right to the exercise of judicial discretion, yet tries to assess the legality and legitimacy of this discretion. But it has to be borne in mind that judicial decisions do not exist in vacuum since they have to relate as much as possible to existing positive law. As some would argue, the main duty of the judge is not to make law but to interprete the law. The view has been expressed however, that judicial interpretation can take either of two forms: In the first sense, interpretation is essential in the context of identifying the meaning of a given text 'so that interpretative statements can be true, or false, depending on whether or not they reflect that meaning'. In the other sense, interpretation extends to creating the meaning of the text. In both forms, there is some element of judicial discretion which could mean freedom to choose among different options, lack of binding legal standards in the form of precedence or the absence of a superior reviewing authority."[117]

[117] Vidal L, 'Interpretation and Judicial Discretion' in Beltran and Mora Pub. (82006) p. 90

The legitimacy of judicial discretion exercised in the form of creating meaning in a given text, depends on whether there is room for choice, and whether the authority to make the choice resides in the court, either by positive conferment, or as a result of legal indeterminacy. Citing Kelsen, Vidal notes that there are two types of indeterminacies; intentional indeterminacy, and unintentional indeterminacy. Both types of indeterminacy have the effect of empowering the applying authority to fill the gap created by the indeterminacy.[118] However, the degree of discretion in situations of unintentional determinacy is lower than in situations of intentional indeterminacy so that the creation of meaning by the applying authority is limited by the surrounding regime standards.[119] It would appear therefore that the authority, even where its decision is not subject to review, has to (Vidal (2006) P. *95),* restrict itself to the principles and standards that can be found within the 'walls' of the given legal system.

Clearly, the 2006 Supplementary Protocol of the ECOWAS Community Court of Justice does not expressly confer power on the ECCJ to 'determine' the human rights instruments that should be applicable in cases brought before the Court. It is rather, the indeterminacy of the Protocol, that has created room for the exercise of discretion by the ECCJ. Hence, relying

[118] Vidal (2006) p. 96
[119] Ibid

on the arguments, it can be argued further, that the ECCJ does not have absolute discretion in the sense of giving itself a right to hear cases based on every single human rights instrument that exists. The legitimacy of the discretion would require that the human rights instruments applied should be those acknowledged by ECOWAS by way of reference in other documents of the Community. It is possible to identify a strain of this consciousness in the jurisprudence of the ECJ. In the early days of its foray into the field of human rights, the ECJ restricted its standards of scrutiny to human rights found within 'the Community legal order' and to the 'constitutional traditions common to the member states'.[120] The indeterminacy that arose out of this approach was met with the 'adoption' of the ECHR as a major source of inspiration.[121] The ECJ appears to have also made some references to the European Social Charter and the non-binding EU Fundamental Rights Charter but it has basically restrained itself from applying universal human rights instruments as much as possible. Looking with the eyes of the human rights practitioner, the liberal approach of the ECCJ is more convenient but it holds the risk of undermining the legitimacy of the system. It also poses a risk of conflict with the supervisory

[120]Tizzano (2008) p. 127
[121]Sheeck (2005) pp. 850 - 852

organs established in some human rights instruments should the ECCJ decide not to defer to the jurisprudence of such organs.

The general indeterminacy, relates to the general indeterminacy of human rights instruments themselves. As a result of the contending interests and views that need to be balanced in the negotiation of human rights instruments, most instruments emerge in vague, imprecise, and abstract forms.[122] Hence, it is noted that the linguistic openness of rights discourse leads to policy being made determinative of particular interpretative outcomes. In the context of the ECOWAS, the human rights provisions which are scattered in different documents of the community, require concrete judicial interpretation, in order to acquire the status of useful statements of law for the benefit of ECOWAS citizens. The ECCJ also has the challenge of giving 'judicial breath' to the neutral provisions in the various instruments that it applies. This has to be done, taking into context, the legal status of such instruments in the national legal systems of member states. A constructive balancing process in this regard is essential to preserve both the credibility and the effectiveness and efficiency of the Court. Up till now, the ECCJ has not had the opportunity to 'interprete' human rights provisions in the ECOWAS Community documents.

[122] Brosig (2006) p. 15

In presenting an overview of the Rules of Procedure of the court in the next heading, it is necessary to highlight the competence of the court, and the sources of law that the ECOWAS Community Court of Justice applies in the adjudication of disputes. It is only against this background, that the Rules of Procedures can be fully appreciated. It is important as well, for lawyers in the sub-region to be fully aware of the competence and jurisdiction of the Court, including those that have access to the Court for the various causes of action under the Protocol of the Court. Under Article 76 of the Revised Treaty, the Court is competent to deal with disputes referred to it regarding the interpretation or the application of the provisions of the Revised Treaty, after attempt by the parties to amicably settle the dispute through direct agreement has failed. It is also important to note that Article 10 of the (Supplementary) Protocol Provides as follows:

"Where in any action before a court of a Member State, an issue arises as to the interpretation of a provision of the Treaty, or the other Protocols or Regulations, the national Court may, on its own, or at the request of any of the parties to the action, refer the issue to the Court for interpretation." [123]

[123] Ibid

The Court of Justice of the European Communities exercises a similar jurisdiction under the concept of Preliminary Ruling.[124] Although the issue of referral is discretionary as stipulated above, it is mandatory in the case of the Court of Justice of the European Communities. There is therefore, the need to amend this provision to give the ECOWAS Community Court of Justice exclusive jurisdiction in the Interpretation of Community protocols in order to ensure uniformity.

One instance in which the ECOWAS Community Court invoked the issue of jurisdiction is the case of *Essein v Rep. of Gambia*.[125] The issue was whether the court has jurisdiction to join a party whose presence is necessary. The plaintiff failed to join the Commonwealth Secretariat which is a necessary party to the claim and who were the architects of the employment relationship between the plaintiff and the defendants. The court decided that it was competent to hear the substantive case on its merit despite the non-joinder of the Commonwealth Secretariat as it held that the Commonwealth Secretariat was not a necessary party to be joined.

Another case on the ECOWAS Community Court's jurisdiction is the case of *Ukor v Laleye*[126]The matter was whether the court was devoid of

[124] Section 5, European Union Court of Justice Protocol, 1975
[125] (2009) CCJLR PT. 2, PP15-21, See also Manneh v Rep. of Gambia (2008) CCJLR PT1 P 18
[126] (2009) CCJLR, PT. 2 P.30, see also, Chukwudolue v Rep. of Gambia (2008) CCJLP, PT.2 P

appellate jurisdiction, and whether the court of first instance in Cotonou can set aside the orders made, and make the complaints justiciable.

The court in upholding its jurisdiction in the case held that the cardinal principle of law on jurisdiction, which never changes, is that jurisdiction or lack of it, is fundamental to the proceedings. It is trite law that jurisdiction means simply the power of a court to entertain an action brought before it.

Similarly, in the case of ***Olajide Afolabi v. Federal Republic of Nigeria,***[127] the applicant, Mr Olajide Afolabi, a Community Citizen and businessman, filed an application before the Court challenging the closure by Nigeria, of its common border with Benin Republic on 9th August, 2003. He allegedly suffered some losses due to the closure. Since it is crystal clear, that Judges do not make law, but only interprete or apply the law as it is, the only option the Court had was to uphold the preliminary objection of Nigeria, by striking out the suit, for lack of jurisdiction. It is a landmark case, because it defined clearly, the competence of the Court under Article 9.3 of its Protocol.

Between 2001 and January 19th 2005 when Protocol A1/P117/91 was finally amended, only two cases were filed before the Court, and both

[127] Suit No: ECW/CCJ/APP/01/03

were filed by individuals directly. Of course, the Court had no jurisdiction to entertain the matters.

In January 2005, the Authority of Heads of State and Governments adopted Supplementary Protocol AISP/1/01/05 amending Protocol A/P 1/7/91. The said Supplementary Protocol expanded the jurisdiction of the Court, and substituted Article 9 of the 1991 Protocol with a new provision.

Highlights of the Supplementary Protocol are that the Court now has jurisdiction in respect of Human Rights,[128] and pending the establishment of the Arbitration Tribunal, the Court shall have powers to act as arbitrator. It also established the method of implementation of the judgments of the Court.[129] The adoption of the Supplementary Protocol has had positive impact on the judicial activities of the Court. Following the adoption, six cases were lodged in the Court in 2006, twenty-one cases in 2006, and so far, ten cases have been lodged in 2007.

[128] Article 9.4 and 10.d
[129] See Article 9, 10 and 24 of the protocol.

3.4 Rules of procedure and evidence of the court

For any Court of record, its Rules of Procedure are important, because they regulate the proceedings of the Court.

In every judicial system, Practice and Procedure of the Court is of paramount importance because of its relevance in the application of the substantive law. Lawyers, are expected to have good knowledge of the law, as well as Practice and Procedure of the various Court systems. It is however of great concern, that many Lawyers in the sub-region are not familiar with the ECOWAS Community Court, its competence, and its practice and procedure. The ECOWAS Community Court is an International Court, and its Practice and Procedure are different from the Practice and Procedure of the domestic courts in Member States.

Pursuant to the provisions of Article 2 [130], the Community Court of Justice formulated its Rules of Procedure, which were approved by Council vide Regulation CIREG/0418102 of 28th August, 2002. The approved Rules of Procedure of the Court have been published in volume 41, of the Official Journal of ECOWAS in August 2002. The Rules of Procedure have been formulated to regulate the proceedings of the Court; However, the overview of the Rules of Procedure of the Court includes generally the Practice and

[130] Protocol A1P1/7/91

Procedure of the Court as provided in the Revised Treaty, the Rules of Procedure as provided in the Protocols of the Court, and Article 38 of the Statute of the International Court of Justice.

Under the Rules of Procedures of the court, proceedings before the Court shall consist of two parts; the written and oral parts. The written proceedings part shall consist of the application entered in the Court, notification of the application, the defence, the reply or counter-statement, the rejoinder, and other briefs or documents in support.[131] The Oral Proceedings part shall consist of hearing of the parties, the agents, the witnesses, the experts, the advocates or the counsel.[132]

Article 19.1 of the Protocol provides as follows: The Court shall examine the dispute before it in accordance with the provisions of the Treaty and its Rules of Procedure.[133] It shall also apply, as necessary, the body of laws as contained in Article 38 of the Statute of the International Court of Justice.

Article 38 of the Statutes of the International Court of Justice provides as follows:

1. "the Court, whose function is to decide, in accordance with international law, such disputes as are submitted to it shall apply;

[131] Article 13(1&3) of the Protocol and Articles 32-51 of the Rules of Procedure
[132] Ibid
[133] A/P/7/91

a) International convention, whether general or particulars establishing rules expressly recognized by the contesting states;

b) International custom, as evidence of a general practice accepted,

c) The general principles of law recognized by civilized nations;

d) Subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono* if the parties agree thereto.

The Court, in the exercise of its power of Arbitration, applies the general principles outlined in Article 38 of the Statute of the International Court of Justice. Therefore, the Court applies both Community law and Universal law in adjudicating upon matters before it.

Article 11 of the Protocol [134] provides as follows:

1. Cases may be brought before the Court by an application addressed to the Court Registry.

This application shall set out the subject matter of the dispute, and the parties involved, and shall contain a summary of the argument put forward, as well as the plea of the plaintiff.

[134] Ibid

2. The Chief Registrar of the court shall immediately serve notice of the application, and of all documents relating to the subject matter of the dispute to the other party, who shall make known his grounds for defence, within the time limit stipulated by the rules of procedure of the Court.

Furthermore, Article 33 of the Rules of Procedure provides that every application shall state:

• The name and address of the Applicant.

• The designation of the party against whom the application is made.

• The subject matter of the proceedings and a summary of the pleas in law. on which the application is based.

• The form of order sought by the applicant.

• Where appropriate, the nature of any evidence offered in support.

• An address for service, in the place where the Court has its seat, and the name of the person who is authorized, and has expressed willingness to accept service.

• In addition, or instead of specifying an address for service, the application may state that the lawyer or agent agrees that service is to be effected on him by telefax, or other technical means of communication.

It should also be noted that the application shall be accompanied, by supporting documents.[135] To every pleading there shall be annexed, a file containing the documents relied on in support of it, together with a schedule listing them. Where, in view of the length of a document, only extracts from it are annexed to the pleading, the whole document or a full copy of its shall be lodged at the Registry.[136] The Court is also empowered by Article 15 of Protocol AJP1/7/91, to request the parties, at any time, to produce any documents, and provide any information, or explanation which it may deem useful. Formal note shall be taken of any refusal.

Where an application does not comply with the requirements set out in Article 33 (1) (4), the Chief Registrar shall prescribe a period, not more than 30 days, within which the Applicant is to comply with them, whether by putting the application itself in order, or by producing any of the above mentioned documents. If the Applicant fails to put the application in order, or to produce the required documents within the time prescribed, the Court shall, after hearing the Judge Rapporteur, decide whether the non compliance with these conditions renders the application formally inadmissible.[137]

[135] See Article 33(5) of the Rules of Procedure and Article 15 of the Protocol.
[136] See Article 32 (4) and (5).
[137] See Article 33 (b) of the Rules.

Article 35 of the Rules of Procedure provides that within one month after service, on him of the application, the Defendant shall lodge a defence stating;

• The name and address of the defendant.

• The arguments of fact and law relied on.

• The form of order sought by the Defendant.

• The nature of any evidence offered by him.

The application initiating the proceedings and the defence may be supplemented by a Reply, to be filed within one month from the date of receipt of the defence and by a Rejoinder by the Defendant, within one month from the date of the receipt of the Reply by the Applicant.[138] It is also a requirement under the Rules of the court, that Notice of the Registration of any Application initiating proceedings, is to be given in the Official Journal of the Community. The Notice shall state:

-The date of registration of the Application.

-The names and addresses of the parties.

-The subject matter of the proceedings.

-The form of order sought by the Applicant.

[138] See Article 36 of the Rules.

- A summary of the pleas in law, and the main supporting arguments.[139]

It should be noted that the Notice of Registration is significant because it serves the purpose of putting Member States, and members of the public on Notice, so that interested parties, who may wish to intervene in the proceedings, can do so.

Article 21 of the Protocol empowers any interested Member State to intervene in a dispute before the Court. By virtue of Article 89 of the Rules of Procedure of the Court, an application to intervene must be made within six weeks of the publication of the Notice of Registration.

Article 59.4 provides thus;

The application for intervention shall contain:

• The description of the case.

• The description' of the parties.

• The name and address of the intervener;

• The intervener's address for service at the place where the Court has its seat.

• The form of order sought, by one or more of the parties, in support of which the intervener is applying for leave to intervene.

[139] See Article 13.6 of Rules.

• A statement of the application is submitted pursuant to Article 21 of the Protocol.

Article 12 of the Protocol of the Court provides, that each party to a dispute shall be represented before the Court by one or more agents, nominated by the party concerned, and the agents may request the assistance of one or more Advocates or Counsel, who are qualified to appear in Court in their area of jurisdiction: A Lawyer acting for a party is required to lodge at the registry of the court, a certificate showing that he is authorized to practice before a Court of a Member State, or another State which is a party to the treaty.[140].

Provisions have also been made in the Rules for Agents, Advisers, and Lawyers, appearing before the Court, to enjoy immunity in respect of words spoken or written by them concerning the case or the parties.[141] The Court may however, exclude from the proceedings any Adviser, or Lawyer whose conduct towards the Court, or Judge is incompatible with the dignity of the Court.[142] Under article 16 of protocol A/P1/7/91, the court may in any circumstance, and in accordance with the person, organization or institution, carry out an enquiry, or give an expert opinion. It is further

[140] See Article 28 3 of the Rules
[141] See Article 28, 29 and 30 of 'the Rules.
[142] See Article 31 of the Rules.

provided under Article 41 of the rules, that the court may adopt any of the following measures of inquiry:

a) The personal appearance of the parties.

b) A request for information and production of documents.

c) Oral testimony.

d) The commissioning of an expert's report

e) An inspection of the place or thing in question

The sources of law in respect of the Practice and Procedure of the ECOWAS Community Court of Justice are as follows:

a) The Revised Treaty of ECOWAS.

b) Supplementary Protocol A/SP.1R)&06 amending the Revised Treaty.

c) Protocol A/P1f7/91 relating to the Community Court of Justice.

d) Supplementary Protocol A/SP. 1/01/05 amending Protocol A/P1/7/91.

e) Supplementary Protocol A/SP.2/06f06 amending Article 3 Paragraphs 1,3 and 7 Article 7 Paragraph 3 of Protocol AIP1/7/91.

f) The Rules of Procedure of the Community Court of Justice.

g) Article 38 of the Statute of the International Court of Justice

h) Decision A.DEC.210M)6 establishing the Judicial Council of the Community.

3.5 SUMMARY

From the above, we have seen the nature and scope of the jurisdiction of the ECOWAS Community Court of justice, its powers and its functions, including some of its limitations in the execution of matters brought before it, in respect of ECOWAS citizens, as the case of Olajide and others show[s].[143] We have also observed the various ECOWAS Protocols in respect of the rules of procedure and evidence of the ECOWAS Community Court of justice. This gives us the background into how the court protects human rights issues brought before it by the ECOWAS citizens. We shall discuss this in the next chapter.

[143] Supra

CHAPTER FOUR

4.0 PROTECTION OF HUMAN RIGHTS BY THE ECOWAS Community COURT OF JUSTICE

4.1 Introduction

Under this chapter, we shall discuss the roles and activities that the ECOWAS Community Court of justice plays in the protection of human rights. Consequently, we shall look at the human rights jurisdiction of the ECOWAS Community Court in their different ramifications. Next, we will consider whether, or not, citizens of ECOWAS member states actually have access to justice under the ECOWAS Community Court. Then, the judicial activism of the community court shall be discussed by examining some selected case law reports on human rights by the ECOWAS Community Court of justice.

The institutional relation between ECOWAS as an international entity and the ECCJ as an institution of ECOWAS necessitates an analysis of the competence of the parent organisation (the ECOWAS) as a basis for investigating the human rights mandate of the Community Court of Justice (ECCJ). The competence of ECOWAS in the field of human rights represents the foundation upon which the exercise of jurisdiction by the ECCJ in that issue area is built. In fact, the question of organisational

competence could be described as a 'central issue of principle' and it is unwise to 'take it for granted that the necessary legal principle and constitutional competence exists' in this area of activity.[144] The significance of this preliminary inquiry is in the fact that international organisations, unlike states that create the organisations, do not have the freedom to engage in just any field of activity they desire. In the same vein, an international organisation can neither endow its organs and institutions with powers the organisation itself does not have, nor can it empower such organs and institutions to exercise powers the parent organisation does not have.[145]

Considering the wide differences in the form in which human rights finds expression in the constitutional epochs of ECOWAS (the 1975 and the 1993 constitutional epochs), it becomes interesting to engage the question whether, ECOWAS had transformed from an economic integration initiative into a political integration scheme or both?. In this sense, it becomes necessary to ask whether the objectives and purposes of the Community have changed or expanded to embrace Community competence in the field of human rights? In view of the fact that the law of

[144] P Alston and JHH Weiler, 'An 'Ever Closer Union' in Need of Human Rights Policy', (1998) *9 European Journal of International Law* p. 660

[145]See generally the Reparation for Injuries Suffered in the Service of the United Nations, (Advisory Opinion of 11 April 1949) ("Reparation Case"), (1949) ICJ Reports, p. 174.

international institutions and indeed, the practice of international organisations, indicate that a principle of limited powers prevails in that sphere we may therefore ask whether or not the human rights provisions contained in the 1993 revised Treaty of ECOWAS are sufficient to confer human rights competence on ECOWAS and to result in legally acceptable transfer of such human rights jurisdiction to the ECCJ? We shall see as the discussion progresses below.

4.2 HUMAN RIGHTS JURISDICTION OF THE ECOWAS COMMUNITY COURT OF JUSTICE

Before we discuss the human rights jurisdiction of the ECOWAS Community Court of Justice we need to understand the concept of human rights, which we have already discussed in section 2.3 of chapter 2 of this thesis. This will help our understanding of what rights are protected by the ECCJ.

As an ethical regime, human rights have intrinsic and consequential dimensions. They are based on certain intrinsic attributes of our shared humanity which are then clothed in law with legal consequences. These different dimensions begin with the nature of the concept of human rights itself. The intrinsic nature of human rights underpins its universal appeal. This is different from the particular cultural context in which these rights are

framed, or drafted, as norms in international, municipal, or any other system of law. The framing of human rights in particular sources of positive law in different legal systems should not be conflated or confused with the integrity of the concept. Human beings and their communities enjoy human rights such as the ECOWAS citizens.

If, or when the fulfillment of these rights is threatened, and enforcement or implementation machinery whose jurisdiction is geo-politically defined - such as national courts, regional courts or the ECOWAS Community Court of Justice may be needed to secure their enjoyment. Donnelly describes this tendency for the ultimate test of commitment to human rights to be found at the point of their endangerment as the "possession paradox of rights".

We shall now examine, by enumerating first, some of the African humanitarian rights that ECOWAS member states are parties to, and how they fared.

The first that comes to mind is the African Union Charter on the Rights and Welfare of the Child (AUCRWC), which all the ECOWAS member states are party to, was ratified on 23rd July, 2001.

Next, is the African Charter on Human and Peoples' Rights (ACHPR), ratified on 22nd June, 1983. There is also the O.A.U Refugee Convention

ratified on 25th May, 1986. Another is the Protocol to African Charter on Human and peoples' Rights (PACHPR) as well as the Rights of Women in Africa all ratified on 16th December, 2004. Also, there is the protocol to the African Charter on the Establishment of African Union (PACEAU) that was ratified on 29th March, 2001. There is the ECOWAS Declaration on the decade of a Culture of Rights of the Child in West Africa signed on 21st December, 2001 as well as the ECOWAS Declaration on the Fight Against Trafficking in Persons in West Africa signed on 21st December,2001. Likewise, there is the Protocol on Free Movement of Persons, Goods and Services ratified on 12th September, 1979.

Infact, there are many of these conventions and protocols that most of the ECOWAS member states are signatories to but, the question is, how effective were they, both in operation and in implementation?

So far, as at the time of this research, it is observed that Nigeria seems to have demonstrated her commitment to the domestication of some of these conventions and protocols.

For instance, section 12 of the 1999 Constitution of Nigeria incorporated the African Charter on Human and People's Rights under Cap. A9 LFN, 2004. It also incorporated the Geneva Convention of 1949 on the Rights

and Welfare of the Child under Cap.162, LFN 1990. It is hoped that other member states of the ECOWAS will follow the Nigerian example.

Unlike the 1975 Treaty, the Revised ECOWAS Treaty of 1993 refers to the African Charter on Human and Peoples' Rights in its preamble. An innovation in the Revised Treaty was the recommendation for adoption of Fundamental Principles by the Community, implemented in Article 4 of the 1993 Treaty. These principles include: maintenance of regional peace, stability and security through the promotion of good neighbourliness, peaceful settlement of disputes among member States, recognition, promotion, and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights, accountability, economic, and social justice, and popular participation in development, promotion, and consolidation of a democratic system of governance in each member State, and equitable and just distribution Charter on Human and Peoples' Rights and the protection of both fundamental principles of the ECOWAS mechanism for Conflict Prevention, Managements, Resolution, Peace-Keeping and Security.

The ECOWAS Community Court of Justice examined the legality of these commitments in the case of ***Hon. Dr. Jerry Ugokwe v. Federal Republic of Nigeria & Hon. Dr. Christian Okeke & Other***.[146]

It held that the reference to the African Charter on Human and Peoples' Rights as a fundamental principle of the community in Article 4(g) of the Revised Treaty enables the Court to "bring in the application of those rights catalogued in the African Charter." The Court thus claims jurisdiction on the human rights provisions contained in the African Charter on Human and Peoples' Rights, which is domestic law in Nigeria, and the Universal Declaration of Human Rights.

It follows then that, to the extent that the ECOWAS treaty is a supra-national treaty instrument directly applicable within its Member States, to that extent the domestic application of the African Charter on Human and Peoples' Rights through the Fundamental Principles of ECOWAS is automatic and mandatory. The Charter is not just a source of law for the Court; it is also a legal instrument that frames the ECOWAS Community Court's jurisdiction on human rights.

Member States of the community agree in Article 56(2) of the Revised Treaty to co-operate for the purpose of realizing the objectives of

[146] 2005/ECW/CCJ/05

several instruments, including the African charter on Human and Peoples' Rights. Charter X of the Treaty contains general provisions relating to other aspects of human rights, including, immigration, regional peace and security, legal and judicial matters, women and development, health and labour rights, information, radio and television, and the press.

For instance, in relation to sex and gender discrimination, the ECOWAS States agree under Article 63(2) of the Revised Treaty to take all measures to:

a) Identify and assess all constraints that inhabit women from maximizing their contribution to regional development efforts, and

b) Provide a framework within which the constraints will be addressed, and for the incorporation of women's concerns and needs into the normal operations of society.

To attain these goals, member states undertake, at the level of the Community to "stimulate dialogue among themselves, on the kinds of projects and programmes aimed at integrating women into the development process..." and establish a mechanism for co-operation with bilateral, multilateral, and non-governmental organizations. Under Article 66, member States of the Community agree also to maintain within their borders and between one another, freedom of access for professionals of

the communications industry and for information sources, facilitate exchange of information between their press organs, and ensure respect for the rights of journalists.

In relation to the right to democratic participation, ECOWAS member States adopted in 2001, a supplementary Protocol on Democracy and Good Governance, which sets regional standards on elections and independence of the legal profession and the judiciary, and prohibits power obtained or maintained, by unconstitutional means. The Member States also agree under this Protocol, to review the jurisdiction of the ECOWAS Community Court of Justice to extend to cases relating to violations of human rights.

In the next sub-section we shall examine access to justice as a human right under the ECOWAS Community Court of Justice. We would see how access to justice under the Court's protocol A/P1/7/91 was very narrow giving access to only member states directly and to individuals and Corporate bodies and groups indirectly. We would see how this affected the quantum of cases that came before the Court until January 2005 when the Authority of Heads of State and governments of ECOWAS adopted Supplementary Protocol A/SP/1/01/05 which reversed the situation.

4.3 Access to the ECOWAS Community Court of Justice for Justice as a Human Right

Each time a case is brought before it, the Court may order any provisional measures, or issue any provisional instructions, which it may consider necessary or desirable.[147]

In the trial of cases before the court, the Judge —. Rapporteur plays an important role. The main task of the Judge — Rapporteur is to make preliminary report to the Court in respect of the application. The preliminary report shall contain recommendations as to whether inquiry, or any other preparatory step should be undertaken. The measures of enquiry that the Court has ordered shall also be conducted by the Judge - Rapporteur. Where the Court commissions an expert's report, the expert works under the supervision of the Judge — Rapporteur.[148]

Pursuant to the provisions of Article 26.1 of Protocol A/P1/7/91, the Authority of Heads of State and Governments fixed the seat of the Court in Abuja, Nigeria, vide Decision AIDEC.23/ 12/01. However, under Article 22 of the protocol, where circumstances or facts of the case so demand, the Court may decide to sit in the territory of another Member State. In an appropriate case, the Court will exercise this power by sitting outside

[147] See Article 20 of Protocol A/P 1/7/91.
[148] See Articles. 39, 41 and 45.of the Rules.

Nigeria in order to bring justice closer to the people. We are aware that because of poverty, and the great distance from Abuja to the member States, it is difficult for some Community Citizens to access the Court. Therefore, in the exercise of the powers vested in the Court by Article 26.2 of the 1991 Protocol, the Court sat in Bamako Mali between 2006/2007.[149] The main consideration of the Court in its decision to sit in Bamako was the age of the Applicant, as a retired civil servant who was eighty one years old.

Article 87 of the Revised Treaty makes provisions for the official and working languages of the Community Court of Justice. The Rules of Procedure of the Court provide that the official languages of the Court shall be English, French, and Portuguese. The language of a case shall be chosen by the Applicant, except where the Defendant is a member State, the language of the case shall be the official language of that State. The language of a case shall be used in the written and oral pleadings of the parties, the supporting documents, and in the minutes and decisions of the Court.[150]

The Protocol of the Community Court of Justice prescribes its jurisdiction. Protocol AIP1/7/91 sets out the competence of the Court in

[149] In Suit No: ECW1CcJ/APP/Q5/06 Moussa Leo Keita .v The Republic of Mali
[150] See Article 25 of the Rules.

Article 9. The Court is also empowered under Article 10 to give Advisory Opinion to Member States, the President of the ECOWAS Commission and Institutions of ECOWAS on their request. The competence of the Court under Protocol A/P1/7/91 is very narrow. Community citizens or nations or Member States private individuals and corporate bodies did not have direct access to the Court. It was only provided that a Member State may, on behalf of its nationals, institute proceedings against another member State or Institution of the Community, relating to the interpretation and application of the provisions of the Treaty, after attempts to settle the dispute amicably have failed. Therefore, only Member States and Institutions of ECOWAS had direct access to the Court under Protocol A/P1/7/91.

The lack of direct access to the court by individuals was the main issue for consideration in the judgment of the Court in the case of ***Olajide Afolabi v. Federal Republic of Nigeria.***[151]

The applicant, Mr Olajide Afolabi, a Community Citizen and a businessman, filed an application before the Court challenging the closure by Nigeria of its common border with Benin Republic on 9th August, 2003. He allegedly suffered some losses due to the closure. Since it is said, that Judges do not make law, but that they only interprete, or apply, the law as it

[151] Suit No: ECW/CCJ/APP/01/03

is, the only option the Court had was to uphold the preliminary objection of Nigeria by striking out the suit for lack of jurisdiction. It is a landmark case, because it defined clearly, the competence of the Court under Article 9.3 of its Protocol.

Between 2001 and January 19th 2005 when Protocol A!/P117/91 was finally amended, only two cases were filed before the Court and both were filed by individuals directly. Of course, the Court had no jurisdiction to entertain the matters.

Therefore, the problem of lack of direct access to the Court by individuals was of great concern to the Court. It is only now that individuals and corporate bodies have direct access to the Court because, it became obvious that individuals must be granted access to the Court for it to become operational.[152]

In January 2005, the Authority of Heads of State and Governments adopted Supplementary Protocol AISP/1/01/05 amending Protocol A/P 1/7/91. The said Supplementary Protocol expanded the jurisdiction of the Court and substituted Article 9 of the 1991 Protocol with a new provision.

[152] Supplementary Protocol A/SP.1/O1/05

The highlights of the Supplementary Protocol provides that the Court now has jurisdiction in respect of Human Rights,[153] and that pending the establishment of the Arbitration Tribunal, the Court shall have powers to act as arbitrator. It also established the method of implementation of the judgments of the Court.[154] The adoption of the Supplementary Protocol has had positive impact on the judicial activities of the Court. Following its adoption, six cases were lodged in the Court in 2006 alone, and twenty-one cases later followed. much more cases were lodged than can be imagined, to date.

In fact, the onset of conflicts in Liberia in1989, and in Sierra Leone in 1991, compelled a re-examination of the role of human rights in guaranteeing regional stability and security in the ECOWAS region.

By the end of the next decade in 2001, ECOWAS Member States agreed that good governance and press freedom are essential for preserving justice, preventing conflict, guaranteeing political stability and peace, and for strengthening democracy. The processes that led to the evolution of this treaty-based consensus' began in 1991.

In July 1991, ECOWAS Heads of State and governments adopted a Declaration of Political Principles, the preamble of which reaffirmed the

[153] Article 9.4 and 10.d
[154] See Article 9, 10 and 24 of the protocol.

need for the creation of a stable and secure region in which peoples of West Africa can live in freedom under the law, and for concerted regional action to promote democracy on the basis of political pluralism, and respect for fundamental rights as embodied in universally recognized international instruments on human rights, and in the African charter on Human and peoples' Rights. In the Declaration, the ECOWAS States undertook as follows:'

> *We will respect human rights and fundamental freedoms in all their plenitude, including in particular, freedom of thought, conscience, association, religion or belief for all our peoples without distinction as to race, sex, language or creed. We will promote and encourage the full 'enjoyment by all our peoples of their fundamental human rights, especially their political, economic, social, cultural, and other rights inherent in the dignity of the human persons and essential to his free and progressive development.*[155]

Prior to the adoption of this Declaration, ECOWAS convened in 1990 a Committee of Eminent Persons, to review the 1975 Treaty. Among its conclusions and recommendations, the Committee urged ECOWAS, through a revised treaty, to shift from its exclusive focus on government to government, to involving the people, NGOs, and the private sector, and adopt provisions establishing organs such as 'the Parliament of the

[155] See ECOWAS Revised Treaty, 1993

community, composed of representatives, elected by the peoples of the Member States, and an Economic and Social Council (ECOSOC), comprising socio-professional groups, drawn from all sections, and categories, of the population of the Member States. The Committee suggested the effective protection of human rights in West Africa, arguing that:

> *Effort towards the establishment of an economic community embracing all the States of the West African region were initiated in the early sixties not long after most of the countries had emerged from colonial domination into independence and Statehood. In this formative state, the natural inclination of the countries was in the direction of consolidating their independence and preserving and enhancing national sovereignty. Additionally, inter-State relations in the region were generally plagued by deep suspicions and political and ideological differences. Perceptions about national sovereignty and the principle of non-interference in the internal affairs of other States are now undergoing gradual transformation as the world shrinks more and more into a 'global village'. Gross abuse of human rights in a State, for example, now elicits prompt international reaction, often in the form of coercive and other measures. More and more countries are now opening their internal political processes, including the subjection of general elections to international observation in order to earn legitimacy for their governments.*[156]

[156] ECOWAS Eminent Persons Report, 1990

The Committee proposed a new draft treaty with significant new amendments to the 1975 treaty.[157] The revised Treaty was adopted in Cotonou, Benin Republic, in July 1993. In the framework of the Revised ECOWAS Treaty, including its accompanying protocols, human rights are recognized as fundamental principles of the Community, rights in factor mobility, substantive State obligations, and as obligations enforceable by the ECOWAS Community Court of Justice.

Fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court. In safeguarding these rights, the Court has to look to the constitutional traditions common to the member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States may not find acceptance in the Community.

In the case of ***Hon. Dr. Jerry Ugokwe v. Federal Republic of Nigeria & Hon. Dr. Christian Okeke & Others***[158] , the ECOWAS Community Court of Justice held that the legal effect of the reference to the African Charter on Human and Peoples' Rights as a fundamental principle of the Community in Article 4(g) of the Revised Treaty is to enable the

[157] Ibid
[158] Supra.

Court to “bring in the application of those rights catalogued in the African Charter.” Thus the Court claims jurisdiction over African charter rights.

However, let us reflect a little bit on, the objectives of the Community which are set out in Article 5(1) as follows:

i. The objectives of the Community shall be to develop policies and programmes aimed at widening and deepening co-operation among its Partner States **in** political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit (Emphasis supplied).

Sub-Articles (2) and (3) give details of pursuing and ensuring the attainment of the objectives as enshrined in sub-article (1), and of particular concern here is the “legal and judicial affairs” objective.

Then Article 6 sets out the fundamental principles of the Community which governs the achievement of the objectives of the Community, of course as provided in Article 5(1). Of particular interest here is paragraph (d) which talks of the rule of law, and the promotion, and the protection of human, and peoples’ rights, in accordance with the provisions of the African Charter on Human and Peoples’ Rights.

Article 7 spells out the operational principles of the Community which govern the practical achievement of the objectives of the Community in

Sub-Article (1), and seals that with the undertaking by the partner States in no uncertain terms in Sub- Article (2):

The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy**,** the rule of law, social justice, and the maintenance of universally accepted standards of human rights.

Finally, under Article 8 (1) (c), the Partner States undertake, among other rights, to abstain from any measures likely to jeopardize the achievement of those objectives, or the implementation of the provisions of this Treaty. While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegation of human rights violation.

It is possible on the basis of this interpretation to distinguish between the foundational role of human rights, as a controlling ethical value of all Community decision-making - including judicial decision-making - and human rights, as an explicit obligation in the Acts and legal instruments of the Community.

It follows also, to the extent that the ECOWAS treaty is a supranational treaty instrument directly applicable within its Member States, as well as,

the domestic application of the African charter on Human and Peoples' Rights through the Fundamental Principles of ECOWAS. It is important, given this context, for the Court to bring the value of human rights protection to all ECOWAS citizens, which underlie all its adjudicatory work.

One major objective of ECOWAS is the liberalization of cross-border trade, and movement, among its members involving, *inter alia,* the removal of obstacles to the free movement of persons, goods, services and capital, and to the rights of residence and establishment. Factor mobility is an entitlement of citizens of the ECOWAS Member States. The scope of this entitlement extends to freedom to travel to, or move to, another Member State for employment purposes and to pursue economic activities or establish in other Member States a trade or profession under the same conditions as citizens of such State, and freedom to provide or receive services on an equal footing with citizens of the host Member States, without discrimination on the basis of nationality. For the legal profession in Nigeria, in particular, this opens up real possibilities in term of cross-border legal practice.

The ECOWAS Authority of Heads of State and Governments has adopted a variety of protocols to implement factor mobility incrementally, in three phases, over a period of fifteen years, beginning with the

establishment of right of entry, and abolition of visas. To facilitate the right of free movement of persons in the Community, ECOWAS established an ECOWAS Travel Certificate, which is obtainable from the governments of Member State.

The second phase establishes the right of residence within the community which is also presently operational. Community citizens resident in a country other than their country of nationality, are entitled to a special ECOWAS residence card. The relevant protocols extend the rights of residence and establishment to natural and legal persons as well.

ECOWAS citizens enjoy rights of free movement within the sub-region, including rights of residence, and establishment, in Member States. For this purpose, the Supplementary Protocol on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment, places States, within the Community, under an obligation to accord Community Citizens national treatment on a non-discriminatory basis, in the establishment of businesses and services. It defines the right of establishment as the right granted to a citizen who is a national of the Member State to settle in, or establish in, another Member State, other than his State of Origin, and to have access

to economic activities as well as to set up and manage enterprises and, in particular, companies, under the same conditions as defined by the legislation of the host Member State for its own citizens.

Among the protections contained in the Protocols, citizens of ECOWAS member states, “shall have in the territories of other Member States, under the same conditions as their citizens, freedom to prosecute, and defend, their rights under any jurisdiction.” Discriminatory expropriation of property on grounds of nationality is prohibited.

A code of conduct regulates the rights of migrants in the Community. This code of conduct enjoys treaty status, having been adopted as one of the implementing protocols to the revised Treaty, it obliges Member States to respect the “fundamental human rights” of Community migrants in respect of illegal migration, expulsion, and the treatment of intra-community migrants, including migration caused by forced displacement. Fundamental human rights are defined to mean “the right of any individual recognized by the International Declaration of Human Rights adopted on 10 December, 1948 by the United Nations General Assembly, extending under the third phase, to all the rights granted to migrant workers under the relevant Conventions of the International Labour Organization relating to the protection of migrant workers.

There are three main features of the rights attached to factor mobility in the Revised Treaty and its implementing Protocols.

First, they firmly prohibit nationality- based discrimination. Second, ECOWAS transforms the Universal Declaration of Human Rights and the ILO migrant workers conventions into treaty law obligations binding on the Member States.

Third, the Protocols also guarantee access to justice, and national remedies, on a non-discriminatory basis. Non-availability of accessible, effective, and non-discriminatory recourse is, therefore, recognized as a violation of Community obligations.

In the relatively short lifespan of ECOWAS, the ECCJ can be described as one of the few institutions that have undergone the most transformation to meet new and emerging challenges. Conceived as a community tribunal under the *1975* ECOWAS Treaty,[159] the judicial organ of the community was born as a Community Court of Justice under its founding 1991 protocol.[160] Since then, the Protocol on the ECCJ has been amended by a supplementary protocol adopted in 2005[161] resulting in the expansion of the jurisdiction of the ECCJ. At inception, in relation to its

[159]Art 11 of the 1975 ECOWAS Treaty.
[160]Protocol A/P. 1/7/91 On the Community Court of Justice.
[161]Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P. 1/7/91 Relating to the Community Court of Justice.

contentious jurisdiction,[162] the ECCJ was empowered to 'ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty'. The ECCJ could only exercise competence in cases between member states of ECOWAS or between member states and institutions of the Community. Where the interest of nationals of member states were involved in relation to 'the interpretation and application of the provisions of the Treaty', a member state was authorised to bring an action on behalf of its national, after amicable settlement has been unsuccessful.[163] In summary, the ECCJ was designed for the purpose of resolving disputes between subjects of international law in the interpretation and application of treaty provisions relating to regional economic integration. This was the old wine which the wineskin was made to accommodate.

Despite not having any opportunity to exercise its original competence in the first few years of its existence,[164] the relevance of the ECCJ was abruptly challenged by its very first case which involved an individual complaint not contemplated by the Court's Protocol. Interestingly, this first

[162]The ECCJ is clothed with an advisory jurisdiction by art 10 (now art 11) of the 1991 Protocol on the Court of Justice
[163]Art 9(2)(3) of the 1991 Protocol on the Court of Justice.
[164] The first set of judges of the ECCJ was appointed in 2001 even though the Protocol establishing the Court was adopted in 1991. The Court was idle from 2001 till 2004 when the case of *Olajide* v Federal Republic of Nigeria, 2004/ECW/CCJ/04 was heard

case *(Afolabi Olajide v Federal Republic of Nigeria*[165]*)* raised issues around the question of individual access to the Court. The question of individual access related to human rights and fundamental freedoms, partly founded on the recognition accorded the African Charter in the 1993 revised Treaty[166]. While the ECCJ declined jurisdiction in the *Olajide* case, the fallout of the case, linked with the new visibility of human rights in the Community agenda, prompted the amendment of the 1991 Protocol on the Community Court of Justice. At the time the *Olajide* case was heard by the ECCJ, there was sufficient human rights content in the constitutional and other legislative instruments of ECOWAS to sustain the exercise of human rights competence by ECOWAS institutions. The case might have been an opportunity for the ECCJ to take a more dynamic role in providing judicial protection of human rights under ECOWAS Community framework.[167] However, the ECCJ shied away from such judicial activism and gave room for legislative provision of judicial competence in the field of human rights. The relevance of this observation is that the restraint exercised by the judges of the ECCJ potentially impacts on public perception of their

[165]Unreported Suit no. 2004/ECW/CCJ/04

[166]The Olajide case alleged a violation of the right to free movement in art 3(iii) of the revised ECOWAS Treaty and the right to freedom of movement under the African Charter based on the provisions of art 4(g) of the revised ECOWAS Treaty. Interestingly, reliance was place on the Nigerian domesticated statute of the African Charter.

[167] See F Viljoen, International Human Rights Law in Africa (2007) Oxford: Oxford University Press p. *507.* Viljoen argues that a more activist court would have taken a different position.

dedication to the cause of human rights protection. This does not however, take away the fact that the approach of the Court in that case is legally defensible on the basis of the doctrine of conferred powers. In any event, the restraint by the ECCJ has resulted in a clear and unambiguous empowerment of the Court by the lawmaking organ of the Community. Thus, the human rights mandate of the ECCJ is 'a legislature-driven' mandate.

The jurisdictional change introduced by the 2005 Supplementary Protocol of the ECOWAS Community Court is rather expansive in the sense that it affects the material, personal, temporal and territorial aspects of the Court's jurisdiction with respect to human rights.[168] In addition to conferring the ECCJ with jurisdiction over cases of 'violation of human rights that occur in any member state',[169] the Supplementary Protocol grants access to the Court to individuals and corporations with respect to different cases of human rights violation.[170] This new jurisdiction is added to the original jurisdiction of the ECCJ and does not replace the original

[168] ST Ebobrah, 'A rights-protection goldmine or a waiting volcanic eruption: Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 2 *African Human Rights Law Journal* p. 307.
[169] New art 9 of the Protocol of the ECOWAS Court as introduced by art 3 of the 2005 Supplementary Protocol
[170] New art 10 of the Protocol of the ECOWAS Court as contained in art 4 of the 2005 Supplementary Protocol. Access is available to individuals and corporations for acts and inactions of Community officials which violate rights, and to individuals for violation of human rights (apparently) that occur in member states.

jurisdiction. Consequently, the 'new wine' is an increased jurisdiction that comprises competence in disputes involving member states and Community institutions, to interprete and apply the ECOWAS Treaty from a regional integration perspective and competence in complaints of human rights violation involving member states, Community institutions, corporations and nationals of member states. With respect to the credibility of the ECCJ, the critical question then, is whether the original design of the Courts is able to sustain this additional mandate without amendments to the Court's structure, composition and procedure.

4.4 Selected case law on human rights by the ECOWAS Community Court of Justice

Right from the begining, a total of fifty-six (56) cases have been lodged before the Court. The Court has held a total of one hundred and forty eight (148) Court sessions since its inception. However, we shall consider some of these cases below:

In the case of ***Hissein Habre v. Republic of Senegal***[171], the Applicant, the former President of Chad, obtained asylum in Senegal after being overthrown in a military coup d'etat mounted by Idris Derby. But

[171] ECW/CCJ/APP/07/08

contrary to the expectations of the Applicant, and in contrast with judicial decisions which had become final, the Defendant had the Applicant tried in one of its Courts, for acts committed while he was Head of State in Chad. The Applicant therefore considers that the Defendant does not guarantee him any condition whatsoever of a fair and just trial. He is asking the Court to determine the violation of the principle of non-retroactivity of Criminal Law, the Principle of equality before the law and the right to an equitable trial and also for an order directing the Republic of Senegal to stop all prosecutions and actions against him.

The ECOWAS Community Court of justice after hearing the arguments of both parties ruled that the applicant ought to be given fair trial. That the Senegalese court has no jurisdiction in such matters affecting member citizens of ECOWAS as all the litigants are members.

Nothing was done concretely to enforce the court's decision as the matter was politically explosive. This case shows how it is difficult to implement some of the ECOWAS Treaties in respect of human rights violation affecting ECOWAS citizens.

Another case that comes to mind is the case of ***Petrostar Nigeria Limited v. Blackberry Nigeria Limited & 2 Ors*** [172]

[172] ECW/CCJ/APP/08/08

The Applicant, a legally incorporated Company, delivered on request *5* Million Litres of Automotive Gas Oil (AGO) to Shell at a total sum of 485 Million Naira. The Applicant filed an application against the Defendants for breach of the terms of the contract of sale, and for attempting to bribe and influence the Counsel to the Plaintiff, in order to prevent him from proceeding with the recovery of the remaining *255* Million Naira.

The court ruled in favour of the applicant, thus upholding the rights of the applicant as regards the business contract. This ruling of course should be applauded as it strengthened the fundamental economic goals of the ECOWAS Treaty.

In ***Dauda Garba v. Republic of Benin*** [173], the Applicant, a citizen of the Community, and a Programme Officer at the Centre for Democracy and Development, situated in Abuja, was questioned and beaten up by officers of the Immigration Services of Benin. He filed an application before the Court for the alleged violation of his fundamental human rights and the right to free movement, as guaranteed by Articles 1, 5, and 12 of the African Charter on Human and People's Rights. The court upheld his contentions and ruled in his favor.

[173] ECW/CCJ/APP/09/08

However, the problem the applicant had was the enforcement of the court judgment as regards payment of the compensation and the damages for the infringement of his human rights under the said charter. This also goes to show some of the weaknesses of the ECOWAS Court's mandate. These issues must be addressed by the ECOWAS Assembly of Heads of state and Governments.

In the case of ***Nuhu Ribadu v. Federal Republic of Nigeria*** [174]***,*** the applicant, Mr. Nuhu Ribadu, a Nigerian citizen, and senior officer of the Nigerian Police, was promoted to the rank of Assistant Inspector-General of Police but later demoted. He filed an action for the violation of his human dignity. But, before the case was heard and concluded, many political maneuverings were taking place and the final decision of the court was left in abeyance.

However, in the case of ***Amouzou Henri & 5 Ors v. Republic of Cote d'ivoire*** [175], the Applicants jointly filed an action alleging the violation of their rights to fair hearing, presumption of innocence, unlawful detention, defamation and violation of the rights of pregnant women and breast-feeding babies. Consequently, the Applicants demanded for their

[174] ECW/CCJ/APP/l0/08
[175] ECW/CCJ/APP/01/09

immediate release from unlawful detention, and compensation for damages suffered. The application succeeded.

In the ***National Co-ordination of the Departmental Delegates of the Coffee and Cocoa Sector v. Republic of Cote D'Ivoire,***[176] the Applicants jointly filed an action for alleged violation of their human right to equal remuneration, and the violation of the principle of equality before the law, by all citizens.

Furthermore, the Applicants sought from the Defendants compensation for violation of their human right. The court granted all the applicants' prayers based on its merits. This too, is a welcome development for the promotion of human rights in the ECOWAS Community Court of justice.

Unfortunately, in the case of ***Private Aliyu Akeem v. Federal Republic of Nigeria*** [177] the Plaintiff, a Community citizen, was arrested and detained in military custody without trial for two years, on the allegation that a riffle was missing from General Malu's house. He filed an action before this Court for alleged violation of his fundamental human right to dignity, and personal liberty, and for Ten Million Naira (₦10,000,000) compensation for injuries suffered. The case could not proceed because,

[176] ECW/CCJ/APP/02/09:
[177] ECW/CCJ/APP/03/09

the defendant failed to appear each time the case was called for hearing, as the matter was brought when the Nigerian government was under military rule.

However, it must be pointed out that cases of this nature, whether under military, or civilian regime, brought before the ECOWAS Community Court, must abide by the Court's legal protocols, if not, it will eventually damage the spirit behind the establishment of this court. So, such attitude should be discouraged in the strongest terms possible.

One special case worthy of serious analysis is the case of **PROFESSOR ETIM MOSES ESSIEN: Applicant and 1. THE REPUBLIC OF GAMBIA: as 1ST Defendant; 2. UNIVERSITY OF GAMBIA: as 2nd defendant.**[178]

The Applicant complained of the violation of his human rights. The Defendants raised a Preliminary Objection of the inadmissibility of the action, for lack of competence of the Court. Inspite of that objective the Court went ahead to, adjudicated and granted *the* preliminary *plea on* the competence of the Court to the merits of the case, in accordance with Article 87 of its Rules of Procedure.

[178] 2006/ECW/CCJ/06

The Applicant, who was a Lecturer at the University of Gambia, filed his Application on 18 November, 2005 at the Registry of the Community Court of Justice. He stated therein that by a letter referenced FCTC/GTAJASD/GAB/77 dated 24 September 2001, he was recruited by the Commonwealth Secretariat, through the *Commonwealth Fund* for Technical Co-operation *(FCTC),* as a *Technical* Consultant, on a two-year lectureship contract at the University of Gambia, for the State of Gambia. The said employment consisted of giving lectures at the Medical School of the above university. The Applicant accepted the employment and exercised his function from 7 February, 2002 to 4 February, 2004.

As his contract was coming to an end, the Defendants approached the Applicant and proposed to him to continue with his services, promising him the renewal of his contract by the Commonwealth Secretariat. Applicant thus continued to exercise his functions to the benefit of the University of Gambia without being paid, and this situation persisted till the 13th day of October, 2004, when he addressed a letter to the University of Gambia claiming his salary arrears.

The University of Gambia then replied that the steps taken towards the renewal of his contract by the Commonwealth did not succeed, and as such, his salaries could not be paid to him on the Commonwealth salary

scale, but rather, on the scale applicable to the University Lecturers, i.e. in Dalasis (the Gambian currency). The Applicant stood against it, and the University of Gambia terminated his employment by notifying him of the non-renewal of his contract as from *26* January, 2005.

On 14 February, 2005, the University of Gambia wrote a letter to the Applicant concerning the settlement of the salary arrears, calculated in Dalasis plus an amount of US$ 6,000 representing an additional salary. The Applicant received the amount of US$6.000 and rejected the sums of money in Dalasis. On 8 November, 2005, he filed his Application at the Community Court of Justice, seeking from the Court the following orders: A declaration that the action and .conduct of the Republic of Gambia, and the University of Gambia by engaging him, (the applicant), for the services of Technical Consultant, from 5 February 2004 to January 26 2005 (1 year), without equal salary for the said services, amounted to economic exploitation and a violation of his right of being paid for equal work. A declaration that the Applicant is entitled to equal payment for equal work, or services, rendered to the Republic of Gambia, and the University of Gambia, during the period from 5 February, 2004 to 26 January, 2005**,** upon the same terms and conditions as he was recruited by the commonwealth Secretariat.

Whereas ultimately, in terms of the Supplementary Protocol, the Court is competent to adjudicate in matters of Human Rights violation; but in the instant Case, the Court does not find any element of human rights violation whatsoever of the Applicant's rights, within the meaning of the Articles cited above.

The Community Court of Justice, of ECOWAS, adjudicating, in the open court, after hearing both Parties, in respect of Human rights violation, said that it cannot apply the conditions of remuneration by comparing them with those offered in the latter case in point, more so when the beneficiaries in the two situations are the same Defendants. The Court also recalls the principle derived from the law on obligations according to which obligations are binding only on those who freely contracted them, and states thereby, that in the case in point, there has not been a subrogation of the Commonwealth by the Defendants, and it shall not be binding on the latter to act as the Commonwealth did.

Indeed, the principle of equality of salary, which implies the elimination of salary discrimination based on whatever criteria that may relate to the person of the salaried worker, does not apply to the diversity of the sources of remuneration. Here, the salaries proposed by the Defendants are to be paid, not from the funds of the Commonwealth, but

from the budget of the Defendants themselves. This was what was established as a principle by the Court of Justice of the European Union, in the 17 September, 2002 Judgement on ***Lawrence and Regent Office Care Ltd. & Others*** [179] when the ECJ stated that "the principle of equal work, equal salary, does not apply when the observed disparities in remuneration cannot be attributed to a single source".

As it were, the Court emphasizes the risk of possible discrimination between the Applicant, and his other Lecturer colleagues in the same university, if he should be paid based on a different salary scale, for, the principle of "equal work, equal salary" also signifies that the employer is bound to offer the same remuneration "to the salaried workers placed under the same conditions".

This is the principle upheld by the Social Chamber of the Court of Cessation of Paris in Case Concerning ***S.A. Aubin v. Chatel***,[180] where it is stated that "this obligation is binding on the employer even in cases where the salaried workers are of different nationalities".

The issue is, rather, that of finding out whether in the instant case, the Applicant was a victim of under-payment vis-à-vis the other Lecturers of the same university, and whether, such treatment could be described in terms

[179] Report 1-07325-C.C.E.E.
[180] Judgement No. 5274 of 15 December 1998

of a violation of the principle of equal work for equal salary. But, as things are, the action of the Applicant does not target a comparison with his other colleague Lecturers, but with the salary system obtaining in the Commonwealth Secretariat. And so, on this point, the Court finds that the principle of equal work for equal salary does not apply, on the grounds that the sources of remuneration are not the same.

Consequently, the Court decided that there was no violation of that principle. Issue 3: Are the rights being claimed by the Applicant positively established by contract or by statute?

The Defendants submitted that the Application was based on the renewal of a contract of employment, and on offers and counter-offers, and on the grounds that the Application is based on ***"quantum meruit"***. The Defendants further argued that the case before the Court deals with relations between an employer and an employee, and that the employee having accepted one part of the salaries i.e. Six Thousand US Dollars (US$ 6, 000), and rejected the other part, the question now boils down to finding out whether the Applicant's claim to the remaining amount of money to be paid him should be granted upon the salary scale of the Commonwealth, or that of the Defendants. And as far as the Defendants are concerned, their

refusal to pay the Applicant based on the Commonwealth scale does not constitute a violation of the applicant's fundamental rights.

The Court finds, indeed, by the letter dated 16 April, 2004 representing Exhibit No. A2, deposited in the Case-file, and by the letter dated 24 August, 2004, representing Exhibit No. A3 equally deposited in the Case-file, that in matters of commitment to the offer of service, the situation was no more than that of relations of fact having generated rights.

The problem posed is how to put these rights into effect. The Court examined the nature of such rights. Given that these rights were given birth to from the relations of fact between the Parties, i.e. constituted by the offers and counter-offers of payment, arising from the working relations between employer, and employee, as acknowledged by the Defendants themselves, such rights are indeed constituted as salary entitlements. The Applicant's claim to salary is a right which the Defendants do not contest.

The international instruments on Human Rights classify salaries among the Civil, Economic and Social Rights, which have been incorporated into the provisions of Article 7 of the 1966 International Pact on Civil, Economic and Social Rights, Article 10 of the Universal Declaration of Human Rights; and Article 15 of the African Charter on Human and Peoples' Rights.

Having regard to the Revised Treaty of ECOWAS, the court adjudges that there is no Human Rights violation of the Applicant, and consequently, dismisses the Application made by the Applicant, and his other claims.

From the above case, one can say indeed, that the issues are well articulated which thus gave room for the sound, meticulous, and exemplary decision of the Court worthy of emulation.

Also, the case *of* ***HADIJATOU MANI KORAOU V. THE REPUBLIC OF NIGER*** [181] is very instructive. In the case, the ECCJ found Niger in breach of failing to protect 24-year- old, Hadijatou Mani from slavery, and ordered damages of 10 Million CFA, to be paid to Ms Mani. The case of the applicant, Ms Mani, was that in 1996, at the age of twelve, she was sold to the tribe chief, Mr. El Hadj Souleymane Naroua, of the Haoussa custom, aged 46 years old, for Two Hundred and Forty Thousand (240.000) CFA Francs under the *"Wahiya"* custom, which permits the acquisition of a young girl, to work as a servant as well as a concubine. While in the household of her 'master', he sexually abused her, and often used violence on her from when she was about thirteen years old. Under this condition, she had Four (4) children with the said master; two survived. In 2005, she was freed from being a slave but the master refused to let her go insisting

[181] **JUDGEMENT NO. ECW/CCJ/JUD/06/08 OF OCTOBER 2008**

that she remained his wife. She nevertheless ran away. She then brought a suit before the customary tribunal requesting the tribunal to sanction her freedom to live her life as a free woman. The said tribunal held that, the applicant and El Hadi Souleymane Naroua were never properly married, since the dowry was never paid, there was no religious ceremony, and Hadijatou Mani Koraou therefore remains free to live her own life with the person of her choice. On appeal by her "master" to the court of first Instance, the earlier decision was set aside. The applicant herein, then appealed to the Supreme Court. The Supreme Court quashed the decision of the court of First Instance on procedural grounds, and remitted the case back for trial. Meanwhile, the applicant had married another man, Mr. Ladari Rabo and as a consequence, the applicant was convicted of bigamy, and sentenced to a six-month jail term. The applicant, appealed against the sentence while in prison. The criminal division of the Court of Appeal granted an interim order releasing the applicant and defers its ruling on the merit until an absolute decision is made by the divorce judge. While this *status quo* persisted, the applicant filed the present suit at the ECCJ, seeking *inter alia,* a declaration that Niger was in breach of Articles 1, 2, 3, 5, 6 and 18(3) of the African Charter of Human and Peoples' Rights.

The Republic of Niger argued that the case was inadmissible on grounds of non- exhaustion of domestic remedies in consideration of the fact that the matter, brought before the ECCJ, was still pending before domestic courts. In response to the argument of Niger Republic, the court said:

> *While the substance of human rights protection under international mechanisms is long standing, this principle has evolved over time. As a result, interpretation of the rule of exhaustion of domestic remedies has been very flexible. That is what the European Court of Human Rights said in its judgment in* ***De Wilde, Ooms and Versyp v Belgium*** *of 18 June 1971 when it ruled that 'there is nothing to prevent States from waiving the benefit of the rule of exhaustion of domestic remedies (....) There exists on this subject a long established international practice'*[182]

The court continued to state that the ECOWAS Community legislature must have answered that call when it decided not to make the rule of exhaustion of domestic remedies a condition of admissibility before the Court. Waiving such a rule applies to all ECOWAS Member States, and the Republic of Niger shall not depart from it.

Besides, the court added that, in stating in Article 4(g) of the Revised Treaty that ECOWAS Member States declare their adherence to the principles of "recognition promotion and protection of human and peoples'

[182] *Ibid.* at Pam 39

rights in accordance with the provisions of the African Charter on Human and Peoples' Rights", the Community legislature simply wanted to integrate this instrument into the law applicable before the ECOWAS Community Court of Justice.

Adherence by the Community to the Charter's principles means that, even in the absence of other ECOWAS legal instruments relating to human rights, the Court ensures the protection of the rights enshrined in the Charter, without proceeding in the same way as the African Commission of Human and Peoples' Rights.[183]

Declaring that the rule of exhaustion of domestic remedies is not applicable before the Court, the court concluded that the non-inclusion of the rule in the protocol is not a gap that should be filled by the ECOWAS Community Court of Justice.[184]

With due respect to the court, its views on the issue of non-exhaustion of local remedies is startling and unjustifiable; this is a case where the court ought not to have assumed jurisdiction at all, if it had considered the issue of exhaustion in the light of prevailing international practice. In the reasoning of the court reproduced above, the court made several faulty assumptions. In the first place, the court misunderstood the

[183] Ibid, Para. 40-42
[184] Ibid. Para. 45

decision of the European Court of Human Rights in ***De Wilde, Ooms and Versyp* v *Belgium*,**[185] and completely applied it out of context by assuming that the court was concerned with a waiver of the rule by treaty. Contrary to the view of the court, what the European Court was concerned about was whether Belgium had, by her conduct waived her right to rely on the exhaustion rule in article 26 of the European Convention. For the avoidance of doubt, the court said, there is nothing to prevent States from waiving the benefit of the rule of exhaustion of domestic remedies, the essential aim of which is to protect their national legal order.

There exists on this subject a long established international practice from which the Convention has definitely not departed as it refers, in Article 26, to "the generally recognised rules of international law". If there is such a waiver in the course of proceedings before the Commission ... it can scarcely be imagined that the Government concerned is entitled to withdraw the waiver at will after the case has been referred to the Court…[186]

The reliance on that judgement by the ECCJ plunged it into a manifest error; based on the judgement, the court concluded that ECOWAS answered the clarion call to waive the application of the rule, when the

[185] Supra
[186] Supra, note 7 at paragraph 55

waiver of the rule by treaty was not within the farthest contemplation of the ECHR. Beyond reliance on that case, the court did not say how it came to the conclusion that the states intended to waive the rule.

It does not stand to reason that the mere fact of omitting, from a treaty, a rule which is so established under customary international law - a law the court is bound to apply - invariably means that the application of the rule is excluded. If anything, it is that the states intend that *the rule should apply. This intention is discoverable from the* disposition of the states to the application of the rule; the respondent States - Gambia and Niger — in the two major cases that have been decided at the suit of individuals, have raised the non-exhaustion of domestic remedies as a threshold issue, which goes to show that the States regard it as applicable to the court.

What is more, all the ECOWAS member States are parties to the African Charter; none of them entered a reservation to the existence of the exhaustion rule in the Charter. This is a strong point which the ECCJ has continued to ignore.

The importance of state practice, when a treaty is silent on an issue recognised by the contracting states as a principle of customary international law, was stressed by the ICJ while dealing with certain provisions, forming a custom of the Latin American States but absent in the

Havana Convention of 1928 between the same states in the case of ***Haya De La Torre***,[187] where the court noted:

> … *the Havana convention, the first article of which requires that persons accused of or condemned for common crimes shall be surrendered to the territorial authorities, does not contain any similar provision in regard to political offenders. This silence cannot be interpreted as imposing an obligation to surrender the refugee ... such an interpretation would be repugnant to the spirit which animated that convention in conformity with the Latin American tradition in regard to asylum ... there is nothing in that tradition to indicate that an exception should be made ... if it had been intended to abandon the tradition, an express provision to that effect would have been needed, and the Havana convention contains no such provision. The silence of the convention implies that it was intended to leave the adjustment of the consequences of this situation to decisions inspired by consideration of convenience … . To infer from this silence that there is an obligation to surrender a person to whom asylum has been … granted would be to disregard … the development of asylum in Latin America….*[188]

The African Charter is couched in a language that is broad enough to accommodate both the substantive and procedural provisions of the United Nations Charter. Article 4(g) empowered the court to recognise, promote, and protect, human and peoples' rights, "in accordance with the provisions of the African Charter on Human and Peoples' Rights." The pertinent

[187] Havana law Report vol 5. 1980 pp87-100
[188] Ibid

question the court has failed to answer is, whether the requirement of exhaustion of local remedies, accords' with the procedures of the Charter?

Had the court considered this question, it would have come to the inevitable conclusion that it is called upon to apply both the substantive and the procedural provisions of the African Charter, *mutatis mutandis.*

The argument in favour of exhaustion could further be advanced based on the proximate link of the individuals in the ECOWAS community to their municipal law, to which they owe constitutional allegiance, which is very tenacious, and cannot be lightly taken away.This is fundamental because, the African Charter, which is applied by the ECCJ, is an integral part of the laws of member countries.[189]

This fact increases the points of potential conflict between the ECCJ, and the organs of member States a conflict the ECCJ should judiciously avoid. It is very difficult to see how the ECCJ can avoid the imminent conflict between it and the organs of the member states, particularly the judiciary if it does not accord the municipal courts their place within the constitutional arrangement of member States.

This is particularly important because, the community court relies on the courts of member States to enforce its judgements, and no municipal

[189] Importantly, Niger along with Senegal, Liberia, Guinea, Togo and the Republic of Benin, and so on, gave legal muscles to the African Charter in their respective constitutions. While in Nigeria and some other ECOWAS countries, the African Charter applies by statute.

court will be willing to enforce an international judgement that infringes on its jurisdiction, or that which was delivered in excess of jurisdiction.[190]

On the case at hand, the fact that the court had clear and undeniable evidence that the matter was, at all material times pending, before an appellate municipal court, on which order, the applicant was released from prison,[191] created complex implications which the court should have avoided.

The court should have bothered about how its judgment will be implemented if it began a political conflict with the municipal court of Niger, the very organ the ECCJ Protocol relies on for the enforcement of its judgement.[192]

What about the cases which were pending before the courts of Niger on the same subject matter; did the ECCJ make an abatement order? Or better still, does it have the power to so do? Assuredly when the pending municipal cases are eventually decided, it is the decision' of the appropriate municipal court that will be implemented while the decision of the ECCJ will remain hanging.

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[190] One reason why the American courts refused to enforce the ICJ judgements in ***Avena*** *and other Mexican Nationals (Mexico v. US)* 2001 ICJ 466 (June 27); *LaGrand Case (FRG v. US)* (2001) ICJ 9 (March 31), is that the ICJ exceeded its jurisdiction. Whether this approach is right or wrong is outside the shade of this discourse.

[191] See the decision of the ICJ in the Interhandel case, supra

[192] 12 Article 24 of the Protocol

This is not a good signal for the integrity and survival of the court in that it will soon fall into disuse when community citizens lose confidence in the efficacy of the court's judgements, seeing the venture as a pure waste of time, and resources.

In Parliament of ECOWAS v. 1. Council of Ministers, Executive Secretary, ECOWAS Community Court of Justice, Abuja[193], the ECOWAS Council of Ministers adopted rule *C/REGI2OIO1IO5* which indicates the type of relation that should exist between the Speaker of Parliament, and the office of the council of ministers and requested that the Executive Secretary of ECOWAS implement this rule, which confers on the later the powers of supervisor of the parliament.

Thus, on the 21st of February. 2005, the Executive Secretary sent a letter to the Speaker of the Parliament asking him to restructure his staff. In addition, through a letter dated 18th February, the Executive Secretary invited the Speaker of the Parliament to suspend the payment of non-authorized salaries and benefits."

The applicant challenged many forms of interference by the council of ministers and the executive secretary in the functioning of the ECOWAS parliament.

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[193] **ECW/CCJ/APP/03/05** 4th **October, 2005 [2009] C.C.J.L.R. (PT.2)**

Issues in this case were;

1. Whether the act of the Executive Secretary in sending letters to the speaker of the Parliament to restructure the parliament staff, and suspend the payment of non-authorized salaries, and benefit is not *ultra vires.?*
2. Whether the independence, and autonomy of, the community parliament forbids any interferences by the Council of Ministers and Executive Secretary in the functioning of the Parliament?.

It was held unanimously, dismissing the application, that:

On the provision of article 76 of chapter XV of the Revised Treaty "Article 76, chapter XV of the Revised Treaty of ECOWAS states:

1. Any dispute regarding the interpretation, or the application of the provisions of this Treaty shall be amicably settled through direct agreement without prejudice to the provisions of the Treaty, and relevant protocols.
2. Failing this, either party, or any other member State, or authority, may refer the matter to the Court of the Community whose decision shall be final, and shall not be subject to appeal. The article compels the parties to have recourse to amicable settlement before coming to the Community Court of Justice. In the present case, nothing indicates that

amicable resolution was tried. Consequently, it is proper to send the applicant to accomplish this first formality.

On the meaning of the expression "either party,"

> *"The expression 'either party,' includes not only member States, or the authority of heads of States but also institutions of the Community such as provided in article 6 of the Revised Treaty."*

Likewise in the case of ***Chief Frank C. Ukor and 1. Mr Rachad Laleye; 2. The Government of the Republic of Benin decided by the Community Court of Justice*** **(Abuja)[194],** the plaintiff **was** Chief Frank Ukor, a Nigerian, who resides in Nigeria. While, the 1st defendant Mr. Rachad Laleye is a Beninois citizen, who resides in Benin. Both of them are community citizens. Chief Frank Ukor and Mr. Rachad Laleye were in a business relationship. The applicant/plaintiff who was purported to be a freight forwarder/clearing agent, and allegedly exercising his trade in Benin, was requested by Chief Frank C. Ukor to carry out certain customs-clearance operations on his behalf in respect of 1,785 packets of items belonging to the company called J.I. Alinnor & Brothers Limited.

In remuneration for his services, Mr. Rachad Laleye was supposed to receive the sum of eight million, seven hundred thousand CFA Francs

[194] **ECW/CCJ/APP/04/05 2'" November, 2007 [20091 C.C.J.L.R. (PT.21).**

(CFA 8,700,000) as the amount agreed upon between the two (2) parties. As a result of the fraudulent representation in the process of clearing the goods as allegedly adopted by Mr. Rachad Laleye, the applicant may have been compelled to pay other additional sums. The issues for determination were:

1. Whether the applicant fulfilled the rules of procedure by filling an application for preliminary objection separate from the substantive action for the court to assume jurisdiction?

2. Whether the court in Benin Republic had jurisdiction to entertain the dispute between the applicant/plaintiff, and the first defendant.

3. Whether the interpretation of the word 'community' is akin to the words 'Member State of ECOWAS, or can be used inter-changeably pursuant to article 10(c) of the Revised Treaty of ECOWAS. ?

4. Whether the court can award damages in respect of human rights violation in favour of a Member State. ?

It was held unanimously, striking out the action.

On provision of article 87 of the rules of procedure:

Article 87 of the rules of Procedure of the community Court of Justice reads:

That a party applying for a decision on a preliminary objection other than a preliminary plea, not going to the substance of the case, shall make the application by a separate document.

The application must state the pleas of fact, and law relied on, and the form of order sought by the applicant, and any supporting documents must be annexed to it."

On purport of jurisdiction:

The cardinal principle of law on jurisdiction, which never changes, is that jurisdiction, or lack of it, is fundamental to the proceedings. It is trite law, that jurisdiction means simply the power of a court to entertain an action.

When a court is said to be competent, it was held in the case of ***Afolabi Olajide v. Federal Republic of Nigeria***[195]***,*** dated April 27, 2004 at page 65, paragraph 32(1)(2) and (3), wherein the court stated thus:

'It is a well established principle of law that a court is competent when:

1) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

[195] (2004) *52* WRN 1; (2004)JEC WICCJIO4

3) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court, from exercising its jurisdiction; and the case comes before the court, initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. The position of the law which cannot be overstated is that, any defect in competence is disastrous, for the proceedings are nullities, no matter how well conducted and decided, the defect is extrinsic to the adjudication.'''

On whether Community Court of Justice is devoid of appellate jurisdiction, and whether, only Cotonou Court of first instance, Benin can set aside the said orders made, and make the complaints justiciable.

> *"The position of this court is that being devoid of appellate jurisdiction; only that court can set aside the said orders made and thus make the complaints justiciable."*

In ***Mr. Mouss Leo Keita and The State of Mali decided by the-Community Court of Justice (Abuja)***[196]**,** the plaintiff Moussa Leo Keita, a retired civil servant, whose address is BP 757, Bamako, Mali, filed an application at the Community Court of Justice of ECOWAS. The application having been registered at the Registry of the said court on 12th July, 2006.

This application was accompanied by the following exhibits:

[196] **ECW/CCJ/APP/03/07 22nd March, 2007 [2009] C.C.J.L.R. (PT.21).**

- An extract from the 1st May, 1969 issue of the Washington Post newspaper containing some specimens of artefacts belonging to the applicant and an evaluation of the artefacts as done by James M. Silbennan, valued at *$65,690.*
- Certification No. 9/Dir. R/MN dated 24th November, 1972 from the National Museum of Mali relating to the collection of artifacts in the custody of Moussa.
- A letter from Moussa Leo Keita dated 4th September, 1972, addressed to Mali's Minister of Foreign Affairs and Co-operation; another, dated 9th January, 1978 addressed to the same Authority; and then that of 3 August, 1989, for the same purposes. Through these letters, the applicant sought to reclaim his collection of artefacts.

The application, as well as the exhibits accompanying it, was served on the Secretariat of the Director General of the State Department for Disputes on l September, 2006, by the Chambers of Diawoye Kante Esq., a Court Bailiff at Bamako. Through this application, Moussa Leo Keita set out his submissions, that he was the owner of a collection of artefacts from his country, which he exhibited at the Embassy of Mali, to make Mali more known to the Americans at the time he was representing his country as Ambassador Extraordinary Plenipotentiary from 1965 to 1969. According to

the applicant, the collection contained 110 articles, evaluated in 1965, at 65,960 US Dollars, by an expert known as Silberman of the Smithsanian Institute. Posted to Egypt in 1969 in the same capacity, he had to leave his materials at the Embassy. In 1972, he demanded these materials, but was met with a refusal from the Government of Mali, the latter challenging the ownership of the materials.

After several complaints in 1972, 1978, and 1989, the Government of Mali finally consented to acknowledge the applicant's ownership of the *artifacts,* and to hand them over to him. But as time went on, they became damaged by bad weather, and exposure at the basement of the Embassy.

That was why he asked for remedy from the State of Mali. The latter maintained total silence, and did not react to his request. He also had to approach the Judiciary of his country, to seek reparation for the injury suffered.

Having taken note of the damage done to his materials, and faced with the tact refusal of the Government of Mali to grant him remedy, Moussa Leo Keita decided to bring his case before the Administrative Chamber of the Supreme Court, by application dated 19th April, 1999.

The State of Mali believed it was not under an obligation to appear before this court in the course of the preliminary procedure, and was

ordered by the judgement of 8th March, 2001 to pay the sum of 30 million CFA Francs, as damages to the applicant. Four years after the issuing of this order, Mali had not paid the amount ordered.

Rather, it contended, having filed on 9th April, 2001, before the Administrative Chamber, an application for revision of the judgement ordering the payment of damages. By another judgment dated 2l October, 2001, the Administrative Chamber of the Supreme Court of Mali reduced the initial amount of 30 million CFA Francs to the sum of seven (7) million, for the following reasons:

- That Mali, which had its own currency, joined the CFA Zone in 1985.
- That there was also a devaluation of the CFA Franc in 1994.

Even then, the latter amount was not paid to the applicant, who thought that he had to bring his case before the Community Court of Justice for the purposes of remedying the wrong caused him. Part of the issues canvassed are;

1. Whether the said reparation granted by the Supreme Court of Mali, which may not have been to the satisfaction of the applicant constitutes a different issue?
2. Whether applicant should specify the particular human right which has been violated?

It was held unanimously dismissing the application.

On provision of article 37 of the Rules of the Court of Justice on issue of a reply to rejoinder:

“Article 37 of the Rules of the court of Justice, provides as follows:

a) In reply to a rejoinder, a party may offer further evidence. The party must, however, give reasons for the delay in offering it.”

On whether the Community Court of Justice is powerless, and incompetent to adjudicate, or revise the decision made by a domestic or a national court of member States?

“The Community Court of Justice is powerless: it cannot adjudicate upon the decisions of the National Courts. Within the meaning of the aforementioned article 10, the Community Court of Justice can only intervene when such courts, or parties, in litigation expressly so request it within the strict context of the interpretation of the positive law of the Community. Hence, the objection raised by the defence regarding the ***ratione materae*** competence of the court must be declared admissible.

The Community Court of Justice, of the ECOWAS does not possess, among others, the competence to revise decisions made by the domestic courts of Member States; it is neither a court of appeal, nor a court of

cassation (court de cassation) vis-à-vis the National Courts, and as such, the action of the applicant cannot thrive.

The court has already responded that it has no jurisdiction to adjudicate upon decisions made by the domestic courts of Member States of the Community.

4.5 Summary

All said and noted, Lawyers in the West African sub-region have a vital role to play in the establishment and sustenance of a virile Court of Justice for the sub-region. It is therefore imperative for the lawyers to be knowledgeable and well informed about the Community texts and rules of Procedures of the ECOWAS Community Court of Justice. It is only a knowledgeable and well informed lawyer on Community texts that can play an effective role in the integration process of West Africa.

We shall see as we conclude in the next chapter how the reaction of the various actors including the court to self within the ECOWAS region will shape the future of the ECCJ. Therefore a proactive approach by the court would be needed to shape the nature of human rights protection by the court, human rights itself having come a long way since 1948.

CHAPTER FIVE

5.0 CONCLUSION, FINDINGS AND RECOMMENDATIONS

In the preceding chapters, we gave a critical appraisal of the role of ECOWAS community court of justice in the protection of human rights under the ECOWAS Treaty. By examining the nature and scope of ECOWAS functions and mandate, we were able to focus on the jurisdiction of ECOWAS community court of justice in the protection of human rights as well as the rules of procedures, and access to justice, in the ECOWAS community court of justice, towards achieving the desired objectives of this research. The selected cases from the ECOWAS community court further enhanced our understanding of the subject matter and we therefore draw the following conclusions:

5.1 Conclusion

The reaction of various actors in the ECOWAS member states to the consequences of such an adopted competence would arguably determine the future of such a judicial institution as the ECOWAS Community Court of Justice (ECCJ). It is however, the reaction of the institution in question that is likely to have the most effect on its own future. A proactive approach by the ECCJ is therefore necessary to shape the future of human rights litigation and protection in the ECOWAS legal system.

The state of human rights in the world today has come a long way since the Universal Declaration of Human Rights was made by the United Nations Organization (UNO) in 1948. During this period, colonialism, and colonial oppression, and exploitation had ended, and had been replaced first, by neocolonial processes, and then later, by globalization in which the subtlety of exploitation and discrimination have become so complex and sophisticated; Soviet communism, and its brand of authoritarianism had collapsed, and had been replaced by a hegemonic uni-polar “new” world order; apartheid in South Africa has been dismantled; many dictatorships, authoritarian, and despotic regimes, have been displaced throughout the world; and globalization, with all its visible, and invisible agenda and implications, has set upon the world.

The celebrated “third wave” of democracy, which has accelerated, in the context of globalization, also has, at the close of the twentieth century, opened up relatively extensive political space, and liberalized the political atmosphere in many post-colonial countries, especially in Africa, where the wind of democratic change systematically blew away one despot after another, thereby setting on course, varying degrees of transitions to democracy.

The concomitant achievements of the struggles against authoritarianism, for democracy, and for the promotion, and protection, of human rights during this period of remarkable, and dramatic global changes have been impressive, as more and more countries aspire to become democratic, and as more and more signed up, and increasingly complied with, the International Bill of Rights, consisting of the Universal Declaration, as well as the associated, and accompanying Covenants, and optional Protocols.

For example, campaigns and awareness of, as well as successful struggles against; torture, other forms of degrading and inhuman treatment, political imprisonment, child abuse, gender discrimination, human trafficking and so on, have increased substantially. Indeed, new generations of rights, pertaining to Economic, Social, and Cultural rights (ESC) have been conceptualized, and advanced, with relative success, although frustrating struggles are still being waged to make them justiceable in most countries.

However, all these global achievements are, comparatively, and remarkably modest, when one takes into account the profound problems and challenges that the struggles for democracy, and the promotion, and

protection of human rights especially in the nascent third wave democracies such as the ECOWAS sub-region have engendered.

Given this general context, we wish to advance in this thesis that, the extent to which countries, like Nigeria, are able to institutionalize a culture of human rights, on the basis of which they could promote and protect, the fundamental rights of their citizens, such would be greatly related to the extent to which they speed up towards good governance and democratic consolidation.

In other words, the ability to adequately overcome problems and challenges, and promote, and protect human rights, would be positively related to the ability to institutionalize good governance, as well as, be on the fast track to consolidation of democracy. Or conversely, the more persistent the problems associated with promotion, and protection, of human rights, the lesser the likelihood of attainment of good governance, and democratic consolidation, and the more likely that the project of democratic consolidation would be derailed, of course with dire consequences for our aspirations for political, and socioeconomic development. All these will hinge on the political will of the leaders.

Return to democracy has certainly, among, other things, paved the way for better protection, promotion, and defense, of fundamental human

rights of ECOWAS citizens. For example, gross arbitrary rule at the systemic level, has substantially reduced. Crass executive lawlessness has also reduced. The tendency of the state to rely on ouster clauses, and retroactive legislation, has abated. The courts now are relatively freer to check abuse of power by public officials, as well as, sanction violations of constitutional provisions guaranteeing human rights. The police are still not as up and coming as it ought to be, but they too have greater scope of getting the right things done, if only they could put their minds to it, and try harder. In general, the political atmosphere has been liberalized, the democratic space expanded, and the scope for good governance has appreciably increased. The situation is remarkably better than what obtained under prolonged military rule, both objectively, and subjectively, and in terms of extent, magnitude, and implications.

However, return to democracy has not paved the way for the promotion, protection and defence of human rights with goals, or as best as it possibly could. The state of human rights is neither perfect, nor as desirable, as it could be. Things are still rough, and edgy, and leave much to be desired, in-so-far as promotion, and protection of human rights is concerned.

This is essentially so because, the profound legacies of military rule are deeply entrenched, and their combined effect is obstructive to the entire democratization project, and especially subversive, of the attempt at promotion, and protection of human rights.

For example, the Nigerian transition to democracy is being propped up by weak and fragile institutions, and it is therefore proceeding without the requisite democratic political culture that is necessary, and which nurtures tolerance, dialogue and peaceful resolution of disputes. Instead, it is predicated on a culture of insensitivity, rashness, brashness and violence, all of which breed mutual suspicions and insecurity.

The state may be piloted by civilians, but ECOWAS citizens are yet to see them as democrats, wearing democratic garb. Rather, any time they look, what seems to stare back at them are civilians with military-authoritarian garb, encapsulated in the traditional ways the military rulers were used to doing things. Essentially and paradoxically, the ECOWAS states seem to be piloted by a species of 'political animal" nowadays called militaries. Therein lies the predicament of the drive for the promotion and protection of human rights in ECOWAS countries today; a predicament that has to be purposefully addressed in order to assure the future prospects of human rights, as well as of the overall democratization process.

Promotion of human rights entails programs of activities in the area of education, whether formal or informal, and general public enlightenment, on what human rights are, and what needs to be done to guarantee, and secure them for all citizens. It aims at making citizens know their rights, and to be able to defend them, as well as, know the rights of others, and to be able to respect, and not breach them. Also, it includes training of law enforcement personnel, and those involved in the administration of justice, to enable them show greater respect for other peoples' rights, and sensitivity, and tact in handling human rights issues in their duties as public officers. All the programs for promotion of human rights, which are ultimately aimed at entrenching a culture of respect for human rights, can be designed and executed either, by government and quasi-government departments, or by NGOs, or by both, whether separately, or in collaboration. They are, also an integral component of broad programs of civic and political education, and secondary socialization.

Protection of human rights, on the other hand, entails efforts targeted at preventing violations of constitutionally, and legally guaranteed rights and, offering redress, remedies, or sanctions, if and when such violations occur. It involves monitoring of human rights situations, and anticipating problems, and using effective strategies, and mechanisms to deal with the

anticipated problems before they occur. It also involves receiving, and responding appropriately to, and acting upon individual, and group complaints on human rights violations. Again, these can be done by governmental and quasi-governmental agencies and institutions, and by civil society organizations.

Hence, the prospects of promotion and protection of human rights in the on-going democratization processes in the ECOWAS region are not bad, although they could be better. The prospects are further enhanced by these factors:

1. Favorable international climate, which is now a bit more serious in providing support and facilitating the promotion and protection of human rights.

2. Favorable local environment, which is characterised by increased awareness of human rights violations, and spirited efforts to challenge these, as evidenced by public hearings.

3. Proliferation, and increased activism of human rights NGOs, many of which have done tremendously well in human rights education, and in the protection of rights through litigations and other related interventions.

5.1 FINDINGS AND OBSERVATIONS

While this research does not pretend to have addressed all conceivable consequences of the human rights mandate of the ECCJ, there are salient issues that are evident from the discourse undertaken in this work. The issues identified in this study include:

a. the challenges posed by the current composition, structure, and procedure, of the ECCJ for the exercise of its human rights mandate;

b. the looming potential for conflict with national courts of member states, and supervisory institutions created under human rights instruments, applied by the ECCJ in carrying out an expanded mandate;

c. the risk of fragmentation of human rights law in Africa, and the dangers in the indeterminate nature of the human rights mandate of the ECCJ.

d. It is not disputable that the protection of human rights in the ECCJ is a positive development in a region infamous for conflicts ignited by abuse of human rights.

It is therefore essential that effort is made to consolidate the gains of the system, and safeguard the future of the ECCJ as a major player in the

field of human rights in West Africa. Other observations are made under the following sub-headings:

5.1.1 Civil and Political Rights

The category of rights that can be considered under the human rights jurisdiction of the ECCJ are those commonly known as civil and political. These are classical rights that are perceived as protection against unwarranted interference from the state and rights that guarantee participation in the affairs of the state. Civil rights protect freedoms and liberties from violation by those exercising public power and intrusion by third parties.[197] Political rights guarantee participation in the public realm and protect the liberties that are instrumental for this guarantee.[198] As already noted, ECOWAS does not have a catalogue of rights containing civil and political rights. However, these rights are present in several other international human rights instruments that ECOWAS has explicitly, or implicitly adopted. These include the UDHR, the African Charter, and CEDAW[199]. Considering the explicit mention of these instruments, it is

[197]Heliskoski (2003) P. 417
[198] Ibid
[199]Civil and political rights are also catalogued in the International Covenant on Civil and Political Rights (CCPR) but out of the 15 member states of ECO WAS , one (Guinea Bissau) had not ratified the CCPR as at 3 October 2008 (see http://www2ohchr.org!english/bodies/ratification/4.htm accessed 3 November 2008). It raises the question whether the CCPR should validly be applied by the ECCJ. All ECO WAS member states have ratified the African Charter as at May 2005 (see ratification status at http://www.achpr,org/english/_infofindexjatificationsen.htm I, accessed 15 November 2008). Similarly,

submitted that the ECCJ can validly exercise jurisdiction over the rights contained in them, as part of the conventions and treaties of ECOWAS that the Court is empowered to interprete and apply. With regard to the International Covenant on Civil and Political Rights (CCPR), considering that not all ECOWAS member states have ratified that instrument, it is doubtful whether the ECCJ can validly apply the CCPR in reaching its decisions. The doubt arises on two possible grounds: first, on grounds of the doctrine of reciprocity, it is arguable that 'non-universality' of ratification would prevent application of the CCPR. Secondly, linked to the previous argument, it can be argued further that the CCPR does not yet constitute a 'treaty of ECOWAS' or a part of a common legal tradition of the ECOWAS Community[200] This approach is not different from the practice of the ECJ in the sense that the ECJ has derived fundamental rights in the European Community from different sources,[201] but did not apply the ECHR directly until that instrument was ratified by all member states of the EU/EC.[202] For the sake of legitimacy, it may however be necessary to show the link between these rights and the objective of economic integration. There is

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CEDAW has been ratified by all ECOWAS member states. See ratification status at http://www2.ohchr.org/english1bodies/ratification/8.htm (accessed 3 November 2008).

[200] A survey of the ECCJ's jurisprudence shows that the CCPR has not been applied by the Court in any of its decisions.

[201] Stever (1996- 1997) p. 959

[202] France became the last original member state of the EC to ratify the ECHR in 1974. It is recorded that the ECJ only directly applied the ECHR in the Nold case after the French ratification. See DS p. 112.

also a further challenge in finding a middle ground between 'ownership' of the source documents and exercise of jurisdiction by the ECCJ on the one hand, and the tension between national constitutional practices and the direct application of source documents through the instrumentality of ECOWAS Community law and order.

Civil and political rights *may* not have any direct link to economic integration, but they are indirectly connected to the realisation of the objectives of economic integration to the extent that the protection of human rights provides a conflict-free environment for the pursuit of economic goals. The argument can be made that part of the difficulties that have prevented the realisation of economic objectives of ECOWAS can be traced to denial of, and demand for, human rights within the borders of member states. In the absence of a democratic culture with guarantees of respect for human rights, internal conflicts and insecurity pervade and result in reluctance to open up borders towards the outside world. It would be observed that this link differs from the European experience where the link can be found in the need to maintain the principle of the supremacy of European Community law following a challenge from the national courts seeking to protect national human rights guarantees that will be violated in

the process of economic integration.[203] This different approach to the link between civil and political rights, and the goals of economic integration reflects in the actual practices of the two courts. Whereas the ECJ uses human rights to limit possible excesses of EU institutions, and member states in the implementation of EU policies and legislations, the ECCJ is forced to guarantee human rights as a means of creating an enabling environment for the realisation of economic integration. In so doing, the ECCJ reaches further than the ECJ to the extent that it takes on cases that do not have direct connection with ECOWAS policies and legislations. This leaves room for conflict with the jurisdictions of national courts and the jurisdiction of the supervisory bodies of the human rights instruments 'borrowed' by the ECCJ in its human rights adjudication. While the scope of this paper does not extent to a consideration of those tensions, it has to be noted that in the absence of exclusive jurisdiction claimed by any institution over the instruments in question, the ECCJ can validly apply the instruments. To the extent that civil and political rights are located in documents adopted by ECOWAS, and in international law generally, the ECCJ should validly exercise jurisdiction. Thus, the ECCJ has received complaints touching on rights such as; fair hearing and political

[203]See the so-called *Solange* cases from Germany: *Solange* 1(1974)2 CMLR 540 and *Solange* 11(1987)3 CMLR 225

participation,[204] personal liberty, life, dignity and fair hearing,[205] the right to property,[206] and freedom from slavery.[207]

5.1.2 Economic, Social and Cultural Rights (ESCR)

The category of rights generally classified as 'second generation' rights have faced resistance from countries on every part of the economic divide for various reasons. Whatever their motivations may be, the result of the resistance is that this category of rights are commonly perceived as programme rights that lack the quality to be enforced by judicial application. Although economic, social and cultural rights are often lumped together, the focus in this work is on economic and social rights. It has been argued that economic and social rights are guaranteed essentially to place states 'under a legal obligation to utilise all available resources maximally to correct social and economic inequalities and imbalances'.[208] Along these lines, it is noted that economic and social rights, through their redistributive function, essentially seek to provide every individual with a set of basic means for the exercise of his or her other rights…[209]Thus, economic and social rights touch directly on the living conditions of citizens. Accordingly,

[204] *Ugokwe* case, Supra.
[205] *Manneh* case, Supra.
[206] *Chukwudolue* case, Supra.
[207] *Koraou* case, Supra.
[208] B de Villiers, The protection of social and economic rights-international perspectives', Occasional paper 9, Centre for Human Rights, (1996) p. 2
[209] Heliskoski (2003) p. 417

some have made the argument that ESCRs are the category of rights most likely to be promoted by economic integration initiatives as a result of the promise of better economic values and gains.[210]

Similar to civil and political rights, economic and social rights are not catalogued for protection under the ECOWAS legal regime. It has to be noted however, that economic and social rights are contained in the UDHR (as declarations of standards) and in the International Covenant on Economic, Social and Cultural Rights (CESCR) as legal rights.[211] To a limited extent, economic and social rights can be found in the African Charter.[212] Since the UDHR has acquired the status of a source of legal rights and obligations under the ECOWAS regime, all economic and social rights guaranteed in the UDHR become justiciable under the human rights mandate of the ECCJ. This is especially so as the UDHR recognises the indivisibility of all human rights.[213] This position is reinforced by the integrated approach of rights adopted in the African Charter, which, by application of the doctrine of implied rights (as first introduced by the

[210] See F Musungu, 'Economic integration and human rights in Africa: A comment on conceptual linkages' (2003) p. 1 *African Human Rights Law Journal* 88 and Nwogu (2007) p. 345

[211] All 15 member states of ECO WAS have ratified the CESCR as at 3 October 2008. See ratification status at http:/www2.ohchr.org/orglEnglishlbodies/ratificationl3 .htm (accessed 3 November 2008).

[212] Arts *15,* 16 and 17 of the African Charter are generally seen as economic and social rights. Art 14 of the African Charter containing the right to property is not widely accepted as an economic right.

[213] See LH 40 in this regard. The 1993 Vienna Declaration also reinforces the indivisibility of human rights.

African Commission)[214], can be stretched to cover economic and social rights not expressly itemised in the African Charter. Hence, on the basis of the UDHR, the African Charter or even the CESCR, economic and social rights can (and at least in one case), have been brought before the ECCJ.

There are however, challenges that arise with respect to the protection of economic and social rights by the ECCJ. The first relates to the status of economic and social rights in the national legal regimes of member states. This is relevant as the essence of the ECCJ's judgments is not only to find international liability of violating states, but to ignite compliance at the domestic level. Where economic and social rights are stated as non-justiciable principles under national constitutional law and the given state has not incorporated (or domesticated) the African Charter to give the limited economic and social rights in the Charter direct applicability in domestic courts,[215] protection of these rights in judicial proceedings sets the process in conflict with national constitutional laws of member states. It thus raises the question whether this is intended and acceptable. The second connected challenge concerns the question whether the judiciary (in this case, an international court) has the technical competence and

[214] In the *SERAC* communication, supra the African Commission first introduced the doctrine of implied rights to find the right to housing.
[215] As in the case of Nigeria. In this regard, see ST Ebobrah, 'The future of economic, social, and cultural rights litigation in Nigeria' (2007) 2 CALS Review of Nigerian Law and Practice p. 109.

legitimacy necessary to interfere with the allocation of resources by elected officials. Thirdly, there is the question whether economic and social rights (at least as contained in the UDHR and the ECSCR), have the legal precision required to attract judicial application. At a general level, it is possible to respond to the challenges by suggesting that to the extent where judicial application is restricted to a determination of the negative responsibility of member states not to interfere with the enjoyment of rights, the ECCJ is as competent as any other court to receive and pronounce on allegations of violation of economic and social rights.[216] However, it has to be added that the ECCJ needs to carefully justify its decisions in this area with detailed analysis and explanation of its decisions. In the *Essien* case,[217] the ECCJ appears to have tilted more to a consideration of the right to satisfactory working conditions from the perspective of non-discrimination rather than an intention to redistribute wealth. Thus, the case represents a 'safe' approach to economic and social rights litigation that avoids grounds for interference with allocation of national resources. These arguments notwithstanding, it is obvious that economic and social rights fall within the ambit of the ECCJ's human rights mandate.[218]

[216]See the SERAC case, supra
[217]Essien case, ssupra
[218]This integrated approach to human rights is also evident in the EU practice as recorded by Alston and Weiler (1998) p. 687 and Shelton (2003) P. 136.

5.1.3 Solidarity rights

Despite known resistance to the generational classification of rights, the solidarity rights are commonly seen as the third generation of rights. This category of rights can be traced to Article 28 of the UDHR even though their transformation into binding legal obligations in *international* law has not been as smooth as has been the transformation of the other two generations of rights even if some solidarity rights can be found in certain binding international human rights instruments.[219] The African Charter, with its provisions on the rights to existence and self determination,[220] the right of peoples to freely dispose of wealth and natural resources,[221] the right to development,[222] the right to national and international peace,[223] and the right to a satisfactory environment,[224] represents the best guarantor of solidarity rights. A significant difference between solidarity rights and the other two generations of rights is that generally solidarity rights are collective in nature and character so that their enjoyment hinges on group affiliation.[225] Algan takes the view that an essential aspect of solidarity

[219]The *right* to self-determination in the CCPR and the CESCR and the right to the enjoyment of national resources in both instruments are clear examples.
[220]Art 20 of the African Charter
[221]Art 21 of the African Charter
[222]Art 22 of the African Charter
[223]Art 23 of the African Charter
[224]Art 24 of the African Charter
[225]Y Dinstein, 'Collective Human Rights of Peoples and Minorities, '(1976) *25 International and Comparative Law Quarterly pp.* 102, 103.

rights is that they are only realisable 'by the combined efforts of all social factors: individuals, states, public and private associations and the international community'[226] From this perspective, solidarity rights sit nicely with economic integration. In fact, in a sense, allusions to solidarity rights can be found in the objective of ECOWAS as well as in certain articles of the revised ECOWAS Treaty.[227] Thus, in addition to the UDHR, solidarity rights can find links to the ECOWAS legal regime in both the revised Treaty and the African Charter. To this end, the right to development can be associated with the objective to raise the living standards of ECOWAS citizens.[228] Similarly, the collective right to a satisfactory or clean environment can be associated with articles 29 and 30 of the revised ECOWAS Treaty. The question of solidarity rights does not seem to arise in relation to the ECJ.

Notwithstanding the presence of solidarity rights within the purview of the ECOWAS legal regime, it is not conclusive that solidarity rights would be accommodated in the human rights mandate of the ECCJ. First, from a procedural angle, it is not possible to state with certainty that articles 9(4) and 10 of the 2005 Supplementary Protocol of the ECOWAS Community Court envisages the grant of access to 'collectives'. Reference to

[226]Algan (2004) p. 125
[227]Arts 3, 29 and 30 of the revised ECO WAS Treaty.
[228] Art 3 of the revised ECO WAS Treaty

'individuals' in the grant of access to the ECCJ leaves room for the debate whether, that term covers 'groups' or 'peoples'. The equivalent usage of the term 'individuals' in the First Optional Protocol to the CCPR appears to have been consistently interpreted to exclude 'peoples' or organisations submitting communications as 'collective institutions'.[229] However, the usage before the Human Rights Committee has not excluded a group of individuals acting on behalf of a community or people who have suffered an alleged violation. From this point of view, the ECCJ can interprete the relevant provisions to allow collections of individuals to present cases alleging violation of solidarity rights. The challenge however, is that, if it is accepted that solidarity rights can only be enjoyed in community with others, individual or representative actions defeat the spirit of solidarity. Notwithstanding this argument, it has to be noted that certain solidarity rights can be enjoyed individually and thus could be violated with respect to a single individual or a group of individuals. Thus, for example, the right to a satisfactory environment could be violated with respect to a single individual or a group of individuals. In which case, there is no reason why such single individual or group should not be able to bring an action before

[229] See for eg, Communication No. 167/1984, Chief Ominayak and the Lubicon Lake Band v Canada, where the Human Rights Committee declined to determine what constitutes 'peoples'. A de Zayas, 'The International Protection of the Rights of Peoples and Minorities', (available at http://www.alfreddezayas.com/Chapbooks/AMSTERDAM.shtml) (accessed 15 November 2008) takes the same position in reliance on several cases before the Human Rights Committee.

the ECCJ for the vindication of the right in question. In fact, it is arguable that even before the African Commission, cases involving solidarity or collective rights have only arisen on the basis of individual or representative actions.[230] The difference between the processes of the African Commission and the Human Rights Committee being that in the former case, the absence of a victim requirement allows for filing of cases by non-victim and further, that the action could be brought in the name of the 'peoples'. In view of the victim requirement in the 2006 Supplementary Protocol of the ECOWAS Community Court, it has to be submitted that the better approach for practice before the Court would be to follow the practice of the Human Rights Committee and allow individual and representative actions for the realisation of appropriate solidarity rights.

From a substantive perspective, there are at least two worries relating to the protection of solidarity rights generally, and specifically, in relation to the ECCJ. The one worry is the lack of clarity, and consequent continuing rejection of the concept of solidarity rights. Despite the pressure from the developing world, the right to development (for example), has failed to acquire universal recognition as a legal right. There are those who even

[230]Katangese Peoples' Congress v Zaire (2000) AHRLR 72 (ACHPR 1995) which involved the claim to self- determination by the Katangese people was filed by Mr Gerard Moke as President of the Katangese Peoples' Congress. Similarly, the SERAC case was filed by two NGOs on behalf of the Ogoni people of Nigeria.

argue that collective rights are a philosophic inconsistency, and a conceptual mistake.[231] Related to this worry is the second question of who emerges as a rights bearer, and who is identifiable as a duty bearer, in claims for solidarity rights. In this regard, even advocates of solidarity rights admit the difficulty in identifying 'peoples' as linked to the enjoyment of the rights in question.[232] The ability of the ECCJ to brave these difficulties in the realm of solidarity rights is likely to affect the credibility of the Court itself.

The issues surrounding public interest litigation in West African States (either in the form of legal obstacles as in Common-Law states, or non-familiarity as is often the case in Civil-Law states), amplifies the need for the ECCJ to offer a viable legal alternative for the realisation of such rights affecting groups. This is essential for the purpose of maintaining a conflict-free environment for economic integration. In the face of this argument, it has to be submitted that solidarity rights represent a difficult question for the ECCJ, but does not fall outside the competence of the Court. For as long as it is possible to protect such rights in favour of individuals and group of individuals, the ECCJ need not shy away from exercising jurisdiction over such rights as guaranteed in the ECOWAS

[231] S Schaumburg-Muller, 'The Uneasy Balance between Individual Rights and the Necessity of Communities in S Lagoutte, H Sano and PS Smith (Eds) ***Human Rights in Turmoil*** (2007) Martinus Nijhoff: The Hague
[232] Dinstein (1976) p. 104

Treaty, and other conventions directly, or impliedly, claimed by the ECOWAS Community.

5.2 RECOMMENDATIONS

5.2.1 General Recommendations

Although the ECCJ is still not a human rights court, it is now commonly accepted by all players that human rights protection forms a significant part of the Court's mandate.[233] Yet, this does not take away the fact that the ECCJ remains the judicial organ of a regional economic community with a primary duty to interprete and apply Community Treaty aimed at facilitating regional integration. Consequently, it would be unrealistic to advocate for substitution of the competence criteria of international law, tilting towards regional integration with a competence in human rights, for qualification to the office of a judge of the ECCJ. However, if the ECCJ has to consolidate its role in the field of judicial protection of human rights, it may be necessary to appoint judges with some demonstrable knowledge in human rights into the ECCJ.[234] In addition to the personal human rights knowledge of the judges, the

[233]The ECCJ recognises this point as indicated by the responses of the Bureau of the ECCJ to questions posed by this writer during a meeting facilitated by the Danish Institute for Human Rights in November 2008 at the ECOWAS Community Court in Abuja, Nigeria.

[234]This position was also advocated by the Vice President of the ECO WAS Court during the November 2008 meeting. For him, the human rights competence of prospective appointees should be taken into consideration even though it should not be expressly stated as a criterion for appointment.

selection of research and other judicial staff of the ECCJ should reflect the increasing human rights protector posture of the Court. All of these can be strengthened with concerted capacity building for judges and staff of the Court.[235] It would also be important for *ECOWAS* to fast-track the establishment of the proposed appellate division in the ECOWAS legal system to address concerns touching on the absence of a right of appeal.[236] While the present Rules of Procedure do not differ substantially from the rules of human rights courts, the ECCJ would do well to strengthen co-operations aimed at providing legal aid to indigent litigants.

In relation to the looming potential for conflict with national and other international judicial and quasi-judicial institutions, there is no short cut towards avoiding potential conflict. Despite opinion to the contrary and the position of the ECCJ itself,[237] it may be necessary to reconsider the question of exhaustion of local remedies before human rights cases come before the ECCJ. This position does not seek to argue that it is 'unlawful' or 'illegal' not to require the exhaustion of local remedies. It also does not seek to wish away the benefits of easy access to the Court. However, it

[235]Judges and staff of the subregional courts seem to agree on the need for capacity building programmes in this regard. This came out both in the meeting with the Bureau and staff of the ECOWAS Court and at a programme facilitated by Interights at Abuja in November 2008.
[236]A proposed appellate division of the ECCJ is still being awaited. Interview conducted with the ECCJ in November 2008 indicates that a consultant is currently working on modalities for the appellate division to start.
[237]See supra above.

would be beneficial in the long run to defer to some sense of the principle of subsidiarity by giving national courts the first opportunity to remedy human rights violations, subject of course to availability and efficiency of local remedies.[238] Some of the consequences of such reconsideration of the question of exhaustion of local remedies is that any appearance of a struggle for primary jurisdiction would be avoided. But it would also allow the ECCJ act in some form of 'appellate jurisdiction' and thereby position itself as a judicial hegemony in the sub-region. Even though the ECCJ seems to want to avoid such a role, the reality of human rights litigation is that a human rights court sitting at the international plane necessarily has to review national decisions from time to time. The only way this can be avoided is if the cases only come by way of reference from national courts for the opinion of the ECCJ. This, it must be submitted, would not be a desirable option considering the gains already made by the court. In this regard also, the ECCJ would in the future, need to carefully select its cases in a manner that preference would be given to cases with new issues or cross-cutting consequences. But this would also mean that the ECCJ should build a jurisprudence that has a binding (or at least, very persuasive) effect in the region. If the jurisprudence of the Court acquires

[238] The jurisprudence of the African Commission is clear on this point. See for eg, Media Rights Agenda and Others v Nigeria (2000) AHRLR 200, para 50.

the expected level of superiority, national courts would refer to decisions of the Court in situations of violations that have previously been addressed by the Court.

With respect to potential conflict with other international judicial and quasi-judicial bodies, the main approach would be to aim at developing co-operation agreements with other relevant institutions. This should be supported by other informal approaches including the exchange of visits, joint participation in colloquia and other capacity building programmes, and the creation of mutual respect between judges of the various institutions.[239] Further, in order to avoid fragmentation arising from conflicting decisions, the ECCJ needs to take previous decisions of the African Commission into consideration in the build up to judgments. This is essential as the African Charter forms the major source of the human rights law applied by the ECCJ. An attractive option may be to propose that ECOWAS adopts its own catalogue of human rights,[240] but the risk of fragmentation on African International Human Rights Law would be stronger if all subregions were to adopt human rights instruments. It would thus be better to work towards

[239]Lyons (2003) p. 330

[240]Similar to the European Charter of Fundamental Rights. There have been moves in East Africa to adopt a subregional human rights instrument while the Southern Africa Development Community already boasts of a human rights instrument of sort.

enthroning the African Charter as the regional human rights standard.[241] Similarly, the ECCJ needs to positively consider the interpretation given by bodies created in other relevant instruments applied by the Court.

As far as indeterminacy of the human rights mandate of the ECCJ is concerned, one cannot rule out the possibility of exhausting the goodwill of states and the emergence of resistance and compliance-fatigue if states perceive the Court to be too activist and exceeding appropriate legal boundaries. It would be necessary therefore, that the Court sticks to the application of instruments envisaged by the ECOWAS Community either by express or implied reference in the ECOWAS Community law. It would also mean that only instruments universally ratified by member states of ECOWAS should be applicable before the Court as sources of law. This would however, not exclude seeking inspiration from other relevant human rights instruments. Further, in order to maintain the confidence of litigants and thus sustain the proper environment for economic integration, the ECCJ needs to maintain its approach of recognising the indivisibility and interrelatedness of human rights. In this regard, as much as they can be accommodated without exceeding the boundaries of legality and legitimacy, the Court should continue to accept cases arising from all

[241] Viljoen (2007) p. 500

generations of human rights. One way of doing this would be to emphasize the duty of states to respect and to protect, while giving a 'margin of appreciation' for national decisions on the allocation of resources. In the absence of powers to ensure compliance of its own judgments, the ability of the Court to maintain credibility and effectiveness depends on its skill in balancing needs of rights protection with respect for the sovereignty of states.

Linked to the question of the relation between the ECCJ and the national courts of member states is the question of the objective of the human rights mandate of the ECCJ. While the mandate is still evolving, it is necessary to delineate whether the ECCJ should take cases that position the Court as a standard setter or it would embrace all sorts of cases and show itself as just another court. Making this determination is useful for a number of reasons. In the first place, the nature of cases taken by the Court and the jurisprudence that results from that could determine whether national courts would perceive some sort of regional 'judicial hegemony' in the jurisprudence of the ECCJ. It would also prevent a situation of a clash of jurisdiction and jurisprudence as the ECCJ would be providing 'judicial leadership' in areas of human rights that are relatively new. Considering that the ECCJ only has seven judges and the Court has to serve the entire

West African region, there is the potential of the caseload becoming a burden. In that regard also, careful choice of cases would prevent a situation of the ECCJ becoming a victim of its own success. However, in this regard, there is need to be careful not to shut out deserving cases unduly. Finally on this point, careful choice of cases brought before the Court would ensure that the goal of the mandate would not be to provide justice in every conceivable case, thereby moving far from its original mandate and thus antagonising member states of ECOWAS, but will enable the Court build a democratic environment in the region. It is in this context of building and preserving a democratic environment with respect for human rights that the link between human rights, conflict prevention and the objective of economic integration can be found.

As currently practiced, there is no clear guidance as to what kind of cases should be brought before the ECCJ in pursuit of its human rights mandate. Since article 9(4) of the Court's Protocol (2006 Supplementary Protocol) permits the ECCJ to 'determine cases of violation of human rights that occur in any Member State', a variety of matters have been brought before the Court.

Hence, the Court has received cases based on non performance of a commercial contract,[242] dissatisfaction with elections in a member state,[243] dissatisfaction with remuneration for work done on the basis of a contract of employment[244] and failure of a state to compensate ECOWAS national for damage to artifacts.[245] The Court has also received cases alleging violation based on inheritance of the estate of a deceased[246] and on slavery.[247] While all these cases have been couched in human rights complaint formats, some have little to do with the complex human rights issues and are matters that can be resolved in national courts. The generality of these cases also aim at providing immediate and personal benefit for the individual litigant. Granted that judgments of a court of law has no use if it can not benefit any one, it is submitted that the aim of an international court should be to cases which have wide consequence for the greatest number of people. Thus, for example, the case relating to slavery may have had an immediate benefit for the victim, but it is significant to the extent that it addresses a societal malaise with wide consequences. While the ECCJ cannot determine the cases that come to it, it can set guidelines by setting

[242] *Chief Frank Ukor v RachadA La/eye,,* Unreported Suit No. ECW/CCJ/APP/01/04
[243] *Ugokwe* case, Supra.
[244] *Essien* case, Supra.
[245] *Keita* case, Supra.
[246] A/ice Chukwudolue and 7 Others v Senegal, Unreported Suit No. ECW/CCJ/APP/07/07
[247] *Karaou* case, Supra Quinn (2001) p. *857*

down clear guidelines in decisions that are made in the cases already before the Court.

The experiences of the European human rights system, and of the European Courts would be relevant to demonstrate the point being canvassed. Relating to the ECHR, it is reported that at the drafting of the instrument, it was understood by the stage of the drafters that the concern is not with 'every case of injustice which happens in a particular country, but with the question whether a county is ceasing to be democratic; "Have those freedoms, give effect to those freedoms and you will ensure that each state remains democratic"'.[248] This approach sits nicely with the role of the ECCJ as an international court within the framework of economic integration, regulating human rights for the purpose of creating an environment suitable for the economic goals. Focusing on the cases that maintain the level of democratic governance and respect for human rights without necessarily entering into the 'national playing field', is vital for the credibility of the Court. In a similar vein, it has been noted that human rights in the ECJ rarely results in individual benefits for litigants[249]. Conceded that this, if it is entrenched, is extreme, the ECCJ needs to take care to select cases that would have wider consequences while providing succour to the

[248] Quinnn (1996-1997) p. 967
[249] Stever (1996-1997) p. 967

individual litigant. The immediate challenge however, is that the human rights of the ECCJ is still at its infancy and cases are only coming in trickles presently. Making the right choice, and using its case law to establish itself as a standard setter, rather than just another court, is most important for the ECCJ to maintain a position of judicial superiority, in the absence of a structure of hierarchy.

The complexities and ambiguities of the evolving system have been considered to provide a basis for investigating the quantum of protection that the system provides, or should provide for ECOWAS citizens:

There are some outstanding problems and challenges, which have attended the task of promoting and defending human rights in the ECOWAS sub-region. A lot more efforts need to be put to create a better enabling environment for the promotion and protection of human rights, geared towards democratic consolidation for the desirable national development. Given the extent, magnitude, intensity, and severity of poverty in the ECOWAS sub-region today, there is need to promote a conception of rights to come to terms with prevailing reality, and that which imposes constitutional and legal duties and obligations on the states to make economic, social and cultural rights justiciable. Doing so will be the

most concrete first line of defense and protection of these fundamental rights, as well as of consolidating the gains of democracy.

Very importantly, political leadership should be more focused, proactive and determined to address the identified problems, obstacles and challenges. The leadership must garner the political will to invest appropriate energy and resources in the development of a sustainable culture of human rights and democracy. It should demonstrate capacity to lead by example, institute and affect the requisite systemic, constitutional/legal, institutional and attitudinal reforms/changes necessary for and protecting the citizens' fundamental rights and democratic aspirations.

Also, the ECOWAS member states political leadership needs to design, in public places, effective mechanisms for ensuring adherence to principles of equity in resource mobilization and efficient utilization, as well as equality of opportunity for all ECOWAS citizens irrespective of gender, religion, creed, or ethnicity.

5.2.2 Specific Recommendations

It is recommended that ECOWAS member states should pay particular attention to the following specific recommendations:

1. Teaching of Civic education in ECOWAS member states' schools.
2. Acceleration of human rights education for the law enforcement agents in all ECOWAS states.
3. Reform of law enforcement agencies, such as the Police Force, Prisons, etc. in all ECOWAS member states.
4. Reform the judiciary and improve the efficiency of the machine for the administration of justice in all ECOWAS member states.
5. The newly enacted Freedom of Information Bill in Nigeria for examples, when adopted by various ECOWAS member states will enhance the right to access information and facilitate accountability and transparency.
6. Introduction of civic and political education programs that would cultivate among all ECOWAS citizens the appreciation of, and respect for, fundamental human rights, the freedoms and the dignity of the human person.
7. Making certain socioeconomic rights justiceable in ECOWAS states.
8. ECOWAS leaders should live by example in their various countries.
9. Strengthen the NHRC in all ECOWAS member states to enable it carry out more effectively and efficiently, its tasks and mandate of promotion and protection of human rights. Empower it, and

strengthen its capacity to continue to provide inexpensive, non-technical and more accessible service to the public as well as inform and advise the sub-regional governments adequately and appropriately.

10. Increase ECOWAS member state's NHRC relative autonomy from other governmental agencies especially the various Ministries of Justice, and provide it with adequate funding. Review the statute establishing it.

5.3 Concluding Remarks

The movement from purely economic objectives into the area of politics has brought ECOWAS into the realm of human rights with its attendant political volatility. The spill-over has resulted in positioning ECOWAS both as an actor and as an arena in the field of human rights. Increasingly, the ECCJ has grown to take position as the arrow-head of the ECOWAS Community intervention in the arena for the protection of human rights. True to type, as a volatile subject, the involvement of the ECCJ as a forum for human rights protection raises questions and creates potential for

resistance by member states of ECOWAS, as well as potential for conflict with national and international institutions. All these have contributed to the necessity for this study. Similar to the EU, the need for ECOWAS and indeed, the ECCJ to decide on how much spill- over into human rights is possible and acceptable under the existing legal framework is vital.[250]

Over the past few years, regime change in the ECOWAS has squarely positioned human rights in its institutional agenda has also culminating in expansion of the competence of the Court. But the manner in which the regime change has occurred has created room for confusion on the actual scope of protection that is available in the area of the human rights. It appears that the more ECOWAS progresses towards acquiring the character of a post-national human rights institution, the more it opens space for contradictions between its original goals and its emerging character. Thus, the ECCJ has to delicately navigate its way through the web of uncertainty and indeterminacy created by the system.

The absence of clear areas or subjects of the ECOWAS Community competence further complicates the task of delineating the extent of human rights mandate that the ECCJ should validly exercise. Yet, in this indeterminacy lies the temptation of pushing the ECCJ to transform itself

[250]Brosig (2006) p. 23 who argues that deciding on the ultimate size of its human rights agenda is a key question for the EU.

completely into a human rights court. If it does so without regard to applicable principles of international law and the law of international institutions, it stands the risk of committing judicial suicide by exhausting the goodwill that it currently enjoys among member states of ECOWAS. On the other hand, if the Court defers too much to respect for sovereignty of states, it would lose the confidence of the ECOWAS citizens. The task faced by the Court is by no means easy, but it is at this stage of infancy that the future of the Court can be shaped. Proactively engaging challenges identified in its work is one certain way that the ECCJ can consolidate and strengthen itself as a sub-regional protector of rights and a guarantor of the environment necessary for the much desired economic integration of the region.

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