Jerry Ukaigwe

ECOWAS Law

Springer

ECOWAS Law

Jerry Ukaigwe

ECOWAS Law

Springer

Jerry Ukaigwe
Director
Maxlaw Consulting
London
UK

Former Lecturer
School of Law
Zenith University College
Accra
Ghana

ISBN 978-3-319-26231-4 ISBN 978-3-319-26233-8 (eBook)
DOI 10.1007/978-3-319-26233-8

Library of Congress Control Number: 2015960753

Springer Cham Heidelberg New York Dordrecht London
© Springer International Publishing Switzerland 2016
This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.
The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.
The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made.

Printed on acid-free paper

Springer International Publishing AG Switzerland is part of Springer Science+Business Media (www.springer.com)

For my wife (Ugonna) and my children (Chukwudera and Chiamaka)

Preface

Like the harmattan wind, regional integration has begun, though slowly, to sweep through the crevices of political and legal structures in West Africa. Whether the wind would intensify and swirl around their systems depends on the people of West Africa. It seems that one of the essential ingredients required in brewing regional integration is community law. So this book is a sincere contribution—to the brewing mix—aimed at reducing the dearth of community legal literature. It distils set of rules, standards, doctrines and principles from a plethora of ECOWAS material and Community Court judgments which are applicable at the Community level.

The language of the book is crafted with simplicity to make for easy and happy reading. And there is no design, either grand or subtle, to disguise this work as a comparative law book; rather, where important provisions in the ECOWAS texts, with European Union law equivalence, have not been applied or interpreted or have been interpreted after a fashion by the Community Court of Justice, recourse will be had to the decisions of the Court of Justice of the European Union for clarity.

Most of the major topics in community law jurisprudence are treated in different chapters of this book: human right, supranationality, free movement, sources of law, reference procedure, competition policy, discrimination, etc. Chapter 1 introduces the book and explains, in a definitive manner, what ECOWAS Law is all about. Considering the explanatory style, in-depth analysis and commentaries employed, it is hoped that students, researchers, Community citizens and practitioners would find this book worthwhile.

Importantly, I am very grateful to God for the idea and actual ability to transform this vision into reality. I thank David Kwame Asumda, Dean School of Law, Zenith University College, for his remarks and Chief Basil Ikpenwa, a learned colleague, for his constructive criticism. Also I am grateful to Ugonna, my wife and friend, for sourcing the initial ECOWAS material, reading a part of the manuscript and making

useful comments. I cannot thank the editorial team at Springer Heidelberg enough, especially Dr Brigite Reschke, Seyfried Anke, Bieler Julia and Schwietzer Manuela as well as the anonymous review team for their comments and suggestions.

Accra, Ghana J. Ukaigwe

Contents

1 Introduction 1
1.1 Establishment and Objectives 1
1.2 What Is ECOWAS? 4
1.3 Socio-Economic, Political and Legal Strictures 4
1.3.1 Infrastructure Deficit 4
1.3.2 Inefficient Institutions 7
1.3.3 Political Dynamics 11
1.3.4 Legal Clog 14
1.4 Distinguishing ECOWAS from Other Economic Groupings . . . 20
1.4.1 OHADA 21
1.4.2 UEMOA 22
1.4.3 Franc Zone 24
1.5 Meaning of Treaty Under the ECOWAS Legal Regime 25
1.6 Definition and Ancillary Matters 27
References 29

2 Sources of ECOWAS Law 31
2.1 Introduction 31
2.2 Sources of ECOWAS Law 33
2.2.1 ECOWAS Revised Treaty 33
2.2.2 Protocol 34
2.2.3 Convention 36
2.2.4 Supplementary Acts 38
2.2.5 Decisions 38
2.2.6 Regulation 40
2.2.7 Directives, Recommendation and Opinion 42
2.2.8 Subsidiary Legal Instruments 44
2.2.9 Article 38 of the Statutes of International Court of Justice 44

2.3 Classification of Laws . . . 47
2.3.1 Primary and Derived Sources . . . 47
2.3.2 Classification According to Origin . . . 48
2.3.2.1 Autochthonous Sources . . . 48
2.3.2.2 Non-autochthonous Sources . . . 48
2.3.3 Legal Texts and Judicial Attempts at Classification . . . 49
2.3.3.1 Judicial Attempt at Classification . . . 49
2.3.3.2 Legal Text Classification . . . 49
2.4 Conclusion . . . 50
References . . . 50

3 Institutions of the Community . . . 53
3.1 Introduction . . . 53
3.2 Authority of Heads of State and Government . . . 56
3.2.1 Functions . . . 56
3.2.2 Meetings . . . 57
3.2.3 Chairman . . . 57
3.2.4 Acts of the Authority . . . 58
3.3 Council of Ministers . . . 59
3.3.1 Responsibility and Functions . . . 59
3.3.2 Meetings . . . 59
3.3.3 Chairman . . . 60
3.3.4 Acts of the Council . . . 60
3.4 ECOWAS Parliament . . . 61
3.4.1 Structure of the Parliament . . . 62
3.4.1.1 The Plenary . . . 62
3.4.1.2 The Bureau of Parliament . . . 62
3.4.1.3 Conference of Committees *Bureaux* . . . 63
3.4.1.4 Speaker of the Parliament . . . 63
3.4.1.5 General Secretariat of Parliament . . . 63
3.5 Commission . . . 64
3.5.1 Appointment of the President of the Commission . . . 64
3.5.2 Vice President . . . 65
3.5.3 Commissioners . . . 65
3.5.3.1 Responsibilities and Functions of the President of the Commission . . . 66
3.6 Other Statutory Appointments . . . 66
3.7 Technical Committees . . . 68
3.8 ECOWAS Bank for Investment and Development . . . 68
3.9 Intergovernmental Action Group Against Money Laundering in West Africa (GIABA) . . . 69
3.10 Community Court of Justice . . . 70
3.10.1 Composition . . . 71
3.10.2 Quorum . . . 72
3.10.3 Terms of Office and Resignation . . . 72
3.10.4 Immunities . . . 73
3.10.5 Jurisdiction of the Court . . . 73

3.10.6 Jurisdiction Under the 1991 Protocol 74
3.10.7 Jurisdiction under the 2005 Supplementary Protocol 75
3.10.8 Limitation of Time 77
3.10.9 Access to the Community Court of Justice 77
3.10.10 Applications Brought Under Article 9 of the Protocol 81
3.10.11 Procedure 85
3.10.11.1 Judge Rapporteur 86
3.10.11.2 Written Procedure 86
3.10.11.3 Close of Pleading 88
3.10.11.4 Nature of Judge Rapporteur's Report . . . 89
3.10.11.5 Preparatory Inquiries and Measures . . . 89
3.10.11.6 Examination of Witness and Experts at Preparatory Inquiry 90
3.10.11.7 Preparatory Measures 92
3.10.11.8 Oral Procedure 92
3.10.11.9 Argument (Brief) 93
3.10.11.10 Expedited Procedures 93
3.10.11.11 Judgments 94
3.10.11.12 Third Party Procedures 94
3.10.11.13 Intervention 95
3.10.11.14 Judgments by Default 96
3.10.11.15 Revision and Interpretation of Judgment 96
3.10.11.16 Interpretation 97
3.10.11.17 Opinions 97
3.10.11.18 Execution/Enforcement of Decisions . . . 99
3.11 Conclusion 100
References 101

4 Terrorism, Conflicts and Legal Interventions 103
4.1 Terrorism 103
4.1.1 Background Facts 105
4.1.1.1 Boko Haram 105
4.1.1.2 Militant Groups in Mali 107
4.1.2 Legal Basis and Interventions 108
4.1.2.1 Comprehensive Counterterrorism Measures 111
4.1.2.2 UN Global Counter Terrorism Strategy 112
4.1.2.3 ECOWAS Counterterrorism Measures 114
4.1.3 Counterterrorism Measures and Human Rights 123
4.1.3.1 Torture 124

4.1.3.2 Deportation and Use of Evidence Obtained Through Torture 128
4.1.3.3 Extrajudicial Killing 130
4.1.3.4 Rights to Liberty and Human Dignity . . . 133
4.2 Conflicts and Legal Interventions 136
4.2.1 Outline of Events 136
4.2.2 Peace Agreement 143
4.2.3 Legal Status of Peace Agreement 146
4.2.4 Concept of International Subjectivity 148
4.2.5 Armed Groups in West Africa and International Subjectivity 152
4.2.6 Status of ECOWAS Peace Agreements 156
4.2.7 Conflict Prevention and Management Plan 157
4.2.7.1 The Mechanism 157
4.2.7.2 Democracy and Good Governance 160
4.2.7.3 Conflict Prevention Framework 163
4.3 Conclusion 165
References 167

5 Human Rights and Other Principles 171
5.1 Introduction 171
5.2 Human Rights (Concept) 173
5.3 Human Right Under the ECOWAS Law 175
5.4 Annotation on African Charter on Human and Peoples' Rights 176
5.4.1 Article 1 176
5.4.2 Article 2 176
5.4.3 Article 3 176
5.4.4 Article 4 177
5.4.5 Article 5 177
5.4.6 Article 6 178
5.4.7 Article 7 178
5.4.8 Article 12 179
5.4.9 Article 14 179
5.4.10 Article 15 180
5.4.11 Article 16 180
5.4.12 Article 17 181
5.4.13 Articles 18–24 181
5.5 Human Right Jurisdiction of the Community Court 183
5.6 Community Court and Human Right Actions 185
5.6.1 Right to Respect of Human Dignity: (Right Not To Be Enslaved) 185
5.6.2 Right to Free Movement of Person 186
5.6.3 Right to Liberty 187
5.6.4 Right to Equal Pay for Equal Work 188

5.6.5 Right to Property . . . 189
5.6.6 Right To Be Presumed Innocent . . . 190
5.6.7 Right to Education . . . 191
5.6.8 Right to General Satisfactory Environment . . . 192
5.7 Other Principles . . . 192
5.7.1 State Responsibility (By Reason of Inaction) . . . 192
5.7.2 Exhaustion of Local Remedy . . . 193
5.7.3 Just and Equitable Reparation . . . 194
5.7.4 Res Judicata . . . 194
5.8 Conclusion . . . 195
References . . . 197

6 ECOWAS Law and National Laws . . . 201
6.1 Introduction . . . 201
6.2 European Union Experience . . . 204
6.2.1 Direct Applicability . . . 204
6.2.2 Direct Effect . . . 205
6.2.3 Indirect Effect . . . 206
6.2.4 Supremacy of the European Union Law . . . 207
6.2.5 Member States' Reception of European Union Law . . . 208
6.2.6 ECOWAS Law and Supranationality . . . 210
6.2.7 ECOWAS Law and Direct Applicability . . . 211
6.2.8 ECOWAS Law and Direct Effect . . . 213
6.2.9 ECOWAS Law and Constitutional Barriers . . . 214
6.2.9.1 Constitutional Supremacy . . . 217
6.3 Conclusion . . . 220
References . . . 221

7 Reference for Interpretation . . . 223
7.1 Introduction . . . 223
7.2 Conditions for Application of the Procedure . . . 224
7.3 Acte Clair and Acte Eclaire . . . 226
7.4 Importance of Reference for Interpretation . . . 226
7.5 Duty to Refer: Discretionary or Obligatory? . . . 227
7.6 Conclusion . . . 229
References . . . 230

8 Actions for Damages and on Legality . . . 231
8.1 Action for Damages (Background) . . . 231
8.1.1 In the Performance of Official Duties and Function . . . 232
8.1.2 Official Act . . . 233
8.1.3 Actions and Omissions . . . 234
8.1.4 Who Should Be Sued? . . . 234

8.2 Action on Legality (Background) . . . 236
8.2.1 Applicants and Capacity . . . 237
8.2.2 Legality of Action . . . 238
8.2.3 Legality of Community Text . . . 239
8.2.4 Reviewable Instrument . . . 239
8.2.5 Right of Access . . . 240
8.2.5.1 Automatic Right of Access . . . 240
8.2.5.2 Qualified Right of Access . . . 240
8.2.5.3 Conditions for Access (Under Article 10(c)) . . . 241
8.2.6 Reliefs . . . 242
8.3 Conclusion . . . 243
References . . . 244

9 Selected-Forum and Community Staff Actions . . . 247
9.1 Introduction . . . 247
9.2 Selected-Forum Actions . . . 249
9.2.1 Agreement . . . 249
9.2.2 Choice of Law . . . 251
9.2.3 Parties . . . 251
9.2.4 Reliefs . . . 252
9.2.5 Execution of Judgment . . . 252
9.3 Community Staff Actions . . . 253
9.3.1 Parties to an Action . . . 253
9.3.2 Exhaustion of Appeal Process . . . 254
9.3.3 Protection of Employment Rights Pending Determination of Matter . . . 255
9.3.4 Reliefs . . . 255
9.3.4.1 Damages . . . 256
9.3.4.2 Reinstatement Order . . . 256
9.4 Conclusion . . . 256
References . . . 257

10 Free Movement of Persons and Right of Residence . . . 259
10.1 Introduction . . . 259
10.2 Community Citizen and the Freedom of Movement . . . 262
10.3 The Right to Move Freely . . . 263
10.4 Right of and Condition for Refusal . . . 265
10.5 Movement of (Persons in) Vehicle . . . 266
10.6 Interpretation of Protocol . . . 267
10.7 Expulsion and Repatriation of Citizens (Guidelines) . . . 268
10.8 Immigrants and Their Property . . . 270
10.9 Free Movement and Border Closure . . . 271
10.10 Member States' Obligation to Immigrants . . . 271
10.11 ECOWAS Travel Certificate (Valid Travel Document) . . . 272

10.12 Right of Residence . . . 273
10.12.1 Effect of Right of Residence . . . 273
10.12.2 Civil/Public Service . . . 273
10.12.3 Justifiable Restrictions . . . 274
10.12.4 Residence Document . . . 275
10.13 Workers . . . 276
10.13.1 Classification of Workers . . . 276
10.13.2 Exclusions . . . 277
10.13.3 Special Workers' Rights . . . 278
10.14 Migrant Workers' Rights (Protection from Expulsion) . . . 278
10.14.1 Grounds for Expulsion . . . 278
10.14.2 Procedure for Expulsion of a Migrant (and Family) . . . 279
10.14.3 Consular and Diplomatic Assistance . . . 280
10.15 Legal Status and Transfer of Fund . . . 280
10.16 Duties of Member States . . . 281
10.17 Inalienability of Migrant Workers' Rights . . . 281
10.18 Conclusion . . . 282
References . . . 283

11 Right of Establishment (Services) and Free Movement of Capital . . . 285
11.1 Introduction . . . 285
11.2 Right of Establishment and Services . . . 287
11.2.1 Extent of Right of Establishment . . . 289
11.2.2 Companies and Eligibility . . . 290
11.2.3 Protection of Investment . . . 292
11.2.4 Recognition of Certificates . . . 292
11.3 Free Movement of Capital . . . 293
11.3.1 Establishment of Capital Issues Committee . . . 294
11.3.2 Duties . . . 294
11.3.3 Promotion and Protections of Capital for Investment . . . 295
11.3.4 Transfer of Capital and Exchange Control . . . 295
11.3.5 Exception . . . 296
11.3.6 Discrimination and Foreign Exchange Transactions . . . 296
11.3.7 Action for Failure to Fulfil Obligation and the Roles of Member States . . . 296
11.4 Conclusion . . . 297
References . . . 298

12 Free Movement of Goods . . . 301
12.1 Introduction . . . 301
12.2 Understanding Common Market . . . 304

12.3 Goods . . . 305
12.3.1 Goods of Community Origin . . . 306
12.3.2 Proof of Community Origin . . . 308
12.4 Origin of Goods and Member State Vessels . . . 308
12.5 Third Country Goods . . . 309
12.5.1 Third Country Goods Within the Community . . . 309
12.6 Common External Tariff . . . 311
12.7 Trade Liberalisation . . . 311
12.7.1 Imposition of Custom Duties . . . 312
12.7.2 Any Other Charges with Equivalent Effect . . . 312
12.7.3 1979 Consolidation of Import Duties . . . 313
12.7.4 Foundation for Specific Liberalisation . . . 313
12.7.5 Specific Liberalisation . . . 314
12.7.5.1 Unprocessed Products . . . 314
12.7.5.2 Traditional Handicrafts . . . 315
12.7.5.3 Industrial Product . . . 315
12.7.5.4 Approval of Industrial Products and Enterprises . . . 316
12.7.5.5 Withdrawal of Approval . . . 317
12.7.5.6 Enterprise Registration and Approval Number . . . 318
12.8 Non-tariff Barriers . . . 318
12.9 Grounds for Restrictions and Prohibition . . . 319
12.10 Directly and Indirectly Discriminatory Taxes . . . 319
12.10.1 Direct Fiscal Charges . . . 320
12.10.2 Indirect Fiscal Charges . . . 320
12.10.3 Internal Taxes and Protectionism . . . 321
12.11 Understanding Goods . . . 321
12.11.1 Transit of Goods . . . 322
12.11.2 Transfer of Goods in Transit . . . 323
12.12 Vehicle in Transit and Insurance (Brown Card) . . . 324
12.13 Check Points and Free Movement of Goods . . . 325
12.14 Liberalisation and Loss of Revenue . . . 326
12.15 Economic Partnership Agreement and Free Movement of Goods . . . 327
12.16 Action for Violation of Right to Free Movement of Goods . . . 329
12.17 Conclusion . . . 330
References . . . 330

13 Discrimination . . . 333
13.1 Introduction . . . 333
13.2 Equal Treatment of Certificates . . . 335
13.2.1 Criteria for Comparability . . . 335
13.3 Gender Discrimination . . . 337
13.4 Pay Discrimination . . . 338
13.5 Work of Equal Value . . . 340

13.6 Equal Treatment to Migrant Workers . . . 340
13.7 Security Personnel and Discrimination . . . 342
13.8 Conclusion . . . 343
References . . . 344

14 Competition Policy . . . 347
14.1 Introduction . . . 347
14.2 Application of Competition Rules . . . 350
14.3 Concept of Agreement . . . 351
14.4 Concept of Concerted Practice . . . 352
14.5 Prohibited Agreements and Practices . . . 353
14.6 Excluded Agreements and Activities . . . 354
14.7 Exemptions . . . 354
14.8 Abuse of Dominant Position and Prohibition . . . 355
14.9 Enterprises . . . 355
14.10 Substantial Share of the Market . . . 355
14.11 Substantial Part of the Common Market . . . 356
14.12 Abuse and Types of Abuse . . . 357
14.13 Merger and Acquisition . . . 357
14.14 State Aid . . . 358
14.15 ECOWAS Competition Authority . . . 358
14.16 Decisions . . . 359
14.17 Conclusion . . . 359
References . . . 360

Index . . . 363

Chapter 1
Introduction

Abstract This chapter traces the establishment of ECOWAS historically and legally, strategically explains what the economic grouping is all about and its integration objectives, as well as analyses the political, socio-economic and legal strictures that impinge on the integration objectives. To help readers navigate through the confusing maze of similar economic groupings within West Africa, the chapter carefully distinguishes ECOWAS from other established economic groupings existing in the Sub-region. Also, the chapter defines and explains Treaty and ECOWAS law—as a relatively new body of laws—respectively.

1.1 Establishment and Objectives

Man, by nature, unless choked by the hands of thralldom and mental debilitation or assessed from the prism of determinism, has always been considered by many as a free moral agent, and he is acutely accountable for what he makes of his gift of freedom. If he elects to live in the cave, by the sea, in the desert, on the tree, all are the fruits of the exercise of his free will. By his nature, he loves to live with his fellows to form a community; however, that he is gregarious does not detract from his power to choose to swim against the tide. Sometimes, he may opt, by principle or nature, to live in such an insulating fashion that leaves his community in wonder about his corporeality.

With reference to origin and development of communities, so many historians and text writers have provided us with various accounts of man's migratory history and how communities came to where they are. Be that as it may, it would be uniquely appropriate to limit the sketch of primal societies to some West African communities, for any further foraying into history of communities outside this geography might be pushing the account too far and beyond the range of this work.

Before the Europeans came to Africa, the inhabitants of the geographical area known today as West Africa lived in a certain natural way. Some communities took pleasure in interacting with their neighbours as regards trades, games, culture, farming and other forms of communal activities. That does not in any way erode the history of conflicts in pre-colonial West Africa, for conflict, to a great extent,

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_1

helped in shaping the contours of history of migration and ancient states of West Africa. Take for instance how the emanation, from the fourth century, of empires and kingdoms in the hinterland and the savannah, and their decline, all ridden in conflicts, propelled the shift in population. In addition to conflicts, of course targeted at conquest, slavery and colonisation[1] also played dynamic roles in that population shift within the geographical landscape known today as West Africa. In addition, it has been suggested that the ancient Sudanese empire, which ran through Ghana, Mali and Songhai, was established either by Sudanese or invaders from North Africa with the weapon they acquired through trans-Saharan trade and also that Umar Tal conducted a jihad in western Sudan which resulted in the migration of thousands of residents living in the valley of Senegal to Karta.

But conflict was not the only factor that influenced migration in West Africa; in fact, religion and trade also had huge influences. The Hausa and the Madinka tribes were people of trade, for they went about the West African Sub-region trading and establishing their settlements known as Sabongari or Zongos[2] and, invariably, proselyting the people found in their new communities. In similar vein, the history of the states of Oyo, Asante, Benin and Dahomey, all in present day West Africa, cannot be completely told without stating how migration either contributed to their establishments or became the ordinary consequence of their establishments.[3]

Generally, in pre-colonial times, persons or, in some situation, a whole community could migrate from one geographical location to another. The causes of the migration could be earnest search for new land, safety, fertile soil[4] or increase in security. But when the unwanted hands of colonialism grabbed the Sub-region, the nature and degree of migration changed; it has been suggested that the motivation and composition also changed. Indeed, the creation of political and economic structures, tax regimes and territorial boundaries, or as Swidell puts it,[5] "formal political boundaries", by colonialists also altered the motivation and composition of migration[6] in the Sub-region.

Before colonialists invaded Africa, the ancient communities within the geographical area known today as West Africa had boundaries, either earmarked or symbolised with trees or stones or by installation of landmark to show the perimeter or territory of any given community. However, while the practice of keeping boundaries has been part of the culture of primal societies in West Africa, it appears that the discriminatory act of entry restrictions at the borders of the West African States was introduced by colonialists for administrative gains.

At the collapse of colonialism, the political leaders, in the West African Sub-region, returned the urge to keep the brotherhood alive; consequently, they

[1] Swindell (1995), p. 196.
[2] Ibid.
[3] Ibid.
[4] Adepoju (2005), p. 1.
[5] Swindell (1995), p. 196.
[6] Ibid.

exchanged visits and nursed new ideas that could foster closer ties. With an eye on cladding what they share with garments of formality, President Tubman (as he then was) of Liberia pushed for a form of unionism; in response, Cote d'Ivoire, Guinea, Liberia and Sierra Leone entered into a multilateral agreement in February 1965.[7] But that agreement in itself could not sustain the weight of the idea; consequently nothing, practically, grew from it.

In 1972, the then Head of State of Nigeria, General Yakubu Gowon, and his Togolese counterpart General Eyadema stirred the interest of other leaders within the region; they drew new proposal for economic integration and canvassed for its acceptance in 12 countries between July and August of 1973. In a meeting held in Lome,[8] the draft of the Treaty was studied carefully by the representatives of the West African countries. The draft was also examined by experts and jurists who met in Ghana[9] with a view to lending it some form of legal tinge. On the 28th of May 1975, in Lagos, the 15 countries present appended their signatures to the first Economic Community of West African States Treaty. That instrument became the constitutive law from 1975 to 1993 until a revised version was introduced. Quite in character, the States parties reeled out loads of reasons to justify the revision exercise.

The Heads of State noted, in the Preamble to the Revised Treaty, that they bore in mind the African Charter on Human and Peoples' Rights and the Declaration[10] of Political Principles of the Economic Community of West African States. They also weighed the effect of the Treaty establishing the African Economic Community of 1991.[11] They also professed, in the same Preamble, that the review arose from the need for the Community to adapt to the changes on the international scene in order to derive greater benefits from those changes. All these points, together with other factors, led them to decide to revise the Treaty of 28 May 1975.[12]

Furthermore, it is commonplace that all the States[13] that make up ECOWAS have acquired independence; some have English as their *lingua franca*, while others make up the Francophone countries. However, Guinea Bissau and Cape Verde, once colonies of Portugal, speak Portuguese as their official language. It is regrettable to observe that all the countries in the Sub-region, whether of the Anglophone nucleus or of the Francophone zone or Lusophone enclave, once laboured under the excruciating weight of colonial imperialism. One of the net results of the long colonial rule is the condensation of these countries into different language blocks.

[7] ECOWAS Profile.

[8] Between 10th and 15th of December 1973.

[9] Accra, January 1974.

[10] Adopted in Abuja on 6th July 1993.

[11] Preamble to Revised Treaty 1993.

[12] Ibid., p. 2.

[13] Benin, Burkina Faso, Cape Verde, Cote d'lvoire, Liberia, Mali, Niger, Nigeria, Gambia, Ghana, Senegal, Guinea, Sierra Leone, Guinea-Bissau, Togo; note that Mauritania withdrew its membership in 1999.

Consequently, because of this linguistic link, the Francophone countries in West Africa tend to associate more with themselves, while the Anglophone countries apply the same rule of polarisation.

1.2 What Is ECOWAS?

Having traced the trajectory of ECOWAS's origin and establishment, it will be needful to explain, in simple terms, what this economic grouping is and intends to achieve, and to examine, briefly, some socio-economic, political and legal bumps along the path of its grand objectives. ECOWAS (Economic Community of West African States) is an international organisation made up of fifteen independent countries located within West Africa. Similar to the European Union, it is an economic community that strives to promote co-operation and integration among its members. The organisation does not in any way intend to abrogate or substitute the municipal laws of the Member States with the Community rules; rather, it does envisage creating laws which would apply to and in all the Member States in order to quicken integration and harmonise practices.

The ultimate aim of ECOWAS is to create an economic union anchored on common market and custom union principles with a view to raising the living standards of the citizens. In elementary terms, the Community wants to, though gradually, reduce the whole West Africa into a single market, without barriers of any sort among the Member States, so that persons, goods, capital and services could move around freely.

1.3 Socio-Economic, Political and Legal Strictures

The living standards of the people of West Africa would, certainly, move up another notch if the political, economic and legal tasks, set by the Community, are achieved. Unfortunately, there are legal and non-legal strictures that hinder the Community's policies on economic integration and the expected improvement of the living standards of the people of West Africa. Some of these major challenges, in no order of importance, are discussed succinctly below.

1.3.1 Infrastructure Deficit

The Member States collectively have massive infrastructure deficit—especially in the areas of power, water, security, information, communication technology and transportation. According to World Bank, infrastructure deficit, especially among lower income countries, has been a principal impediment to business activities in

Africa, and this also reduces productivity by 40 %.[14] The power sector seems to have a greater share of the deficit bug. The inefficiency, in this sector, runs across power generation capacity, security of supply and electricity consumption. It is difficult to accept that the amount of power generated by the whole sub-Saharan countries equates to the amount of power generated by Spain.[15]

Regarding West African Sub-region, it has been shown[16] that the territory is strewn with natural resources, including oil and gas; however, they are not evenly distributed; the exploitation process within the territory is inadequate and minimal; and the energy access rates are significantly low. Another perturbing trend, as laid bare by a report,[17] is that West African countries would require additional 90 GW in order to meet the increase in demand for power.

In regard to information and communication technology, African countries may have chalked relative success in access to telecommunication through their global system for mobile communication (GSM) programmes; however, the success rate of Internet connectivity within the Community may not be summed up in similar terms. Reports showed that slightly above 2 million persons were subscribers, and about 12 million persons were using Internet services between 1996 and 2006.[18]

The region also has challenges with regard to water security; the World Bank attributes these to high level of hydrological variability, lack of water storage and irrigation facility. The water storage required to achieve water security is put at 750 m^3 per capita, which has been achieved only by South Africa, while the rest of the pack are at the level of 200 m^3 per capita.[19] Transportation is another murky area in this challenge-filled landscape. The transport systems are grossly inefficient, and the roads are inadequate or in bad shape. World Bank report showed that African road density is sparse when viewed against the continent's vastness: only one third of persons who live in the rural areas are within 2 km of all season roads.[20] In the report published for Commonwealth Business Council, the President of the ECOWAS Commission observed that the cost of transport and logistics in the Sub-region ranked among the highest in the world.[21] He noted that there is need for expansion of seaports in the Sub-region with a view to accommodating projection of increase in container traffic. He also called for investment in railway rehabilitation in order to prop up intra-Community trade.[22]

The question at this juncture would be: how would this chronicle of infrastructure deficit impair integration policies and, by extension, stifle the Community's

[14] World Bank (2013).
[15] Ibid.
[16] Quedraogo (2013), p. 25.
[17] Ibid.
[18] World Bank (2013).
[19] Ibid.
[20] Ibid.
[21] Quedraogo (2013), p. 25.
[22] Ibid.

objective of raising the living standards of the citizens? Another could be: what is the correlation between infrastructure deficit in West Africa and the impact of ECOWAS legal regime? It is obvious that infrastructure deficit gnaws more at the end product of integration, which is improved standard of living, than economic integration. But what it does to the latter is to take the wind off its sail, and render the implementation cumbersome and invisible. Of what benefit is effective legal framework for free movement of goods, for instance, when there are insufficient goods, originating from West Africa, to haul around the Community or the goods are, relative to Asian products, very expensive? From economic perspective, if goods are produced with alternative power supply, manufactured with water acquired at exorbitant rates and freighted to other Member States slowly and expensively, consequently the unit price of such goods would likely be costly.

Situating this view within the ECOWAS context, it is clear, from the facts gleaned from the reports,[23] that there exists infrastructure deficit within the Sub-region; this would certainly affect the cost of power, water, communication and transportation. Invariably, it makes goods manufactured within the Sub-region very exorbitant relative to similar goods made in China or India, and renders the whole intra-Community trades hugely expensive.[24] Bearing in mind the degree of economic challenges, low purchasing power and unemployment ravaging the Sub-region, it is expected that the citizens would be attracted to cheap, sometimes expired, Asian products. When such economic mishap takes place, it will gradually but inevitably weaken competitive abilities of West African enterprises. Consequently, this mishap will trigger retrenchment, further financial difficulties and winding up. This hostile economic cycle sketched above cannot, by any stretch of imagination, enhance or raise the living standards of the citizens. In such economic state, it will count little that the legal framework of ECOWAS for economic integration is efficient or that it has been implemented by the Member States.

Pursuant to the argument canvassed above, the correlation between the effect of Community legal texts and infrastructure deficit is that laws are instrument of social engineering; they do not mean much on their own. Their effectiveness is often seen when they change or impact the course of social existence. When a regional law fails to change or impact a region, it matters little that it either exists or applies. With infrastructure deficit of gigantic proportion, it would be intensely tough to meet the goal of 'improved standard of living' through the vehicle of ECOWAS laws. Inversely, if the laws are amended in a pragmatic fashion and implemented by the Member States, and the huge infrastructure deficit is tackled assiduously, then the laws will certainly aid the quest for improved standard of living in the Sub-region.

[23] Quedraogo (2013) and World Bank (2013).

[24] Alter et al. (2013).

1.3.2 Inefficient Institutions

Having dealt with infrastructure deficit, it is necessary to examine the impact of inefficient and corrupt national institutions on the implementation of the economic integration policies of ECOWAS. To Acemoglu,[25] inefficient institution is one that does not maximise the growth potential of a society. It is appropriate to enter a caveat that the word 'institution' is not limited to establishments, funds and the personnel but covers practices, rules and behaviours that shape their output. Acemoglu share that view too, for he sees 'economic institution' as 'rules and constraints' guiding economic interaction. It is agreed that there could be numerous factors capable of impeding productive prowess of an institution, yet one cannot rule out corruption in drawing up one's list of impediments. So the element of corruption is subsumed in the concept or characteristics of inefficient institutions. Now attention should be turned to the Community and the institutions of the Member States.

It is commonplace that the Community drives down its programmes to the Member States and subjects through the channels of national institutions. This strategic option is inevitable because the Community institutional architecture was not crafted to operate independently of national institutions and agencies. Even if it were remodeled to shoulder such enormous institutional responsibility, it would still have failed for want of resources, authority, personnel and domestic support. Consequently, the success, or otherwise, of the integration programmes of ECOWAS depends on the efficiency of national institutions in the Member States. Efficient national institutions, in this integration mandate, are to the Community what skeleton and spine are to the body; therefore, the Community cannot pull the citizens out of the pit of poverty with inefficient national institutions. Little wonder then that some scholars have explained poverty as a consequence of inefficient institutions and customs relating to property rights.[26] If one should extend this nexus between inefficient institutions and poverty to West African economies, one would begin to appreciate that the excruciating economic difficulties persisting within the Sub-region trace their roots to corrupt, unruly, irresponsible and mismanaged public institutions.

It may be proper to ask: why would public institutions created by laws be awash with these listed vices? It is because the laws are not obeyed by such institutions. Principles of fairness and good governance are not rigorously applied to their services and the conducts of their personnel. Other statutory provisions that ensure accountability, integrity and productivity are seen as mere surreal idea of what a public service should be and not what should apply practically to an African public institution. It means, therefore, that there is an interconnection between rule of law and inefficient institutions. It is primary knowledge that one of the features of the doctrine of rule of law, at least as shown by Bingham in his sub-rule approach, is

[25] Acemoglu (2006), p. 342.

[26] Kuffour (2006), p. 101.

that the law should apply to all equally.[27] If the laws have not been applying to all in public institutions and governments equally in West Africa; if this improper application—in some cases non-application—of laws to public institutions in West Africa have led to waste of resources, mismanagement, irresponsibility and arbitrariness; if these dire consequences have resulted in economic difficulties and poverty within the Sub-region, then there is a link between poverty and the rule of law in West Africa.

Unfortunately, policymakers and Governments of the Member States have not employed robust and practical strategies to enhance rule of law because they do not want to accept the link between economic hardships in West Africa and their indiscriminate abuse of the law. It is likely that the political and economic actors want the institutions to remain inefficient to protect their unseen interests. That was why an expert had argued that the elite prefer inefficient institutions for the purpose of implementing inefficient policies that are advantageous to them.[28]

However, it is conceded that the Community has recognised the link between conflicts and good governance and, in response, introduced a legal framework on democracy and good governance.[29] The Member States were right to tie some standards of civilisation, like rule of law, to conflict prevention but have been slow in linking rule of law to the success of their integration programmes. While the idea of having a legal framework on democracy, good governance and rule of law appears bright and commendable, the nature of the provisions and the implementation strategies envisaged by the Community do not look irreproachable.[30]

First, the legal framework has no supranational component; therefore, it is subject to Member States' discretion on how the instrument would be treated within their territories. Second, the major provisions on rule of law were couched in a language that depicts what the Community considers as 'ideals for a modern democratic government'. The draftsmen employed phrases like 'recognizes' and 'convinced' in the operative part of the law; this does not evince 'peremptoriness'. Rather, it is a loose drafting approach that softens the law, protects sovereignty and shelters the Member States from any type of regional interference in their domestic affairs—including decisions on applicability of laws within their territories. This porous drafting approach characterises every legal text made by the Community institutions. And as suggested by some scholars,[31] this international law pattern does not make for good community law regime. Third, the practical modalities for the implementation of rule of law have been reserved, indefinitely, for the Member States and the Community to fashion out.[32] How, then, would the Governments of the Member States come up with practical modalities that would enhance rule of

[27] Stone (2013), p. 31.

[28] Acemoglu (2006), p. 361.

[29] Preamble to Protocol on Democracy and Good Governance 2001.

[30] Ibid., sections 32–39.

[31] Alter et al. (2013), p. 741.

[32] Article 34 Protocol on Democracy and Good Government 2001.

law within their territories when arbitrariness inure to their benefits and shield their incompetence and corruption?

In general, the public institutions in West Africa are not diametrically inefficient; it is only an issue of percentage and dimension. The degree of inefficiency among a large number of them is so high that it renders the few efficient institutions insignificant.[33] Painfully, those few efficient institutions cannot constitute sufficient channels through which integration dividends can be taken to the inner communities of West Africa.

No specific theory could match all the institutions in West Africa; they all have their unique problems and challenges. Some might fit into the Marxian model, which considers bureaucracy as a tool for exploitation and marginalisation employed by the elite that controls and manipulate the institutions to achieve economic and political power. There are a lot more that could be likened to the Weberian model, which views public service as a big and specialised organisation, with inherent features of complexity and hierarchy, created to achieve national goals efficiently—by impartial application of the laws to their entire activities.[34] Unfortunately, the smears on some of these institutions in this class are the presence of corruption[35] and 'rule of man', which have made it impossible for them to deliver national goals efficiently.

Since the tenor of the argument is that inefficient and corrupt institutions in West Africa would certainly hamper the implementation of integration policies, it will be evidential to sample few cases of corruption, arbitrariness and irresponsibility on the part of Governments and their conduits: public institutions. Most regional economic communities are led by some political and economic juggernaut,[36] and ECOWAS is not an exception. Nigeria, Ghana and Cote d'Ivoire are the political arrowheads of the Community. Where these countries do not agree to a proposal, it is likely it would not survive the heat of resentment and criticisms from this triumvirate. In spite of their economic and political weight, in West Africa, they have very weak and corrupt institutions.

Ghana has become, lately, the mirror of flourishing democratic culture in the entire Sub-region, but her apex institutions are as good as their neighbours'. Under the laws of Ghana, the Bank of Ghana has a statutory duty to advise the Government on any monetary transaction,[37] and it is also responsible for keeping the foreign exchange of the Republic of Ghana.[38] Furthermore, the Bank also has the statutory duties of receiving, remitting and paying money on behalf of the Government. In the same vein, the laws of Ghana restrict the transfer of foreign exchange to abroad

[33] Examples of efficient public institutions include Kofi Annan International Peacekeeping Training Centre Ghana, Nigerian Law School Abuja, etc.

[34] Imhonopi and Ugochukwu (2013), p. 80.

[35] Ibid.

[36] The European Union is dominated by Germany, France and, probably, the United Kingdom.

[37] Section 32 Bank of Ghana Act 2002.

[38] Ibid., section 53.

except through a bank.[39] It means that the Government cannot withdraw foreign exchange without the knowledge and procedural assistance of the Bank of Ghana; it should not remit or pay money except through the apex bank. Unfortunately, during the 2014 World Cup in Brazil, the Government of Ghana withdrew three million US dollars, stashed them in bags, chartered a flight and transferred the money by air to Brazil in order to pay players' appearance fees. That gesture contravened the foreign exchange laws of Ghana.[40] Given the archetypal bureaucracy in Ghana, that transaction must have involved more than one public institution, none of them drew the attention of the Parliament of Ghana to this executive illegality. Query: what did the Bank do, knowing that the law expects it to be responsible to the Parliament in the performance of its function in relation to the foreign exchange?[41]

With regard to Nigeria, it is the hub of economic activities in the Sub-region, with a population of over 170 million people, with her shores overstocked with oil, gas and other assorted mineral resources, yet her institutions are ailing. The police, which ought to be the spine of civility and orderliness in Nigeria, ranks first as the most corrupt public institution in that country; the following is the list of very corrupt institutions in Nigeria in order of their corruptness: political parties, national and state legislatures, local governments, federal/state executive councils, traffic police, federal road safety corps and National Electric Power Authority (now Power Holding Company of Nigeria).[42]

Turning the radar to Cote d'Ivoire, it has gained reputation in international trades because of its cocoa produce; unfortunately, there are seepages in the institutions that manage the resources gotten from the sales. A report published by an agency of ECOWAS has shown that the commonest corruption techniques in Cote d'Ivoire are embezzlement of funds and conversion of public property by government officials, bribery among government personnel, influencing performance and inflation of contracts.[43] All these corrupt behaviours are linked to public institutions in Cote d'Ivoire.

The examples of institutional challenges shown above underline the argument that the channels through which the Community intends to implement its integration policies are clogged with corruption, arbitrariness, ineptitude and inefficiency. To appreciate the importance of this difficulty, it is better to apply the fresh water analogy, which shows that "fresh and clean water designated for indigenes of a rural community cannot get to them fresh and clean if the water is transported through rusty pipelines that have been used in conveying sea water. In order to get fresh and clean water down to the community, the pipes need to be replaced or cleansed". Applying this to ECOWAS integration policies, the pipelines, which are the public

[39] Section 15 (1) Foreign Exchange Act, 2006.

[40] Ibid.

[41] Ibid., section 53.

[42] Imhonopi and Ugochukwu (2013), p. 84.

[43] GIABA Report 2010, p. 34.

institutions, must be cleansed by wave of rule of law, good governance, human right regimes and accountability principles.

Another factor that is proximate to institutional inefficiency is the apathy demonstrated by private institutions to the entire integration process; the reasons for this lack of enthusiasm are not far-fetched. The Community has not fully involved the private sectors in its grand design and implementation of the integration cause. This behaviour may not be unique to West Africa, for it is taken for granted that allocating little roles to private sector can adversely affect integration programmes generally. Majority of the companies in the West Africa do not appreciate what the integration policies are all about. But how would they appreciate the integration efforts when their goods are surcharged at the borders like freight of their Chinese competitors, the barriers are still there at the border posts and corporate entities do not know where to get the certificate[44] that would evidence that their goods are of Community origin. The banking sectors all[45] around West Africa do not appreciate that insistence on residence permit before persons from other Member States could open an account inhibits freedom to provide services. The entrepreneurs and traders who moved from their countries of origin to other Member States are greeted with anti-integration laws that are skewed toward protectionism.[46] With all these tales, laws and experiences, it would be difficult for them to be enthused about the integration cause.

1.3.3 Political Dynamics

Before examining legal landscape in the Community and the landmines that have frozen the freedoms,[47] it will be proper to round off this segment—on socio-economic and political factors affecting integration—with a discourse on political factors that have been trailing and hampering the economic integration process of ECOWAS. First, there has been political rivalry between the Anglophone countries and the Francophone states on the one hand and between the two leading Anglophile countries, Nigeria and Ghana, on the other hand. There are also pockets of ancient feuds between neighbouring countries within West Africa. Differences in economic ideologies among the Member States might have influenced the disparate reception of the ECOWAS integration cause. The Francophone countries, led by Cote d'Ivoire, had different economic expectations. Because of their colonial ties to France, French corporations had huge control of most of their industries—prior to 1975 and even after

[44] Article 10 Protocol Relating to the Definition of the Concepts of Originating Products 2003.

[45] In Ghana, for example, banks would not let a non-Ghanaian, inclusive of West Africans, to hold account unless he/she presents a residence permit.

[46] GIPC Act 2013.

[47] Free movement of persons, goods, services, capital and right of establishment.

the signing of the original Treaty. It has been stated[48] that in Cote d'Ivoire, alone, the French held 99 % of the leather industry; 71 % of the petroleum refinery activities; and 88 % of the chemical industry. The story was not different in Senegal: the French had a hand in 92 % percent of their leather and footwear market, 71 % of their tobacco industry and 89 % of the beverages industry.[49] The corollary was that the removal of tariff and non-tariff barriers would have favoured the French corporations situated in that part of West Africa. Expectedly, the Francophone countries were agitating for trade liberalisation within the Sub-region in support of the growth and expansion of the French corporations operating within their countries.

On the other side of the divide, Nigeria and Ghana had formed a different economic ideology: they were routing for indigenisation programmes that would spur the growth of local entrepreneurs and businesses. They were apprehensive of the competitive effect the trade liberalisation scheme would have on their indigenisation programmes; hence, they sought other restrictive conditions[50] that would limit the French companies from taking advantage of the scheme to flood their markets with foreign goods. To this end, the two countries pushed for the introduction of the rules on community origin.[51]

The concept, as envisioned by the two Anglophone countries, provided for certain conditions which all goods must satisfy before they could move freely within the common market of ECOWAS; the Francophone countries vehemently opposed the idea.[52] In retaliation, the Anglophone also stood against the Francophone countries' proposal which ordinarily would have eased foreign goods into the Community market.[53] That clash of ideologies and economic interests also bred animosity and resentment between the two groups. Surprisingly, remnants of that animosity could still be traced in the relations of these two groups. Also, there is an ingrained strain between Nigeria and Cote d'Ivoire, because of the support[54] which Cote d'Ivoire gave Biafra, when the group attempted to secede from Nigeria between 1967 and 1970.

Regarding Nigeria and Ghana, the bonding between the two countries, which caused them to present a common front in canvassing for introduction of the rules on community origin, could not deter them from infighting. In 1983 to be precise, Nigeria took anti-integration steps by expelling every illegal migrant from her territory; the expulsion swept through all ECOWAS citizens[55] living in the country—of course except those who hid themselves in the inner cities and hinterlands. The expulsion came at the heels of the fall of oil prices round the globe, and to

[48] Kuffour (2006), p. 27.
[49] Ibid.
[50] Ibid.
[51] Article 2(1) Protocol Relating to the Definition of the Concept of Originating Products 2003.
[52] Alter et al. (2013), p. 743.
[53] Ibid.
[54] Kuffour (2006), p. 22.
[55] Alter et al. (2013), p. 743.

cushion the effect, Nigeria thought it right to heap attention to the growth of indigenous industries and commerce. While the move was applauded back home, because it liberalised the employment space, it received condemnation at the regional and global levels for contravening the common market norms.[56]

The rivalry and acrimony between the two countries have not been mellowed by time. By relying on her investment law, Ghana in recent times has been taking strong measures, through the introduction of protectionist rules, to eradicate Nigerians and some other ECOWAS citizens from their retail sector. The application of the law has irked the National Assembly of Nigeria, and the members of the Assembly have condemned it, describing the law[57] as an impediment to the integration process in West Africa.[58] Nigeria, too, has been shooting from the hip in recent times; in 2005, the Government of Nigeria imposed a ban on importation of certain goods, which included films produced by the Ghana film industry. That imposition of ban caused Ghana to seek for negotiation with the Nigerian authorities and to contest the action at the African Peer Review Mechanism Meeting.[59] The consequences of these acrimony and disputes include distrust between the Francophone countries and their Anglophone counterparts and misgiving between the two Anglophone countries. These distrust and misgiving also exist between Senegal and Guinea, as well as between Cote d'Ivoire and Guinea,[60] due to perennial territorial and sociopolitical disagreements.

Another point that could fit into this discourse is the political undertones which could be inferred from the behaviours of the political leaders in West Africa. Kuffour has inferred 'weakness in the ECOWAS institutional mechanism' from Ghana's declaration of intention to contest the ban imposed by Nigeria in 2005 at NEPAD—and not at ECOWAS forum. Also, the reliance by Nigeria on the Multinational Joint Task Force[61] made up of Cameroun, Chad Nigeria Benin and Niger to combat Boko Haram, lately, instead of availing itself of the institutional tools and structures of ECOWAS also aligns with the above view. So if top countries in the Sub-region, which ought to resort to ECOWAS institutional mechanisms, in times of disputes, are not doing so, it will unarguably affect the trust which the other countries may have in the Community institutions and their integrations policies. In summary, it could be said that the rivalries between the Anglophone and Francophone countries and between Nigeria and Ghana have been infecting the political environment within the Community; distorting the quality of decisions made at the Community level; and eroding the trust required for economic integration. All this mix of vices will, at the long run, impact on the integration objectives of the Community.

---

[56] Ibid.

[57] Section 28 GIPC Act 2013.

[58] The Nigerian Voice.

[59] Kuffour (2006), pp. 121–122.

[60] Goodridge (2006a), p. 36.

[61] Fessy (2015).

1.3.4 Legal Clog

Having examined some non-legal restraints to ECOWAS integration process, it would be necessary to discuss two important legal limitations capable of purloining the entire objectives for which the Community was set. These limitations are the absence of a supranational governance system—in the face of national constitutional barriers—and the Community Court of Justice's response to the legal issues of supranationality and teleology.

The idea of creating supranational governance in the Sub-region may be deduced from the report of the Committee of Eminent Persons set up to review the original Treaty of 1975.[62] It seems, from examining the Treaty and other numerous Community texts, that the Community did not implement that suggestion or introduce a supranational regime in the Community. The Community, surprisingly, relegated the idea of supranationality to the Preamble[63]—where it would certainly count for nothing. Practically, when a law made by an international organisation, like ECOWAS, is said to be supranational, it means that the law can be applied within the territories of the Member States without the aid of domestic incorporation or legislation.

Even if the doctrine of supranationality was actually incorporated in the Revised Treaty, it would not have guaranteed the supranationality of ECOWAS laws within the sovereign territories of the Member States. This is because the Community–Member States relationship is always based on multilateral agreements. The Member States must take certain constitutional or legal steps, if there is no existing constitutional vent, before the agreements will be applicable within their territories.

The countries in the Sub-region are sovereign and independent; therefore, they could restrict external interference from all other countries and organisations. It is agreed that the doctrine of sovereignty may have been undergoing some form of reconstruction in contemporary times because of the impact of globalisation, human right, economic inter-independence, interventionism, etc. However, the components of 'control over internal matters and non-intervention in domestic affairs'—subject to international law norms—are still intact[64] to a reasonable extent. So sovereignty could still mean the authority of a state to take charge of her affairs, laws and territory without intervention from other countries, organisations and persons—unless as prescribed by international norms. Therefore, ECOWAS, as an international organisation, cannot project its laws into the territories of the Member States without their acceptance (reception). Acceptance is required because the constitutions of all the 15 Member States have provisions which directly or indirectly stand as bulwark against non-domestic laws.

[62] Falana (2010), p. 9.

[63] Preamble to the Revised Treaty 1993.

[64] See the definition of sovereignty in Law and Martin (2009), p. 517.

Every Member State erects bulwark which mirrors her political position towards international agreements. Generally, this is cast in the shape of dualism or monism: the proponents of dualism are of the view that there is visible difference between international law norms and municipal laws in terms of subjects and spheres of operation; therefore, neither of the systems should determine or affect the rules of the other, while the monists, though led by the divergent writings of Lauterpacht and Kelsen, generally consider international law and municipal law as operating within the same system of norms—with Lauterpacht emphasising more on the supremacy of international law and Kelsen de-emphasising the primacy of international law.[65]

Consequently, a dualist state would not permit the application of international agreements within her territory unless constitutional requirements are satisfied—often the requirements may involve incorporation of the international agreement in a local law. The monist permits the application of international agreement within her territory but may or may not attach superiority status to such agreement. The English speaking countries of West Africa relate to international agreements from the dualist perspective. For instance, the Constitution of Nigeria[66] requires the National Assembly to domesticate every treaty by enacting law, for that purpose, before it can be applicable; the laws[67] of Ghana provide that international agreements shall be ratified by an act or resolution of the Parliament, and the Constitutions of Liberia, Sierra Leone and Gambia have similar provisions couched in dualist terms.[68]

The corollary of these constitutional restrictions is that ECOWAS legal texts would not be applicable within the jurisdictions of the Anglophile countries. Where these laws are inapplicable, it becomes impossible for any person, whose Community right has been violated, to enforce it at the municipal court. If these rights are not enforceable, then it would be difficult for the economic integration policies to be implemented in the entire Community.

The Francophone countries[69] seemingly have more solvable constitutional limitations: in essence, international agreements are not only applicable within their jurisdictions but also superior to local laws. This superiority flourishes where the other parties to the agreement or treaty have reciprocated by applying the agreements or treaties in similar fashion. Although the Francophone countries are monists in principle, yet attention has been drawn to their subtle dualist character.[70] For instance, there could be a provision in the constitution which would restrict the

[65] Brownlie (2003), pp. 32–33.

[66] See section 12 Constitution of the Federal Republic of Nigeria.

[67] See Article 75 (1) (2) Constitution of the Republic of Ghana 1992.

[68] See sections 57 Liberia Constitutions, 40 (4)ii Constitution of Sierra Leone 1991, and 79(1) c of the Constitution of Gambia 1997.

[69] Article 98 of Constitution of Senegal 2001, Article 140 of the Constitutions of Togo, Article 147 of Constitution of Benin Republic 1990.

[70] Nwauche (2009), p. 183.

ratification of any agreement or treaty that is inconsistent with the constitution—unless the latter (constitution) is amended to accommodate the former (agreement or treaty).[71]

Therefore, two condition precedents must be satisfied before ECOWAS laws can be applicable within the Francophone countries: their Anglophone counterpart must be seen to be applying the Community texts, on the same wavelength, within their territories, and where any of the Community texts is inconsistent with the constitution, it should not be ratified unless the constitution is amended to accommodate the inroad. In summary, these constitutional barriers have deprived the Francophone countries the legal basis to apply ECOWAS law within their territories.

The Lusophone countries of Cape Verde and Guinea Bissau relate to international treaties and agreement from the monist standpoint; therefore, it is expected that their Constitutions[72] would accommodate the application of treaties within their jurisdictions. For instance, the Constitution of Cape Verde states that general and common international laws which are enforced within the international legal order shall be part of Cape Verde legal order.[73] It seems the laws which the draftsmen had in mind, under this head, were international customary laws and other mandatory international norms like *jus cogens* and *erga omnes*.

If there is merit in this view, where then is the basis for application of Community texts within the Cape Verde Island? It appears that Article 11(3) of the Constitution has created a legal aperture through which any supranational laws may be applied within Cape Verdean territory. It provides that

> The legal acts emanated from the relevant organs of the supranational organizations of which Cape Verde is a member, shall enter directly into force in the domestic legal order, provided that, that is so established in the respective constitutive instruments.

It means that ECOWAS law may be made applicable within that territory through the vent of Article 11(3); however, the provision has in it a latent restriction which is seen upon careful reading of the proviso. That is, the acts of the supranational organisation shall be part of the national legal order if Community texts provide that Community law shall be enforced within the domestic legal landscape of the Member States. Unfortunately, the Community legal texts do not contain such supranational components; rather, they are drafted in such a manner that ensures state discretion and lends credence to the existence of full sovereignty of the Member States.[74] Therefore, it becomes difficult to say that ECOWAS law will have supranational effect in Cape Verde because the Community texts appear to fall short of the constitutional requirement.

Regarding the response of the Community Court of Justice to the issues of supranationality and teleology, it would be salvific to discover the Court's genetics

[71] This can be deduced from Articles 146 and 97 of the Constitutions of Benin Republic and Senegal, respectively; see generally Nwauche (2009), p. 188.

[72] Constitution of Cape Verde 1999 and the Constitution of Guinea Bissau 1996.

[73] See Article 11(1) Constitution of Cape Verde 1999.

[74] Study generally the Revised Treaty of 1993.

from three significant cases.[75] In Ugokwe case, an applicant brought an action praying the Community Court, among other things, to nullify the procedure and judgments delivered by the Election Tribunal and the Court of Appeal of Nigeria for breach of right of fair hearing. In response, the Court unambiguously refused the application since it appears to it as an invitation to sit on appeal over the decisions of the two domestic courts. In that decision,[76] the Community Court revealed its legal thoughts, indirectly, on the subject of supranationality and the relationship between Community law and national laws but, surprisingly, limited its discourse to judicial monism in this manner:

> The distinctive feature of the Community legal order of ECOWAS is that it set forth a judicial monism of first and last resort in Community law.[77]

It is easily understood that monism, as intended in the dictum, entails the treating of Community Court's decisions, relating to Community law, as part of the (judicial decisions) laws of the Member State—even though the execution of the Community Court decisions within the Member States may raise certain constitutional issues, especially in the Anglophone countries. The attention here is on the limitation of the subject of monism (which can have supranational effect in this context) to the Court's decisions. It seems that the Court was weary of the effect of including the 'Revised Treaty and other Community texts' in its monism thesis. If the Court had done that, then it would have acted like the European Court of Justice in Van Gend case.[78] Had the Court been generous enough to include all ECOWAS laws in this monism theory, it would have meant that ECOWAS texts ought to have been received within the Member States as part of their laws—though subject to some form of constitutional or judicial acceptance.[79]

Since the Court has not held in Ugokwe or elsewhere that the laws of ECOWAS are supranational and the supranationality cannot be located in any of the Community texts, it is then accurate to state that, in the meantime, ECOWAS laws are not supranational.[80] In view of this legal reality, it becomes a bit intriguing to think that the Community adopted this model of economic integration, similar to the European Union model, without the intention of energising it with the power of supranationality, which is required for its success, especially where the Community knows that the other route to success, apart from supranational governance system, which is honest and timely incorporation of Community policies and laws in the national legislation of the Member States, would be difficult to ply because of

[75] Olajide v Federal Republic of Nigeria 2004, Ugokwe v The Federal Republic of Nigeria 2005, Pinheiro v Republic of Ghana 2012.

[76] Ugokwe v The Federal Republic of Nigeria 2005, p. 51.

[77] Ibid.

[78] I963.

[79] Acceptance could be achieved by constitutional amendment or decisions of apex courts.

[80] Alter et al. (2013), p. 741.

internal politics, lack of enforcement and accountability mechanisms, sovereignty, lack of political will and poor culture of rule of law.

Having treated the first limb, which is the Court's response to supranationalism, it will be needful to consider the other limb, which is the employment of teleological interpretative approach by the Community Court of Justice. Teleology as a doctrine relates, in part, to interpretation of phenomena in terms of their purpose rather than possible causes.[81] As regards judicial interpretation, a teleological approach, or purposive rule, would aim at achieving the policy objective[82] of the law being interpreted, rather than limiting the construction exercise to the clear meaning that could only be supported by the exact words used in the text. Consequently, if this interpretative approach is exploited fully by the Court, it will certainly go a long way in cementing the cracks in the integration process.

In Afolabi Olajide, the Community Court was invited, indirectly though, to look at the Community policy on integration, especially the rights to free movement of persons and goods, and expand Article 9 of Protocol A/P1/7/91 in order to accommodate individual applicants whose Community and human rights have been violated. In denying the invitation, the Court rightly admitted that the request of the applicant would entail employing a broader purposive interpretation of the relevant text; it proceeded to allude to broad purposive approach which the Court of Justice of the European adopted in expanding a similar provision to cover new bodies for judicial review and to fill up gaps in the European Union Treaty. At the end of its allusion, the Community Court of Justice ECOWAS noted that the approach adopted by the Court of Justice of the European Union has attracted so much criticism; therefore, it was not ready to tow that line. It can be inferred from this decision that the Court is not ready to adopt critical and sensitive approaches that could foster the integration process; it is only willing to seise jurisdiction that is clearly given to it, leaving behind every latent opportunity[83] it could seise to concretise and expand the integration cause—through teleological or purposive interpretative device.

Another opportunity fell in the path of the Court to redeem the troubled integration process.[84] In that matter, a Senior Advocate of Nigeria[85] claimed that he was denied the opportunity of writing the qualifying examination by the Ghana Law School merely because of his (Nigerian) nationality. In sum, he considered the decision as a violation of his Community rights relating to freedom of movement, right to residence and establishment as provided in the Revised Treaty and other relevant Community texts. Even in the face of the official electronic mails

[81] Brookes (2006), p. 1572.

[82] Hartley (2007), p. 74.

[83] See the opportunity created by Pinheiro case, for instance, to distinguish service from establishment and to pronounce on the impact of Community rules on national laws of the Member States.

[84] Kemi Pinheiro v Republic of Ghana 2012.

[85] Senior Advocate of Nigeria (SAN) Nigeria's equivalence of the English Queens Counsel.

evidencing refusal on the grounds of nationality, the Ghanaian Government cooed that the applicant had not satisfied certain statutory requirements as his degree must be awarded by an institution approved by the Ghana Legal Council.[86] Nothing was actually said on whether Ghana Law School, indeed, took steps to verify if the applicant's degree was properly awarded, nor did it demonstrate to the Court that the Ghana Legal Council had not approved of the institution that awarded the degree.

In refusing the application, the Court disposed of other issues and determined the case, finally, on the grounds of right of access and jurisdiction. Astonishingly, the Court held that the law did not empower individuals with the right of access to enforce Community rights. According to the Court, where there is failure to fulfil an obligation by a Member State under the ECOWAS law, it is either the ECOWAS Commission or the Member States that have direct access to the Court.[87] In reaching its decision, the Court did not consider the effect the judgment would have on the frail provisions of right of establishment,[88] nor did it seek to tighten the loose ends of the law on the freedom of establishment and services[89] with the tool of teleology.

In effect, what the decision did was to dash every hope of expanding, through judicial interpretation, Articles 9 and 10 of the Supplementary Protocol[90] to enable individuals to enforce their Community rights. The decision, also, painfully, failed to address the vexed questions of whether Community rules should impact on the national legal order of the Member States and whether national institutions should not apply and interpret municipal laws in such a conforming manner that would not render the Community texts redundant and nugatory.

It may be significant to relate these judicial episodes[91] to the experiences of the Court of Justice of the European Union because the laws which the Court had been called upon to interpret and the institutions of ECOWAS[92] were, to a reasonable extent, fashioned after the European Union model. It is presumed, therefore, that if Pinheiro were decided by the Court of Justice of the European Union, it would have frowned upon the reliance on national law to defeat a Community provision—as it did in Marleasing SA case by insisting that national law should be interpreted in the light of Community law.[93] Had Afolabi case been decided by the European Court, the same reasoning that caused it to expand Article 119 of the Rome Treaty in

[86] Pinheiro v Republic of Ghana 2012, p. 4.

[87] Ibid., pp. 9–10.

[88] Supplementary Protocol on the Implementation of Third Phase (Right of Establishment) 1990.

[89] Article 3 (2) (d) (iii) of the Revised Treat 1993.

[90] Supplementary Protocol Amending the Protocol Relating to the Community Court of Justice 2005.

[91] Ugokwe case, Olajde Afolabi case, Pinheiro case.

[92] Alter et al. (2013) p. 741.

[93] Marleasing SA v La Commercial Internacional de Alimentacion SA 1990 p PI 4161.

favour of individual applicants in Defrene v Sabenna[94] would have propelled it to adjust the old Article 9 of the Protocol relating to the Court in order to entertain Afolabi Olajide's grievances. And were the European Court given the privilege which ECOWAS had in Ugokwe, it could have explained the existence or non-existence of supranationality within the Community—similar to what it did in Costa case.[95]

In conclusion, it can be said that the absence of supranational governance in ECOWAS, and the attitude of the Community Court of Justice (ECOWAS) to teleological interpretation and doctrine of supranationality have affected tremendously the integration process in ECOWAS. The plausibility of this assertion is underlined by the social engineering functions of law as espoused by Pounds.[96] Although the social engineering theory has been criticised[97] strongly, yet the core elements of that thought are still useful: for law could help in maximising want, reducing friction and balancing conflicting interests.

Therefore, had ECOWAS law been supranational, some of the latent political hindrances hidden under the concept of sovereignty would have been exposed in national courts. The national courts would have helped in balancing conflicting interests of the beneficiaries of the Community law—the citizens—with the economic and political policies of the Governments of the Member States. Nonetheless, it is also necessary to remark that economic integration can still be achieved in the absence of supranational governance where the members of an economic community or grouping have developed the practice of honest and timely incorporation of community or regional laws into national legislation but that practice flourishes on the existence of political will and constitutional basis which allow community rules to alter national legal order. Unfortunately, these political and legal factors are not in existence in West Africa, hence the reliance on supranational governance system and the teleological interpretative function of the Community Court.

1.4 Distinguishing ECOWAS from Other Economic Groupings

It would be useful to distinguish ECOWAS from other economic or monetary groupings that have sprouted in West Africa. One of the reasons for this delineation is to free the reader from the likely confusion that could stem from the similarity in memberships of these different groupings. For instance, some of the members of the Franc Zone make up ECOWAS, while some of the Member States of ECOWAS constitute the membership of the West African Economic and Monetary Union.

[94] Defrenne v Sabena 1976, pp. 474–475.

[95] Costa v Enel 1964, p. 593.

[96] Doherty (2003), pp. 189–190.

[97] Ibid.

It should be entered that there is no intention to treat the operations, ideologies, jurisprudence, challenges and economic models of these groupings extensively and analytically; such intellectual craving deserves a whole and separate book. Perhaps doing that would, ungracefully, blow this work, in size and subject, out of proportion. In this segment, therefore, the outline will be limited to the establishments, objectives, institutions, membership and decision-making process/governance of (1) Organisation pour l' Harmonisation du Droit des Affaires en Afrique (OHADA),[98] (2) Union Economique et Monetaire Ouest Africaine (UEMOA)[99] and (3) the Franc Zone.

1.4.1 OHADA

The concept stemmed from a curious desire to create a unified system of law which could support the conduct of commerce and business on the continent of Africa. The Heads of State from the French-speaking countries of Africa held a series of political meetings for the purpose of streamlining the idea, and in 1991, at a summit in Ouagadougou, Burkina Faso, the Finance Ministers from the Franc Zone commissioned some experts to study the political and technical possibility of achieving the task. The experts, led by Mr K. Mbaye, a reputable judge from Senegal, came out with a report, which was approved in October 1992 at a summit in Libreville. After the approval, a Steering Committee was set up to draft the prospective treaty and isolate the possible areas of law in need of harmonisation.[100] The Steering Committee came up with an acceptable draft, and on 17 October 1993 in Port Louis, Mauritius, the Treaty was signed. It eventually entered into force on the 18th September of 1995.[101]

The objectives of the economic group are to create a uniform business law which would regulate businesses within the geo-economic area and to promote arbitration as a tool for resolving contractual disputes.[102] It is also the collateral intention of this international organisation to extend the membership to all the countries in Africa.[103] But whether the intention to spread round about Africa would be achieved or not might depend on OHADA's success and the ability to find a workable common ground in regard to differences in the legal systems, languages and political and economic ideologies.

[98] Rendered in English as: Organisation for the Harmonisation of Business Law in Africa (OHBLA).

[99] The translated version reads West African Economic and Monetary Union.

[100] Eversheds (2002), p. 5.

[101] Ibid., pp. 4–5.

[102] Ibid., p. 6.

[103] Ibid., p. 7.

The institutions of OHADA are Council of Ministers, which is made up of the Ministers of Justice and Finance from all the Member States; the Permanent Secretariat, with headquarters in Yaounde Cameroon; Common Court of Justice and Arbitration, which is situated at Abidjan with powers, under Article 19 of its Rules, to hold proceedings in any Member State; and Regional Training Centre for Legal Officers.[104] The Council of Ministers, the highest decision-making organ, performs administrative as well as legislative functions. The Permanent Secretariat, on its part, performs administrative and supportive functions, especially to the Council of Ministers.[105] The Common Court of Justice and Arbitration, comprising seven judges, performs arbitral and judicial functions, while the Regional Training Centre for Legal Officers trains legal officers and judges from the Member States.[106]

Regarding membership, all the 16 countries[107] that make up OHADA, except Guinea Bissau, Equitorial Guinea and the English-speaking provinces of Cameroon, are former colonies of France. Consequently, they are tied together by common language (French) and the same legal system (civil law). Because of this uniqueness, it becomes easier for the Community to create supranational governance within the geo-economic area. The uniform acts made by the Council of Ministers, according to Article 10 of the Treaty of 1993, are directly applicable;[108] they could be relied upon, in the national courts, without the need for incorporation. This singular advantage clearly distinguishes OHADA from ECOWAS.

1.4.2 UEMOA

This international organisation was established by Dakar Treaty of January 1994 and was ratified in July of the same year. The new Union is a replacement for the former West African Union of 1962 and the West African Economic Community of 1973. The grouping seeks to establish a union similar to that of the European Union.[109] The Union as it is today has been stated to be, to a reasonable degree, the brain child of Charles Konan Banny, former Governor of Central Bank of West African States, who, indeed, helped in preparing the guiding principles and institutional framework of the organisation.[110] As has been established, the French-

[104] Ibid., pp. 8–17.

[105] Ibid., pp. 9–10.

[106] Ibid., pp. 11–17.

[107] Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Islamic Republic of Comoros, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo.

[108] Ibid., p. 20.

[109] Ibid., p. 291.

[110] Department of International Relation and Co-operation, South Africa.

speaking countries that make up UEMOA have always been members of economic grouping from independence, for what exists today as UEMOA can veritably be linked to West African Monetary Union (UMOA) of 1962.

Generally, the objectives of UEMOA are to create a common external tariffs and common market: free movement of persons, goods, services and capital. It also aims at harmonising technical standards and co-ordinating disparate national policies.[111] With a view to deepening the Union's integration to achieve high, sustainable and poverty-reducing growth, for instance, it adopted, in 2004, a 5-year Regional Economic Programme.[112] It was envisaged by the Union that the Regional Integration Programme would give the economies of the Member States a new boost and position them for sustainable development.[113]

To achieve all its objectives, the Union has put in place institutional structures. It has governing bodies comprising the Conference of the Heads of State and Government, the Council of Ministers, and the Commission. The Conference lays down the policies, the Council legislates and the Commission executes.[114] The regulatory bodies of the Union consist of the Court of Justice, which maintains uniform interpretation of the Union's Instruments, and the Court of Auditors, which supervises the accounting activities and records of the other institutions. There is also an Inter-Parliamentary Committee, which performs consultative role in conjunction with the Commission.[115] The Union also has two financial institutions:[116] the West Africa Central Bank[117] with main office in Dakar, Senegal, and West African Development Bank,[118] which is centered in Lome, Togo.

In reference to membership, the Union is made up of six countries, namely Benin, Burkina Faso, Cote d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo. Auspiciously, the laws made at the Union level are applicable within the territorial jurisdictions of all Member States. It is refreshing to note that the regulations of the Union are not only directly applicable but also superior to national laws of the Member States.[119] These characteristics, structures and governance system distinguish the grouping from ECOWAS.

[111] Eversheds (2002), p. 292.

[112] Articles 1 and 2 DECISION UEMOA on the Adoption of Regional Economic Programme 2004.

[113] West African Economic and Monetary Union (2004), p. 13.

[114] Eversheds (2002), p. 291.

[115] Eversheds (2002), p. 292.

[116] Ibid.

[117] Banque Centrale des Etats de l'Ouest (BCEAO).

[118] Banque Ouest-Africaine de Development (BOAD).

[119] Eversheds (2002), p. 291.

1.4.3 Franc Zone

The Franc Zone could be explained as an economic and monetary area, divided into sub-zones, that cuts across France, French Overseas Territories and Central African and the ECOWAS Sub-regions. It is made up of countries, most of which were once colonies[120] of France, bound together by the intention of maintaining monetary co-operations among themselves.[121] The sub-zones are the West African Economic and Monetary Union, consisting of eight countries;[122] the Central African Monetary Union,[123] made up of six nations; and other French Oversea Territories (CPF). The West African Economic and Monetary Union and the Central African Monetary Union are jointly referred to as Communauté Financière Africaine (CFA) Franc Zone. Moreover, the initial monetary agreement between France and the African countries was made in the early 1950s, originally for the purpose of entrenching common exchange rate among the Member States, but there were new monetary co-operation agreements which were signed between 1959–1962 and 1972–1973 which also re-purposed the Zone.

In regard to institutional architecture, the Banque des Etats de l'Afrique de l'Ouest is laden with the function of monetary control over the countries in West African Economic and Monetary Union, while the Banque des Etats de l'Afrique Centrale performs the same monetary control function over the countries in Central Africa. With specific reference to the West African arm of the Zone, it should be stated that other institutions of UEMOA also play vital roles in order to achieve the required monetary co-operation between UEMOA and other sub-zones and among the Member States in UEMOA.[124] The Conference of Heads of state steps in when the Council of Ministers experiences decisional en passé; the Council makes the financial and monetary policies, while the Bank Commission established in 1991 takes steps to ensure that prudent laws are made and applied by the financial institutions within the sub-zone.[125]

Regarding decision-making and governance, the laws made by the institutions of UEMOA are supranational; therefore, they are enforceable in the national courts of the Member States. There is also an indication that there exists transfer of national monetary sovereignty in favour of the sub-zone: Nomsi sought to show that monetary integration would require the wilful surrender of national monetary

[120] Except Guinea Bissau (Portuguese) and Equitorial Guinea (Spanish).

[121] Eversheds (2002), p. 290.

[122] Benin, Burkina Faso, Cote d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.

[123] Cameroon, the Central African Republic, Congo, Equatorial Guinea, Gabon and Chad.

[124] Note that UEMOA (French acronym) is the same as West African Economic and Monetary Union (WAEMU).

[125] Nomsi (2004), p. 24.

sovereignty in favour of a unitary bank, single currency and common monetary policy.[126] Relating this theory to the sub-zone, it is evident that the countries within UEMOA, which is part of CFA Franc Zone, have surrendered their money and monetary policies to a bank and to an institution. Inferentially, there is some form of transfer of monetary sovereignty to the sub-zone—this also reflects the supranational character of the governance system adopted by the sub-zone.

So many factors clearly distinguish Franc Zone from ECOWAS. The Franc Zone extends beyond the territory of West Africa, while ECOWAS's jurisdiction and membership are limited to territories and countries in West Africa, respectively. While ECOWAS strives at economic integration and harmonisation of laws and policies, the Franc Zone pushes for maintenance of monetary co-operation among its members. The laws of ECOWAS do not have supranational effect, but the laws of the Franc Zone can be applied within the territories of the members without judicial or legislative aid. The constitutive norms and institutions of Franc Zone differ greatly from those of ECOWAS.

1.5 Meaning of Treaty Under the ECOWAS Legal Regime

Before explaining what ECOWAS law is, attention should be paid to the definition of treaty as contained in the Revised Treaty of 1993. It defines treaty as "this Revised Treaty" and did not, at least on the face of it, include protocols, decisions or annexure. In the same article, it reads: "Protocol means an instrument of implementation of the Treaty having the same legal force as the later". The literal interpretation of this definition would be that protocols, like Supplementary Protocol (A/SP.1/01/05), would possess similar force of law as the Revised Treaty of 1993. Another instrument[127] of ECOWAS renders that "treaty" means the Revised Treaty of the Economic Community of West African States (ECOWAS) signed in Cotonou on 24 July 1993. This instrument and the parent Treaty align their definitions of the word "treaty" in one direction. In the event of interpretation, the ECOWAS Court (Community Court of Justice) would be expected to adopt a purposive approach in order to avoid leaving out what ought to be included.

However, there are expanded definitions found in other normative or directional instruments. The Community Court Rules[128] define Treaty as the Revised Treaty of the Economic Community of West African States and include protocol and conventions and annexure. It is very likely that the Community Court would be influenced by the inclusive nature of the definition of Treaty found in its Rules. Furthermore, Protocol A/P.1/7/91 is the instrument that defines the composition and

[126] Ibid., p. 8.

[127] Protocol Relating to the Mechanism for Conflict Prevention 1999 (definition).

[128] Rule of the Court of 2002.

competence of the Community Court of Justice.[129] In Article 1,[130] the instrument defines "Treaty" as the Revised Treaty of the Economic Community of West African States and includes protocols and conventions annexed thereto. On close examination, it becomes apparent that though this definition includes protocols as part of the Treaty, yet it is not as wide as the definition of Treaty found in the Community Court Rules. The Community Court Rules includes protocols and conventions and "annexure";[131] by so doing, it means that any extra part of a treaty or protocol or convention can be relied upon as the Treaty.

One fact has emerged from this entire exposition: that there are different definitions of the word "treaty" under ECOWAS jurisprudence. In 2005, ECOWAS introduced a Supplementary Protocol to amend the Protocol (A/P1/7/91) Relating to the Community Court of Justice;[132] the question, now, is whether this fresh Supplementary Protocol did constrict the definitive article to agree with the Revised Treaty of 1993, thereby reducing any disparity in meaning (regarding what a treaty actually is under ECOWAS jurisprudence). Before exposing the effect of the amended articles, it will be helpful to look at one of the points of consideration found in the Preamble:[133] "Considering that the articles of the Treaty referred to in the Protocol relating to the Community Court of Justice are articles of the Treaty of 28th May, 1975 and that it is therefore necessary to harmonise such references with articles of the Revised Treaty adopted on 24th July 1993."

A careful analysis of this Preamble would reveal that the Community had thought it expedient to amend some of the articles of the Protocol Relating to the Community Court, because the references made in the Protocol concerning the Court (articles) are those of the Treaty of 1975. By this amendment, whenever a reference is found in the Protocol Relating to the Court that borders on Treaty, then it must be the Treaty of 1993 and not that of 1975. The amendment was necessary because the Protocol A/P.1/7/91, which defines the composition and competence of the Court, was made before the revision of the Treaty in 1993. Therefore, the Protocol ought to be revised since it derived its strength from and referenced the old Treaty of 1975.

Because it was made under the 1975 Treaty,[134] all the references to "articles of the Treaty" meant articles found in the Treaty of 1975. Consequently, the draftsmen have made all references to articles of Treaty to be articles of the Treaty of 1993. In the amending Supplementary Protocol,[135] Article 1 paragraph (b) provides that "in Article 1 references to Articles 1, 5, 6, 8(1) and 11 of the Treaty are replaced by Articles 2, 7, 10, 17(1), 17(2) and 15 of the Revised Treaty respectively".

[129] Preamble to Protocol A/P.1/7/91.

[130] Art. 1 Protocol.

[131] Rules of Court.

[132] (A/SP.1/01/05).

[133] Preamble to the Protocol.

[134] Treaty 1975.

[135] Art. 1 Supplementary Protocol (A/SP.1/01/05).

The effect of this amendment is that in Article 1 of the amended Protocol,[136] any reference made to Articles 1, 5, 6, 8(2) and 11 of the Treaty of 1975 has been replaced by Articles 2, 7, 10, 17(1), 17(2) and 15 of the Revised Treaty of 1993, respectively. Elementarily, Article 2 of the 1993 Revised Treaty replaces Article 1 of the 1975 Treaty. Noticeably, Article 1 of the 1975 Treaty, which has been replaced by Article 2 of the Revised Treaty, was the establishment provision. It was not the definitive article, so it becomes proper to say that the definition of treaty as contained in Protocol A/P.1/7/91[137] has not been amended. Conclusively, the definition of the word "treaty" found both in the Rules of the Community Court and in the Protocol Relating to the Court is broader than that found in the Revised Treaty of 1993. In the interest of justice, whenever the interpretative jurisdiction of the Community Court is invoked, the Court should embrace the broader rather than the narrow approach of interpretation.

It is encouraging to commend the Community Court on how it reconciled the disparity found in Article 39 of the Protocol on Democracy and Good Governance with Article 4 of the Supplementary Protocol[138] Relating to the Community Court of Justice.[139] The Court, in Musa's case, traded the restrictive provision of Article 39 (which intended that individuals will bring application to enforce their rights only when they have exhausted local remedy) for the liberal provision of Article 9 paragraph 4[140]—which gives rise to right of application irrespective of whether local remedy has been exhausted or not. The Court obviously in this case towed the expansive interpretation lines.

1.6 Definition and Ancillary Matters

As regards the definition of the discipline, ECOWAS law is still at its nascent state; however, an explanation of what it is would be: the body of laws, rules, principles and standards derived from, and inclusive of, authoritative instruments emanating from the Community; principles and rules of international law; and the judgment of the Community Court; which guide, unite and regulate the relationship among the Member States, Community institutions, and citizens in order to attain economic integration.

In addition to the explanation of what ECOWAS law is, it will be important to state why the term 'ECOWAS LAW' has been used in this work—knowing that, in some quarters, there has been doubt as to whether the entire legal regime of the Community has acquired that 'distinct character of a law discipline' associated with

[136] Protocol (A/P1/7/91).

[137] *Ibid.*

[138] Supplementary Protocol A/SP.1/01/05.

[139] Musa Saidykhan v Republic of Gambia.

[140] Supplementary Protocol A/SP.1//01/05.

other notable body of laws like European law, environmental law, etc. But the truth is that when a body of laws has been evolving for 40[141] years, has attracted diverse scholars[142] to expound different aspects of its subjects, has been found worthy to be studied in universities[143] as distinct area of learning irrespective of whether it was fused together with other similar subjects for academic convenience, has merited international court that adjudicate solely on it and has successfully developed its jurisprudence and legal character that are uniquely different from the laws of the states that make up the organisation to which it applies, then such a body of law deservedly should be particularly termed as to distance it from other law disciplines. For these reasons, it is proper to describe the laws of the Community as ECOWAS law.

Structurally, this work is layered into 14 chapters. Chapter 2 exposes the types of norms that constitute the sources of ECOWAS law, as well as classifies these different sources into distinct blocks. Chapter 3 collates and studies all the institutions of ECOWAS except the West African Health Organisation, while Chap. 4 interrogates the legal interventions which ECOWAS has taken to curtail the escalation of terrorism and conflicts within the Member States. Human right regime under the ECOWAS laws is clearly treated under Chap. 5, and the frosty relationship between Community law and the laws of the Member States is laid bare in Chap. 6. Chapter 7 distinctly, but briefly, explains the reference procedure under the ECOWAS law and clarifies, with the aid of European Union cases, issues that had not been tried by the Community Court.

Chapter 8 explains flawlessly action for damages and action for determining the legality of Community texts, while action for damages covers causes that could be brought under the law of tort or contract in a municipal setting, action for determining the legality of Community texts covers causes that could be instituted under administrative law in a national court. Chapter 9 examines selected forum action which is a jurisdictional platform that allows litigants to select the Community Court of ECOWAS as their forum for settlement of dispute arising from agreement. It also examines actions brought by Community officials against the Community or institutions in respect of their contracts of service. Chapter 10 treats extensively free movement of persons and right of residence, while Chap. 11 explores the right of establishment and free movement of capital. Chapter 12 captures and explains all the concepts around free movement of goods in West Africa. Chapter 13 tackles discrimination in West Africa, especially in regard to equal treatment of certificates, as well as pay-related discrimination. The book ends with Chap. 14, which examines competition policy under the ECOWAS legal regime.

[141] Treaty of 1975.

[142] Kuffour (2006), Goodridge (2006b), Falana (2010) and Alter et al. (2013).

[143] Ghana Institute of Management and Public Administration (GIMPA) offers ECOWAS law as part of another module.

References

Laws

Decision N° 01/2004/CM/UEMOA on the Adoption of the Regional Economic Programme (REP) 2004–2008
Ghana Investment and Promotion Centre Act 2013
Protocol A/P.1/7/91 Relating to the Community Court of Justice ECOWAS 1991
Protocol Relating to the Definition of the Concepts of Products 2003
Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security 1999
Revised Treaty of the Economic Community of West African States 1993
Rules of the Community Court of Justice ECOWAS 2002
Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 Relating to the Community Court of Justice
Supplementary Protocol A/SP 2/5/90 on the Implementation of Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment
Treaty of the Economic Community of West Africa States 1975

Cases

Afolabi Olajide v Federal Republic of Nigeria (2004–2009) CCJELR
Costa v Enel C-6/64 via eu-lex.europa.eu/Lex Uri Serv/Lex Uri Servi do? Uri=CELEX: 61964CJ0006: EN: PDF. Accessed 18 October 2013
Defrene v Sabena, 43/75 8/4/1976 eu-lex.europa.eu/Lex Uri Serv/Lex Uri Servido? uri=CELEX 61975 CJ0043:EN: PDF. Accessed 13 October 2013.
Marleasing SA v La Commercial International de Alimentacion SA C-106/89 13/11/1990 eu-lex.europa.eu/LexUri Serv/LexUri Servido? Uri= CELEX61989CJ0106: EN: PDF. Accessed 17 October 2013
Musa Saidykhan v Republic of Gambia Suit No ECW/CCJ/RUL/05/09 Unreported
Ugokwe v Federal Republic of Nigeria (2004–2009) CCJELR
Van Gend & Loos v Nederlandse Administratie Der Belastingen C-26/62 5/2/1963 eu-lex.europa.eu/Lex Uri Serv/Lex Uri Servido? Uri=CELEX61962CJ0026: EN:PDF. Accessed 17 October 2013

Publications

Acemoglu D (2006) Modeling inefficient institutions. http://economics.mit.edu/files/5697. Accessed 11 July 2014
Adepoju A (2005) West Africa Migration, a paper prepared for Policy Analysis and Research Programme of Global Commission on International Migration. www.gcim.org/attachment/R58.pdf. Accessed 13 Sept 2011
Alter K, Helfer L, McAllister J (2013) A new International Human Rights Court for West Africa: The ECOWAS Community Court of Justice. Am J Int Law J 107:737. Scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5546&context. Accessed 13 July 2014

Brookes I (ed) (2006) The Chambers Dictionary, 10th edn. Chambers Harrap Publishers Ltd, Edinburgh
Brownlie I (2003) Principles of public international law, 6th edn. Oxford University Press, Oxford
Department of International Relations and Cooperation, Republic of South Africa, 'West African Economic and Monetary Union'. http://www.dfa.gov.za/foreign/Multilateral/africa/waemu.htm. Accessed 25 July 2014
Doherty M (2003) Jurisprudence: the philosophy of law, 3rd edn. Old Bailey Press, London
ECOWAS Profile. www.africaunion.org/Recs/Ecowas. Accessed 30 Aug 2011
Eversheds (2002) Business law in Africa OHADA and the harmonization process. Kogan Page Ltd, London
Falana F (2010) ECOWAS Court: law and practice. Legaltext Publishing Company Limited, Lagos
Fessy T (2015) Boko Haram: can regional force beat Nigeria's militant Islamist? BBC News www.bbc.co.uk/news/world-africa-31695508. Accessed 7 July 2015
Goodridge R (2006a) (chapter 4) Economic Community of West African States (ECOWAS). nccur.lib.nccu.edu.tw/bitstream. Accessed 17 July 2014
Goodridge R (2006b) Factors against economic integration. nccur.lib.nccu.edu.tw/bitstream/140.119/33930/7/93302807. Accessed 19 May 2015
Hartley T (2007) The Foundation of the European Community Law, 6th edn. Oxford University Press, Oxford
Kuffour O (2006) Institutional Transformation of Economic Community of West African States. Ashgate, Hampshire
Imhonopi D, Ugochukwu M (2013) Leadership crisis and corruption in the Nigerian public sector: an albatross of national development. Afr Symp 13(1)
Inter-governmental Action Group against Money Laundry in West Africa (GIABA) (2010) Corruption-money laundering nexus: an analyses of risk and control measures in West Africa. GIABA Report. http://web.giaba.org/media/f/114_corruption-and-money-laundering-nexus---english-rev051810-1-.pdf. Accessed 15 July 2014
Law J, Martin E (eds) (2009) Oxford dictionary of law, 7th edn. Oxford University Press, Oxford
Nomsi C (2004) The CFA zone: the prospect for successful monetary integration. Thesis, Faculty of Economics, University of Ljubljana. http://www.cek.ef.uni-Ljubljana.si/magister/nomsi175.pdf. Accessed 30 Aug 2015
Nwauche E (2009) Enforcing ECOWAS law in West Africa National Courts. Paper presented at ANCL conference, Cape Town. http://www.ancl-Radcliffe.org.za/sites/default/files/Enforcing%20Ecowas%20Law%20in%20West%20Africa%20National%20Courts.pdf. Accessed 20 Dec 2011
Quedraogo K (2013) "Infrastructure in the West Africa Region" Africa infrastructure investment report. Common wealth Business Communication Limited, London
Stone E (2013) Public law. University of London Press, London
Swindell K (1995) People on the move in West Africa: from pre-colonial politics to post independence states. In: Cohen R (ed) Cambridge survey of world migration, 1st edn. University of Cambridge Press, Cambridge
The Nigerian Voice: 'Quit Order to Nigerians Reps Committee on Diaspora Drags Ghana to ECOWAS Parliament'. http://www.thenigerianvoice.com/NigeriaHome/. Accessed 17 July 2014
West African Economic and Monetary Union (2004) Regional Economic Programme
World Bank (2013) Fact sheet: infrastructure in sub-Saharan Africa. http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:21951811~pagePK:146736. Accessed 7 July 2014

Chapter 2
Sources of ECOWAS Law

Abstract This chapter unearths where the institutions of ECOWAS derive the set of laws which they apply or interpret in the performance of their duties. For instance, if a Nigerien citizen invokes the jurisdiction of the Court on account of violation of the people's right in his local community, would the Court rely on Niger's national rules or on other sets of laws? One of the factors that would determine the choice the Court would make is whether the laws it wants to rely on, for the purpose of determining the dispute, are applicable within the ECOWAS jurisdiction. So what is this set of laws which the Court would apply or interpret whenever its jurisdiction is invoked? The answer to this question would be found in the remaining part of this chapter. Nonetheless, the chapter would, prior to the discourse on what constitute sources of law, explain that the term 'sources of law' relates more to 'legal authority to use a law or instrument' than to 'historical derivation of a law or instrument'. It will also portray different attempts made at classifying the laws of ECOWAS.

2.1 Introduction

An explanation of the key word "sources" would water down any ambiguity or disharmony as to what the sources of law are; this approach, apparently elementary, would quicken one's understanding of the concept. The word "source" means a place, person or thing that you get something from.[1] Relatively, sources of law would then be the authoritative seat from where the law is derived. It is common knowledge that legal practitioners would always consider "sources of law" as the legal places from which laws derive their authority. This explanation of the concept of source of law is in sync with popular understanding. Inferentially, sources, in this conventional context, relate to seat of authority rather than the place of historical derivations.

For instance, Article 38 of the Statutes of International Court of Justice reads: 'The Court whose function is to decide in accordance with international law such

[1] Hornby (2001), p. 64.

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_2

dispute as are submitted to it shall apply (a) International conventions whether general or particular establishing rules expressly recognized by the contesting states. (b) International custom, as evidence of a general practice accepted as law. (c) The general principles of law recognized by civilized nations. (d) Subject to the provision. . . judicial decision and the teaching of most highly qualified publicist of various nations as subsidiary means for determination of rules of law.'[2] If a lawyer who professes to practice in an international or regional jurisdiction is asked what the sources of law applied in his jurisdiction are, he would revert his mind to Article 38,[3] he would canvass these sources, especially when he wants the court to accept his argument, rationalising its application by citing other judicial decisions of a similar or higher international tribunal where such principles were applied.

For that lawyer, his attention would be on establishing that the principle has a force of law within the jurisdiction and consequently should be applied. The lawyer would not bother about the historical development of the principles, even though law may have an authoritative part as well as historical source. The "authority" may not be at issue—if the proponent has cases or laws to cite—but the origin may not be examined at all. Paragraph C of Article 38[4] reads: "The general principle of law recognized by civilized nations". This article, in itself, did not care where the principle which it is lending "authority" came from. Its concern is on "recognition" and not "derivation". The common law of England is applied in England and will be taken as, considering its growth and dispersion, "general principle of law recognized by civilized nations".

But in truth, some of the contents or origin of some common law principles could be traced, historically, to other foreign laws. A lawyer would ordinarily agree that the source of law is the English common law because it developed there and has been lent seal of authority by the courts. In this sense, if a particular law or legal principal had an Ottoman origin but was modified, developed and accepted by the people of England as a legal authority, then the source of the law would be English law and not the Ottoman traditional rule of ancient times. Also, it is commonplace that Roman law had infiltrated into the body of laws of some European countries that had contact with the ancient Roman Empire. Assuming some rules of the Roman law had been modified and applied in modern France and Germany, there might be a tendency that some of them had been codified in modern-day European treaties or assimilated into the principles and practices of the countries in Europe. Given this background, one would agree that any European treaty that codified some of these ancient laws or the principles which have absorbed these Roman norms would pass for a "source of European Law" because it had been made, developed and applied in Europe. In reality, the historical source may be foreign but the authoritative source can be the European treaty that gave it "force" within

[2] Ibid.

[3] Statutes of International Court of Justice 1945.

[4] Statutes of International Court of Justice 1945.

European legal landscape. In that vein, the sources of ECOWAS law will be discussed from the authoritative rather than from the historical perspective.

2.2 Sources of ECOWAS Law

The sources of ECOWAS law include the Revised Treaty of 1993, protocols, convention, supplementary act, decisions and regulation. They also include subsidiary legal instruments, Article 38 of the Statutes of International Court of Justice, as well as opinions, recommendation and directives of the institutions of ECOWAS. Therefore, these listed sources are treated, in detail, below.

2.2.1 ECOWAS Revised Treaty

The Revised Treaty was signed by the Presidents, Prime Ministers and Heads of State of 16[5] countries of West Africa in 1993. It contains 93 articles: some of which are establishment articles, some border on the various forms of co-operation,[6] which are intended to exist among Member States. Importantly, the Treaty provides that protocols shall have the same weight of legal force[7] as the Revised Treaty of 1993. Its status as a source of law has never been in doubt; in fact, the Community Court had stated, in one case, that the Treaty is one of the applicable texts.[8] That means it is an instrument that could be relied on or applied in a case before the Community Court.

It must be noted that the ECOWAS Treaty of 1975 was the applicable law, until it was revised in 1993. In other words, when did the Treaty of 1975 cease to be the law or when did it complete its cycle under the ECOWAS law? The answer to this question would be located not in the ECOWAS Treaty of 1975 but in the transitional and saving provisions of the ECOWAS Revised Treaty.[9] Article 92 paragraph 2 provides that 'The ECOWAS Treaty of 1975 shall be deemed terminated when the Executive Secretariat has received instruments of ratification of this Revised Treaty from all Member States. The Executive Secretary shall notify the Member States in writing thereof'. Inversely, the 1975 Treaty would not had been deemed terminated until all the Member States had sent in their instruments of ratification and the sent instrument had been received by the Executive Secretariat.

[5] Islamic Republic of Mauritania withdrew her membership in 2000.

[6] Co-operation in Food: Arts 6–24; in Science: Arts 26–28; in Environment: Arts 29–31; etc.

[7] Art 1 para 18 Revised Treaty.

[8] Mousa Leo keita v state of Mali 2007, p. 72; Professor Essien v Republic of Gambia 2007, p. 102, Karaou v The Republic of Niger 2007, p. 227.

[9] 1993.

At one point, at least in principle, the ECOWAS Treaty of 1975 and the ECOWAS Revised Treaty[10] must have co-existed, even if they were not coterminous. This reasoning finds ground in reading Article 89 together with Article 92(2). The first article[11] provides when the ECOWAS Revised Treaty would have come into force, that is, upon ratification by at least nine signatory States, in accordance with the constitutional procedures of each signatory State. As soon as nine Member States had ratified, the Revised Treaty came into force. After it had come into force and the entire Member States have not sent their instruments of ratification, and even if they had been sent but had not been received by the Executive Secretary, what then could be the status of the Treaty of 1975? Article 92 paragraph 1[12] shows a clue: "upon the entry into force of this Revised Treaty in accordance with the provisions of Article 89, the provisions of the United Nations Vienna Convention on the Law of Treaties shall apply to the determination of the rights and obligations of the member states under the 1975 ECOWAS Treaty and this Revised Treaty". Therefore, had there been any discrepancy on rights and obligations between the time the Revised Treaty came into force and the time the 1975 Treaty was completing its cycle, be it concrete or academic, it could have been resolved by applying relevant provisions of the United Nations Convention on the Law of Treaties.

2.2.2 Protocol

The diversity of meaning attached to the word "protocol" can be seen in legal literature as well as in legal texts. Irrespective of whether it is technically wrong, some legal texts have employed terms like treaty, convention, protocol and sometimes agreement in a coterminous pattern. Often, it is the effect and not the title that counts in the eyes of international law.[13] Generally, a protocol could be taken as the first or original version of an agreement, especially a treaty between countries,[14] or an extra part added to an agreement or treaty.[15] But for the purpose of this study, a protocol means an instrument of implementation of the Treaty having the same legal force as the latter.[16] Additionally, it had been noted elsewhere[17] that the meaning of Treaty as contained in some ECOWAS instruments includes protocols, convention and, in one case, annexure.

[10] Ibid.

[11] Art. 89 Revised Treaty.

[12] Revised Treaty (transitional and savings provision).

[13] Study generally the United Nation Convention on the Law of Treaties.

[14] Hornby (2001), p. 938.

[15] *Ibid*.

[16] Art 1 Revised Treaty 1993.

[17] See introduction.

Therefore, protocol has a special status comparatively in that it has been described as an instrument of ECOWAS that has the same legal force as the Treaty.[18] Automatically, it is a source of law under the ECOWAS legal regime. The Community Court of Justice relied on a supplementary protocol[19] to confirm its jurisdiction to entertain individual application where the local remedy had not been exhausted.[20] It also admitted an applicant[21] to be a person, with right to sue, placing reliance on a protocol bordering on good governance. There has been a situation where the Court had to clear grey areas lying between provisions found in two equivalent protocols.[22]

It is not very clear how the Community Court would react when it is invoked to interpret the provision of any protocol that is not expressly in symmetry with any provision of the ECOWAS Revised Treaty. It seems that the energy would be directed towards achieving the objects of co-operation and integration rather than weighing their superiority. Any argument that the Court ought to disapply the protocol even where it can flesh out slimmer provisions of the Revised Treaty would never agree with the spirit of the law. In clear terms, the draftsmen intended that the ECOWAS Revised Treaty should function at *par* with the other protocols; otherwise, they wouldn't have included "protocol means an instrument of implementation of the Treaty having the same legal force as the later"[23] in the text.[24]

Furthermore, in one case[25] the Court was given an opportunity to consider rights to free movement of persons which are enshrined in the Protocol on Free Movement of Persons and Residence and Establishment. Painfully, the Community Court sloughed off jurisdiction on the ground of right of access. By the decision[26] of the Community Court, any protocol made by the ECOWAS Community in pursuit of its integration goal shall be applied. In another matter,[27] the Community Court clothed itself with jurisdiction to hear an application based on the provision of Articles 9(4) and 10(d) of the Protocol relating to the Court.

However, it must be stated that a protocol may not be successfully relied upon if there is any condition precedent that the party seeking reliance had not satisfied. A good example would be the provision of Article 9(6) of Supplementary Protocol

[18] Art 1 Treaty.

[19] Supplementary Protocol A/SP.1/01/05.

[20] Femi Falana & anor. V Republic of Benin &14 ors 2010, p. 113, Musa Saidy Khan v Republic of Gambia 2009, p. 58.

[21] CNDD v Cote d'Ivoire 2009, p. 311.

[22] Art 39 Protocol A/SP1/12/01 and Art 10(d) Supplementary Protocol. A/SP.1/01/05; Musa Saidykhan 2009.

[23] Art. 1 Treaty.

[24] *Ibid.*

[25] Olajide Afolabi v Federal Government of Nigeria 2004, p. 77.

[26] Mousa Leo keita case 2007, p. 72.

[27] Hissence Habre v Republic of Senegal (unreported) 2010, p. 35.

Relating to the Community Court,[28] which gives the Court the jurisdiction to adjudicate on contractual issues where the parties provide, in an agreement, that the Court shall settle disputes arising from the agreement. If the agreement between the parties does not provide for submission to the Court's jurisdiction, it is very likely that it would decline jurisdiction.[29]

In summary, the ECOWAS legal history is replete with cases where the Community Court applied protocols as a source of law: when the ECOWAS Executive Secretary invoked the interpretative jurisdiction of the Court,[30] the Community Court carefully, in giving its advisory opinion, considered the provision of the Protocol Relating to the Parliament of the Community. Even in Odafe case,[31] the Community Court showed that a protocol is a good source of law, when it considered the effect of Article 10 paragraph C of the Supplementary Protocol Relating to the Court and declined jurisdiction to entertain an action which challenged certain acts of the Council of Ministers. In an attempt to clarify procedural steps litigants must take, in order to bring an acceptable application before it, the Court was compelled to refer to Article 11 of a Protocol[32] in pointing out procedural error in the processes[33] filed.

Again, Ugokwe case[34] was another opportunity for the Court to explain certain unclear provisions found in a protocol. In another case,[35] the Court applied provisions of a supplementary protocol in rejecting the defendant's argument that it should declare that the plaintiff's case was statute barred. In many other cases, the Court had either applied, interpreted or declined to apply provisions of different protocols, and in situations where the Court did decline, the summary of the reasons, given in or inferred from the judgments, has always been that, considering the circumstances of the case, it would not be proper in law to apply them and not that they did not constitute a source of ECOWAS law.

2.2.3 Convention

There appeared to be more protocols than conventions, or, better framed, there seemed to be more instruments characterised as protocols than conventions, at least in the first 35 years of the existence of ECOWAS. The Treaty[36] deemed it necessary

[28] A/SP.1/01/05.

[29] Linas International Nigeria Limited 2009, p. 280.

[30] Request for Advisory Opinion 2005, p. 60.

[31] Odafe Oserada V ECOWAS Council of Ministers 2008, p. 176.

[32] Protocol A/P1./7/91.

[33] Lijadu Oyemade (No 3) 2008, p. 93.

[34] Ugokwe v Federal Republic of Nigeria 2005, p. 49.

[35] Djotbayi Talbia & 14 or V Fed Rep.Nigeria 2009, pp. 268–269.

[36] Treaty.

to define what Treaty and protocols are.[37] For some unclear reasons, the draftsmen did not save the Community the trouble of searching elsewhere for the meaning of "convention". Since the Treaty has failed to explain what a convention is, the option would be to locate it elsewhere. Ordinarily, a convention is "an official agreement between countries or leaders, an example would be the United Nations Convention on the Rights of the Child".[38] In the eyes of ECOWAS law, a convention is part of the ECOWAS Revised Treaty. The Protocol of 1991,[39] which relates to the Community Court, defined Treaty in these following words: "Treaty" means the Revised Treaty of the Economic Community of West African States and includes protocols and conventions annexed thereto. This definition included convention as part of the Treaty but in an ambiguous manner. It attaches a condition which can invite interpretative confusion. The phrase "includes protocols and conventions annexed thereto" needs to be understood. Is the phrase "annexed thereto" qualifying or relating to both protocol and convention or relating, only, to convention? Whether it relates to one or both texts, the literal interpretation would be that one or both will only be part of the Treaty if one or both texts are annexed to the Treaty.

But the legal meaning of protocol, at least, under ECOWAS legal regime has been defined in the Treaty.[40] It has been considered as an instrument of implementation of the parent Treaty, which in itself has the same legal force as the Treaty. From the definition, it is evident that a protocol should not be an annexure, before it can share similar force with the Treaty. It may appear that "annexed thereto" relates, considering it was not defined in the Treaty,[41] only, to convention. But this argument can be faulted with some ease; this is because there is a clearer definition elsewhere.[42] The rules of the judicial organ of the Community, in its wisdom, ended the controversy by enlarging what the Treaty means in these concise terms: "The Revised Treaty of the Economic Community of West African States includes protocol and conventions and annexure". This definition is larger and less ambiguous.

Two legal lessons are derived from this expostulation: first, that a convention is an instrument of a high nature and, second, that putting all the definitions together it would be concluded that a convention should not be annexed to a treaty for it to be part of the Revised Treaty of 1993. Convention therefore is a source of law under the ECOWAS jurisprudence. The Court is therefore enjoined to apply or be strongly guided by the definition found in its Rules, assuming the secondary

[37] Art 1 Treaty.

[38] Hornby (2001), p. 252.

[39] Protocol A/P.1/7/91 Relating to the Community Court.

[40] Art 1 para 18 Revised Treaty.

[41] Art. 1 Revised Treaty.

[42] Rules of the Court 2002.

process[43] of interpretation ever arises. Examples of some of the applicable conventions are Convention Relating to Inter States Road Transit of Good[44] and Convention[45] Regulating Interstate Road Transport between ECOWAS Member States.

2.2.4 Supplementary Acts

The Revised Treaty,[46] protocols and convention are not the only instruments that could be used in making or amending existing laws; the Community may also employ the instrument of supplementary act to piece together its policies or amend an existing law. A supplementary act, normally, would enter into force after publication by the Commission on a date specified in that instrument.[47] It must be noted that the idea of using or introducing acts[48] either to create new rules or to amend existing laws[49] is laudable. It is pleasing to know that the Community[50] is beginning to take strategic steps to improve on its decision-making process. It may be the opinion of ECOWAS that by virtue of the change in the form of instruments of law making, the principles of supranationality would become more prominent.[51] Contrastingly, this opinion does not hold sway because the steps only attack the delay element in the old requirement of ratification and will hardly introduce any requisite supranational component into the legal regime of the Community. The idea of renaming law-making instruments[52] and removing the hurdle of ratification cannot make ECOWAS law supranational. Nonetheless, convention is still a source of ECOWAS law.

2.2.5 Decisions

Article 9[53] provides that the Authority shall act by decisions; and Authority, here, means Heads of State and Government of the Member States.[54] The

[43] Executive Secretary of ECOWAS v Tokunbo Lijadu Oyemade 2008, p. 116.
[44] A/P4/5/82.
[45] A/P2/5/82.
[46] Revised Treaty.
[47] Art. 2(2) Supplementary Protocol A/SP.1/06/06.
[48] Supplementary Act A/SA.3/01/10.
[49] Art 9 of Revised Treaty was amended by Supplementary Act.
[50] ECOWAS Newsletter.
[51] Ibid.
[52] Supplementary Act A/SA.5/01/07; Supplementary Act A/SA.2/01/07; Supplementary Act A/SA.4/01/07.
[53] Art. 1 para. 2 Revised Treaty.
[54] Art. 7 Revised Treaty.

Treaty,[55] having established this organ, elevated it to the lofty status of a 'supreme institution' in the institutional architecture of the Community.[56] The Authority is responsible for the general direction and control of the Community.[57] The result of their conclusions shall be in the form of decision; this instrument is intended to have force and is crafted to bind Member States as well as the institutions of the Community.[58] Unfortunately, its applicability appears suspect because of the absence of supranational governance or alternative effective governance model in the Community.

However, decision as a law-making instrument attracted some special treatment prior to the 2006 significant amendment.[59] For instance, Article 7 (6)[60] provided that "such decision shall automatically enter into force sixty (60) days after the date of their publication in the official journal of the Community". The effect of that provision[61] was that the usual requirement for "ratification and deposition of ratified instrument with depository before it would have entered into force" was not needful. It also meant that "eight-state requirement",[62] introduced by the Revised Treaty, did not relate to decision of the Heads of State. However, by virtue of the 2006 amendment, a decision, now, shall be communicated to the person designated therein and shall enter into effect on the date of notification; consequently, the sixty-day rule has become spent. Article 9(6)[63] has introduced the rule of "automatic force", which would save the Community the delay associated with ratification. This rule of "automatic force" may not be the same with the direct effect principle that has been part of the European Union law.[64] Automatic force rule deals with the entry into force of an instrument without the need of ratification by Member States, while direct effect principle relates to reliance, by a citizen, on a regional law provision before a national court even where the law has not been incorporated in a local legislation.

It is expected that the Court, when it is availed of the further opportunities in the future, would hold that ECOWAS instruments can be relied upon by individuals before their national courts. But in contrast to European Court's attitude,[65] the Community Court of Justice seems to act[66] with so much caution in the face of

[55] *Ibid.*

[56] *Ibid.*

[57] Art 9 para. 4 Treaty.

[58] *Ibid.*

[59] See generally Supplementary Protocol A/SP.1/06/06.

[60] *Ibid.*

[61] *Ibid.*

[62] Art. 89 Treaty as amended by Supplementary Protocol A/SP.1/06/06.

[63] Revised Treaty.

[64] Defrenne V Sabenna 1976 Pp. 474–475.

[65] *Ibid.*

[66] Peter David V Ambassador Uwechue 2010, p. 134.

recondite issues. However, in Pinheiro,[67] the Court hinted that national courts have competence to apply Community law that makes up their internal legal order. Nonetheless, decisions are a source of law and can be relied upon as such.

2.2.6 Regulation

Regarding institutional architecture, the Treaty[68] created the Council of Ministers of the Community. This Council comprises the Ministers from the Member States who are in charge of ECOWAS affairs, in their various countries, and any other Minister from the Member States.[69] The Council's duties are numerous, ranging from making recommendation[70] to the Authority, appointing statutory appointees[71] except the President of the Commission, approving work programmes,[72] requesting the advisory opinion of the Community Court[73] to carrying out all other functions assigned to it under the Treaty.[74] In performance of these and other decision-making functions, the Council is expected to employ the instrument of regulation.

The law which provides that the Council shall act[75] by regulations also states how regulation can come into force and bind institutions under its authority. For a regulation to bind an institution it must be adopted, depending on the subject matter under consideration, by unanimity, consensus or a two thirds majority of the Member States.[76] While regulation binds the institutions, it does not bind the Member States instantly; it must receive certain kind of approval from appropriate Authority.[77] This limitation is clearly embodied in the law[78] in the following wording: "They shall be binding on Member States after their approval by the Authority".[79] Consequently, all regulations emanating from the Council of Minister which have not received the Authority's approval can only be a source of law with regard to matters among the institutions. Inferentially, a Member State would not invoke the Community Court to decide an issue based on any provision found in

[67] Pinheiro v Republic of Ghana 2012, p. 10.
[68] Art. 10 (1) Revised Treaty.
[69] Art. 10 (2) Revised Treaty.
[70] Art. 10 (3)(a) Revised Treaty.
[71] Art. 10 (3)(b) Revised Treaty.
[72] Art. 10 (3)(g) Revised Treaty.
[73] Art. 10 (3)(h) Treaty.
[74] Art. 10 (3)(i) Treaty.
[75] Art 12 (1) Treaty.
[76] *Ibid.,* 12(2).
[77] Art 12 (3) Treaty.
[78] *Ibid.*
[79] Authority here refers to Heads of State: Art 7(1).

such regulation against another Member State. Where the regulation is approved by the Authority, it becomes generally binding on the institutions and Member States.

Since regulations, whether approved or not, can bind institutions, an individual could rely on their provision in matters against the institutions of the Community—especially where the cause of action is premised on violation of rights. Furthermore, there exists an exception to this rule of "binding after approval". A regulation may be binding even though it had not been approved by the Authority if the regulation is made pursuant to a delegation of powers by Authority in accordance with Article 7(3) (f) of the Treaty.

With reference to publication, entry into force and conditions, before the 2006 amendment, the Treaty[80] provided that the same timeline and conditions that guide a "decision" should govern "regulations". That means that the President of the Commission should publish the regulations thirty (30) days after the date of their signature by the chairman of the Council.[81] The regulation would automatically come into force sixty (60) days after the date of publication only where it relates to the institutions under the Council.[82] But it will bind all the Member States only when the Authority had given its approval[83] and had published it in the official Journal of the Community.[84]

However, the law has been modified regarding the provision on "entry into force" by the 2006 amendment; the current position of the law is that a regulation will enter into force after publication by the Commission on a date specified therein;[85] therefore, the sixty-day rule has been removed from the law, while the other provisions discussed above remain. The Member States should also publish the regulation in the national gazette within the period stipulated in Article 9(6) of the Treaty.[86] It must be noted that it is the publication made by the Community in its journal that causes the regulation to enter into force and not the publication made by the Member States in their various national gazettes.

On the status of regulation as a source of law, the Community Court has had various opportunities to determine cases before it based on this form of instrument. In one case,[87] the Court was urged to treat a certain Regulation[88] as illegal since it allocated the office of the Secretary General of the Community Parliament to Guinea; the application failed because the party did not establish that there exists a sufficiently direct relationship of cause and effect.[89] Conclusively, Member

[80] Art 12(4) Revised Treaty.
[81] Art 9(5).
[82] Art 12(3).
[83] Ibid.
[84] Art 9(6).
[85] Article 2(2) Supplementary Protocol A/SP.1/06/06.
[86] Treaty.
[87] Oserada v ECOWAS Council of Ministers 2008, p. 176.
[88] C/REG.5/06/06.
[89] Oserada case 2008, p. 177.

States, institutions and, maybe, individuals can rely on the provisions of regulations before the Community Court of Justice.

2.2.7 *Directives, Recommendation and Opinion*

Under the new legal regime of ECOWAS, the Community acts would include directives, recommendations and opinions.[90] Having been included as Community acts, invariably they would qualify as sources of Community law. Under the Revised Treaty, the Authority of Heads of State is empowered to give directives,[91] while the Council of Ministers is authorised to make recommendations.[92] The powers to issue directives can be exercised by the Council of Ministers where such powers have been delegated to them by the Authority of Heads of State.[93] Both the Authority of Heads of State[94] and the Council of Ministers[95] are vested with powers to request the Community Court to give advisory opinion on any legal question. The Court has been empowered to give, in an advisory capacity, legal opinion on questions pertaining to the Revised Treaty.[96]

All opinions given by the Community Court in that capacity will qualify as source of law. In one case,[97] the Court seised jurisdiction to give opinion on conformity of a provision of a rule with a provision of a protocol. But it should be observed, from the law, that the powers of the Court to give legal opinion under the Protocol[98] relates only to the Treaty, while the powers, provided under the Revised Treaty, to refer questions either by the Council of Ministers or Authority of the Heads of State to the Community Court extend to any legal question.[99] This phrase is broader and could overlap with any Community text, contract or law so long as it is a legal question and has connection to the Community. To limit the power of giving legal opinion, in advisory capacity to the Treaty, would be restrictive and retrogressive; the better view would be that the Community Court can give its opinion on any legal question so long as it has jurisdiction to hear the case in respect of which its opinion is sought.

[90] ECOWAS Newsletter.

[91] Art. 7 (3) (a) Revised Treaty 1993.

[92] See generally the functions of the Council: Art 10(3) a–i Revised Treaty.

[93] *Ibid*., (c).

[94] Art 7(3) h Revised Treaty 1993.

[95] Art 10 (3) h Revised Treaty.

[96] Art 11(1) Protocol A/P.1/7/91.

[97] Request for Advisory Opinion 2005, p. 55.

[98] Art 11 (1) Protocol A/P.1/7/91 as amended.

[99] See Art 10(3) h and Art 7(3)(h) Revised Treaty.

However, it would be helpful if the opinion on legal question should be extended to other international agreements[100] in which the Community is a party. Practically, there are legal authorities upon which the Court could interpret such international agreement. In Ugokwe case,[101] for instance, the Community Court confirmed that it could apply sources of international law through the vent of Article 38(1) of the Statute of International Court of Justice. Consequently, it may be within its jurisdiction to give its opinion, when it is sought, regarding international agreement, provided that the parties, approaching the Court, satisfy the requirements of jurisdiction and right of access to court as provided under Articles 9 and 10 of the Supplementary Protocol Relating to the Court.

Under the Protocol,[102] the legal persons permitted to request the legal opinions of the Community Court regarding any issue pertaining to the Revised Treaty are broader: the Authority of the Heads of State, Council of Ministers, one or more Member States, or the President of the Commission, and any other institution of the Community, while, as has been stated earlier, the Revised Treaty limited the persons who can seek opinion, on all legal questions, to the Authority and Council of Ministers.

The inconsistency in language, found in these laws, regarding whether the Court can give its legal opinion on all legal questions irrespective of the parties may be a mere draftsmen error. However, this form of disparity can be resolved by interpretation, and the approach to be employed by the Community Court would depend on the objectives which it intends to achieve. In pursuit of its objective, for instance, the European Court of Justice (as it then was) in Van Gend en Loos[103] was believed to have been influenced by *une certain idée de l'Europe* (a particular idea of Europe) when it extended the enforcement of the provisions of the Community law, in national courts, to individuals.

In reference to directive, the law has enlisted it as part of the Community acts; therefore, it ought to come under the gamut of source of law in the ECOWAS legal order. However, it is helpful to understand that directives, generally, can pose difficulty in regard to application within an economic community.[104] This is because a directive is often an instructional instrument given by a community to the parties to the economic community agreement to implement different aspects of the integration policy of the community or union. Often, it does not vest rights in citizens of the community. Nonetheless, the community rights of the citizens may be affected where a party's (state's) failure to implement the policy directives deprives the citizens of the benefits which could have accrued to them had the party implemented the policy directives. Under European Union jurisdiction, this difficulty may be resolved by the principle of indirect effect; regrettably, such principle is not in existence under ECOWAS law.

[100] For instance, Economic Partnership Agreement 2010.

[101] 2005, p. 50.

[102] Art 11 (1) Protocol A/P.1/7/91.

[103] Van Gend en loos v Nederlandse Administrate der Belastingen, p. 16.

[104] Van Duyn v Home Office 1974, p. 1349.

2.2.8 Subsidiary Legal Instruments

The Protocol[105] Relating to the Community Court of Justice provides that the Court[106] has competence to adjudicate on any dispute relating to "the interpretation and application of the regulations, directives, decision and other subsidiary legal instruments adopted by ECOWAS". It would, therefore, be contradictory to argue that subsidiary legal instruments are not a source of law[107] under the ECOWAS legal regime. However, the Protocol[108] did not explain or list what constitutes subsidiary legal instruments. But it should be assuaging to know that community laws, though *sui generis*, have some form of similarities with international law, and under the latter, subsidiary legal instruments might include soft laws like resolution. It may then mean that resolution will constitute subsidiary legal instrument under the ECOWAS law. However, most resolutions do not have the character of other binding instruments, but it is possible to have some that are binding. A good example is the class of the resolutions passed at meetings of the United Nations Security Council.[109] If resolution will pass for a subsidiary legal instrument, it then means that the resolutions on the implementation of the programmes of the Higher Committee on Land Transport[110] done at Banjul by the Council and on the reduction of the number of road check points in ECOWAS Member States[111] done at Banjul in 1990 constitute source of ECOWAS law.

While the Community Court would be disposed to apply any legal instrument adopted by the institutions of the Community,[112] it is not yet clear how national courts would treat such subsidiary instrument in the course of exercising their jurisdictional powers. However, the Community Court should lead the cause and hew paths which the national courts should follow as to the application of such subsidiary legal instruments.

2.2.9 Article 38 of the Statutes of International Court of Justice

Article 38 summarily shows which body of laws an international court or tribunal should apply in the performance of its determinative function. The court is required

[105] Art 9 (b) Protocol (A/P1/7/91) as amended by Art 3 Supplementary Protocol 2005.
[106] Community Court of Justice, (ECOWAS).
[107] Art 9(1)(c) Supplementary Protocol 2005.
[108] *Ibid.*
[109] Abc of International Law, p. 32.
[110] C/RES.1/12/88.
[111] C/RES.4/5/90.
[112] Mousa Leo Keita v State of Mali 2007, p. 72.

to apply international covenants,[113] international customs,[114] general principles of law recognised by civilised nations,[115] judicial decisions and the teaching of most highly qualified publicists.[116] Through this opening, a court can apply different International laws, principles embedded in national laws, thoughts of international law experts,[117] international customs and judicial decisions. The draftsmen of the Protocol[118] Relating to the Community Court incorporated this vent when it empowered the Community Court to apply Article 38 of the Statute of International Court Justice. The draftsmen, in choosing their words, did not opt for a term like "may", which creates a discretionary effect; rather, they employed the word "shall", which normally creates a perfunctory effect.

At this point, it may be asked whether the phrase "as necessary" has any inhibiting or expansive effect on the ease and degree of application of the provisions of Article 38. The exact wording used by the draftsmen is reproduced here for clarity:[119] 'it shall also apply, as necessary, the body of laws as contained in Article 38 of the Statutes of the International Court of Justice'. Given this rendition, does 'as necessary' mean the application of international law rules and principles where there is a lacuna[120] in the ECOWAS texts? If it does, should the Court use the vent to apply international and foreign (national) principles without searching, first, the case vault of the Member States for equivalent provisions? A lacuna ordinarily refers to a place where something is missing in a piece of writing, in an idea or a theory, etc.[121] Using Oyemade as an example, could it be said that in all the laws of the Member States, there exists no legal provision for the protection of rights warranting the importation of such principles from foreign jurisdiction through Article 38? Assuming, just for emphasis, that the matter had been decided under the old Article 9,[122] which provided that the Court of Justice should observe the principles of equity and law in the interpretation and application of the provision of the Treaty, could it have justified the importation of principles from foreign jurisdiction? The word used in that article was "observe", which meant contextually to obey rules, laws, etc.[123]

Taking it together with Article 38 of ICJ, the Court could have observed laws and principles of equity found in the legal systems of the Member States of the Community. Albeit, the matter was decided under the new Articles 9 and 10, so the

[113] Art 38(1)(a) Statutes of ICJ.
[114] *Ibid.,* (b).
[115] *Ibid.,* (c).
[116] *Ibid.,* (d).
[117] A publicist.
[118] Art 20 A/P1./7/91 (now 21) as amended by (A/SP.1/01/05).
[119] Art 21 Protocol Relating the Community.
[120] Falana (2010), p. 14.
[121] Hornby (2001), p. 661.
[122] Protocol A/P1/7/91.
[123] Hornby (2001), p. 805.

Court could have relied on Article 38 of ICJ to import principles from the legal systems of the Member States as it did in Falana case.[124] This patriotic and inward-looking approach breeds growth of community laws; for instance, the German principle of proportionality had been appropriated generously by the Court of Justice of the European Union.[125] Therefore, the Court is encouraged to reckon, always, that the Member States of ECOWAS do have developed legal systems; the store of decisions in these systems contains legal principles which could cater for the adjudicatory needs of the Court.

Returning to the exact interpretation to be given to "as necessary" in Articles 21,[126] it seems that the Court should put into account the laws of interpretation of treaties. A good source of these laws would be the Vienna Convention[127] on the Law of Treaties. The Convention provides[128] that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It seems that applying this interpretative rule would only encourage a court to construct legal provisions in such a way that the purpose of the law being interpreted would be achieved.

The purpose of ECOWAS is to create and promote economic integration in West Africa, and to foster relations among Member States with a view to raising the living standards of the people and to contribute to the progress and development of the African continent.[129] It is obvious from the wording of Article 3 that it is all about growth in West Africa. So the laws that would guide these progressive steps ought to be fashioned in a particular way. It should always be the kind of laws that fit the Sub-region, unless an application of an international rule or principle from foreign civilised countries becomes inevitable.

When would the application of an international rule or foreign principle become inevitable? A good example would be where two or more Member States are parties to a particular or general treaty of international nature, which may have a link to or be connected with an ECOWAS text, and there appears to be a dispute as to its application within West Africa and one of the Member States, based on agreement, decides to bring an action in the Community Court rather than in other international forums. In carrying out its adjudicative role, in such situation, the Community Court of Justice would inevitably rely on such international treaty or on any of the principles from the civilised nations involved in the transaction. The Court should use the vehicle of Article 38,[130] in such circumstance, to import foreign principles from civilised nations or international rules.

---

[124] Falana v The Republic of Benin 2012, p. 15.

[125] Internationale Handelsgesellschaft 1970, pp. 1129–1130.

[126] Protocol A/SP.1/01/05.

[127] 1969.

[128] Article 31.

[129] Art 3 Revised Treaty.

[130] Statutes of ICJ 1945.

Furthermore, it has been suggested that the phrase "as necessary" means "what you know you need (to do)"[131] or "according to what is needed".[132] Should the Court elect to apply this, the net effect of Article 21 would be that the Court shall apply, when it is needful or when it is needed, the body of laws as contained in Article 38 of the Statutes. When exactly will it be needful to use Article 38 to import international law norms or principles from civilised nations? Pursuant to the points raised above, international law norms may be applied when there is a lacuna which cannot be filled by the principles derived from the Member States or the issues before Court have an international dimension or connection or their determination would have a global effect or they could be better resolved, because of the nature of the legal subject, by applying international law norms, while foreign law should only be used when no equivalent principles exist in the laws of the Member States.

2.3 Classification of Laws

ECOWAS law has been classified into primary and derived sources. However, in this segment, other forms of classifications will be employed in order to place all applicable laws within appropriate blocks. Specifically, the laws will be considered from autochthonous and non-autochthonous perspective; as well as from judicial and text attempt at classification of the ECOWAS body of laws.

2.3.1 Primary and Derived Sources

The ECOWAS sources of laws have been classified into primary and derived sources.[133] According to the proponents of this act of classification, primary sources include (a) the Revised Treaty, (b) protocols and (c) conventions, while derived sources include (a) regulations, (b) directives, (c) decisions, (d) declaration, (e) rules, (f) recommendation, (g) opinions. It is welcoming to see that attempts have been made at developing the ECOWAS law. However, it is not very clear how to classify all these laws that could be applied in the Community Court through the vent of Article 38[134] should this two-way classification approach be adopted. It does not appear that the proponents would find space under the umbrella of primary sources; therefore, they would be tempted to drop them with the "derived sources".

Again, the Court also applies the African Charter on Human and Peoples' Rights. To subsume this international legal instrument under primary or derivative

[131] Word Reference.

[132] Word Reference.

[133] Falana (2010), p. 9.

[134] Statutes of International Court of Justice 1945.

source would require a great deal of explanation. It is the opinion of the writer that placing international law conventions, customs, laws of civilised nations, judicial decision and the African Charter on Human and Peoples' Rights under a different umbrella would help prospective students of ECOWAS law, as well as practitioners in ECOWAS jurisdiction.

2.3.2 Classification According to Origin

It may also be helpful, especially for students of ECOWAS law, to classify the law in terms of the origin of the law. Such classification would result in the division of the sources along autochthonous and non- autochthonous lines.

2.3.2.1 Autochthonous Sources

By this kind of classification, reference is made to all the sources of ECOWAS law derived from instruments of the Economic Community of West African States, namely (a) the Revised Treaty, (b) convention, (c) supplementary acts, (d) protocol, (e) regulation, (f) decision, (g) other subsidiary legislation and (h) judgment of the Community Court.

2.3.2.2 Non-autochthonous Sources

Within this bracket, one finds the following laws made applicable through Article 38 of the Statutes of ICJ: (a) general principles of law recognised by civilised nations, (b) judicial decisions and opinion of publicists, (c) international conventions, (d) custom of international law. Also in this bracket is (e) the African Charter on Human and People's Rights,[135] which was made by the African Union and could be applied without having recourse to Article 38 of the Statutes of ICJ.

These sources of law, though applicable, did not originate from the Economic Community of West African States and its jurisdiction. It will be recalled that the African Charter on Human and Peoples' Rights is an African Union text, created as a new human right instrument for all Africans by Africans. None of these laws was made by the institutions of the Economic Community of West African States. The first part, that is (a)–(d), consisted of international law provisions,[136] while the second is an African Union instrument.[137]

[135] 1981.

[136] Article 38 Statutes of International Court of Justice 1945.

[137] 1981.

2.3.3 Legal Texts and Judicial Attempts at Classification

An academic approach to unveiling classification could be to look at the laws governing the subject to see if the draftsmen expressly, impliedly or unconsciously classified or attempted to classify the law. Sometimes a court may in listing laws in any of its judgment[138] make an attempt at classification or in some situation classify the body of laws intentionally. For the purpose of explanation, judicial attempt at classification will be treated first.

2.3.3.1 Judicial Attempt at Classification

In Mousa's case,[139] the Court stated: "as regards material competence, the applicable texts are those produced by the community for the needs of its functioning towards economic integration: (a) The Revised Treaty (b) Protocol (c) Convention and (d) Subsidiary legal instruments adopted by the highest authorities of ECOWAS". All the laws under this entry originated from ECOWAS; the division is seen by the employment of the disjunctive article "AND", which demarcates the principal laws from subsidiary instruments. This appears as a demonstration intended to separate a particular class of laws from subsidiary legal instruments.

2.3.3.2 Legal Text Classification

Attempts at classification could be inferred from studying Article 9 of the Supplementary Protocol[140] The instrument did not, in any way, state that the division or segmentation in the article was done for classification purpose. However, it gives a reader clues as to the mindset of the draftsmen. It reads:[141] The Court has competence to adjudicate on any dispute relating to the following: "*Interpretation and application of Treaty, convention and protocols of the Community*". By virtue of this segmentation, it has grouped these instruments together. In paragraph (b), it reads thus: "The interpretation and application of the regulations, directives, decisions…" This is another grouping showing separation from the first grouping. In the same paragraph[142] it continues: "and other subsidiary legal instruments adopted by ECOWAS". From this article,[143] it would be seen that the draftsmen grouped the sources of law into three, namely (a) treaty, convention and protocols; (b) regulations, directives, decision; and (c) other subsidiary legal instruments

[138] Mousa Leo Keita v states of Mali 2007, p. 72.
[139] *Ibid.*
[140] (A/SP.1/01/05).
[141] Article 9.
[142] *Ibid.,* Paragraph 13.
[143] Article 9.

adopted by ECOWAS. Note, however, that this classification, in some respect, tallies with the listing made by the Community Court in Mousa[144] case.

2.4 Conclusion

In summary, this chapter did examine different legal instruments, ranging from the Revised Treaty, protocols, decisions, conventions, regulations, acts to subsidiary legal instruments that are applicable within the ECOWAS legal order. It is not doubtful that the judgments of the Community Court of Justice ECOWAS constitute source of law within the Community legal order, for the Court is always inclined to depend on its previous decisions[145] even though there is no clear establishment of the doctrine of judicial precedent. If the Court could rely on decisions of international tribunals through the vehicle of Article 38 of the Statutes of the International Court of Justice, how much more its own decisions? Of course, when the Court gives opinion at the instance of any of the institutions, such opinion constitutes a source of law. Finally, this chapter also captured different attempts at classification of ECOWAS law.

References

Laws

African Charter on Human and Peoples Right 1981
Convention A/P2/5/82 Regulating Interstate Road Transport between ECOWAS Member States
Convention A/P4/5/82 Relating to Inter State Road Transit of Goods Protocol A/SP1/12/01 on Democracy and Good Governance
Protocol A/P.1/7/91 Relating to the Community Court of Justice
Regulation C/REG.5/06/06 by the Council of Ministers Allocating the Post of Secretary General of the ECOWAS Parliament to Guinea
Resolution C/RES1/2/88 on Implementation of the Programmes of the Higher Committee on Land Transport
Resolution C/RES.4/5/90 on the Reduction of the Number of Road Check Points in ECOWAS Member States
Revised Treaty of the Economic Community of West African States 1993
Statutes of International Court of Justice 1945
Supplementary Act A/SA.3/01/10 Amending the Revised Treaty
Supplementary Act A/SA.2/01/07 on Access and Interconnection in Respect of ICT Sector
Supplementary Act A/SA.5/01/07 on the Management of the Radio- Frequency Spectrum
Supplementary Act A/SA.4/01/07 on Numbering Plan Management

[144] *2007*, p. 72.

[145] Tidjanni v Federal Republic of Nigeria 2007, p. 84.

Supplementary Protocol A/SP.1/01/05 Amending Protocol. Protocol A/P.1/7/91 Relating to the Community Court of Justice
Supplementary Protocol A/SP.1/06/06 Amending the Revised Treaty
Vienna Convention on Law of Treaties 1969

Cases

Djot Bayi & 14Ors v Federal Republic of Nigeria7 4Ors (2004–2009) CCJELR 268
Executive Secretary of ECOWAS v Mrs Tokunbo Lijadu Oyemade (No 4) (2008) CCJLR (PT1) 116
Femi Falana & anor. v Republic of Benin & 14 ors (2010) CCJLR (PT3) 113
Femi Falana & anor v The Republic of Benin & 2 Others ECW/CCJ/JUD/02/12, 24/1/2012 via www.courtecowas/site/pdf 2012. Accessed 21 March 2014
Hadijatou Mani Karaou v The Republic of Niger (2004–2009) CCJELR 227
Hissence Habre v Republic of Senegal May 2010 (Unreported) Suit No ECW/CCJ/APP/07108 cited in Falana 2010 p 35
Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle Fur Getreide Und Futtermittel, C-11/70 17/12/1970 via eu/Lex Uri Serv/Lex Uri Servi do? Uri=CELEX61970CJ0011:EN:PDF. Accessed 17/10/2013
Linas International Nig Ltd v Ambassador of Mali & 2 ors. (2004–2009) CCJELR 280
Mrs Tokunbo Lijadu Oyemade v Executive Secretary ECOWAS (No 1) (2008) CCJLR (PT 1) 25
Mrs Tokunbo Lijadu Oyemade v Executive Secretary ECOWAS (No 3) (2008) CCJLR (PT1) 93
Mousa Leo Keita v Republic of Mali (2004–2009) CCJELR 72
Musa Saidy Khan v Republic of Gambia (2009) CCJLR (PT2) 58
Odafe Oserada v ECOWAS Council of Ministers &2 Ors (2004–2009) CCJELR 176
Olajide Afolabi v Federal Government of Nigeria (2004–2009) CCJELR 77
Peter David v Ambassador Uwechue (2010) CCJLR (PT 3) 134
Pinhero v Republic of Ghana 2012 ECW/CCJ/JUD/11/12 www.courtecowas/site/pdf. Accessed 7 July 2015
Professor Essien v Republic of Gambia (2004–2009) CCJELR 102
Request for Advisory Opinion from Executive Secretary of ECOWAS Relating to Article 23 (11) of the Rules of Procedure of the Community Parliament and the Provision of Articles 7 (2) and 14(2)(f) of the Protocol on the Community Parliament (2004–2009) CCJELR 55
Ugokwe v Federal Republic of Nigeria (2004–2009) CCJELR 50
Van Duyn v Home Office C-41/74 4/12/1974 via eu/Lex Uri Serv/Lex Uri Servi do? Uri=CELEX61974CJ0044:EN:PDF. Accessed 13/10/2013
Van Gend &Loos v Nederlandse Administratie Der Belastingen, C-26/62 5/2/1963 via eu/Lex Uri Serv/Lex Uri Servi do? Uri=CELEX61962CJ0026:EN:PDF. Accessed 14/10/2013

Publications

ECOWAS Newsletter. www.ecowas.int/publication/en/newsletter/Ecowasnewsletter_01-Eng.pdf. Accessed 1/8/2011
Falana F (2010) ECOWAS Court: law and practice, 1st edn. Legal Text Publishing Company Limited, Lagos

Hornby A (ed) (2001) Oxford Advanced Learner's Dictionary Special Price edn. Oxford University Press, Oxford
Word Reference. http://www.forum.wordreference.com/show/bread.php=1439358;wordReference.comLanguage.Forums. Accessed 17/8/2011
Word Reference. http://www.wordreference.com/enfr/as%20necessary. Accessed 12/12/13

Chapter 3
Institutions of the Community

Abstract This chapter identifies the institutions of ECOWAS and examines, in detail, the structures, powers, responsibilities, functions and other ancillary or unique features that typify them. Also, it treats extensively the jurisdiction and procedure of the Community Court of Justice for the benefit of lawyers and interested persons who may want to engage the services of the Court. Nonetheless, the chapter opens with a brief primer on the real institutional state of some of the organs of the Community.

3.1 Introduction

The Revised Treaty made provisions[1] for various institutions, namely the Authority, Council of Ministers, ECOWAS Parliament, Economic and Social Council, Community Court of Justice and the Commission. Others were the Fund for Co-operation, Compensation and Development; Specialized Technical Committees;[2] and any other institution that may be established by the Authority.

However, in 1999, during its 22nd session held on the 9th and 10th of December, the Authority of Heads of State transformed the Fund for Co-operation, Compensation and Development into a regional holding entity called ECOWAS Bank for Investment and Development. The bank had then two subsidiaries, namely ECOWAS Regional Development Fund and ECOWAS Regional Investment Bank. The reason for the operational expansion was to open up the Fund's capital to non-regional investors for the purpose of improving on its financial resources. But in 2006, with a view to unifying the groups in order to have an entity with a

[1] Art. 6 Revised Treaty.

[2] Committees are (a) Administrative and Finance; (b) Agriculture, Environment and Water Resources; (c) Human and Gender Development; (d) Infrastructure; (f) Macro Economic Policies; (g) Political Affairs, Peace and Security; (h) Trade, Custom, and Free Movement of Persons; (i) Legal and Judicial Affairs; and (j) Communication and Information Technology.

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_3

single governance system, the three entities were merged into one bank known as ECOWAS Bank for Investment and Development.[3]

Also, ECOWAS has restructured or created relatively new institutions and specialised agencies. The institutions are West African Health Organisation (WAHO) and Inter-governmental Action against Money Laundering and Terrorism Financing in West Africa (GIABA). The specialised agencies are West African Monetary Agency (WAMA), Regional Agency for Agriculture and Food (RAAF), ECOWAS Regional Electricity Regulatory Authority (ERERA), ECOWAS Centre for Renewable Energy and Energy Efficiency (ECREEE), West African Power Pool (WAPP), ECOWAS Brown Card, ECOWAS Gender Development Centre (EGDC), ECOWAS Youth & Sports Development Centre (EYSDC), West African Monetary Institute (WAMI) and ECOWAS Infrastructure Projects Preparation and Development Unit (PPDU).[4]

Observably, it is significant to note that ECOWAS does not portray Authority of Head of State and Council of Ministers, as well as Economic and Social Council, as institutions of ECOWAS on their website anymore. Since Economic and Social Council is no more portrayed as an institution, no commentary will be run on its structure and objectives, as well as West African Health Organisation; however, the Authority of the Heads of State and Council of Ministers will be treated in details.

Before the examination, it will be useful to highlight, though briefly, the real institutional and operational setting within which the laws defining the powers and functions of the institutions are meant to be applied. This highlight is useful because it bridges the gap between the ideals as contained in the rules and the operational reality. It also provides a quick answer to questions on why the Community citizens, in spite of large institutional structures, have not been getting the appropriate integration services that would help them reap the dividends of economic integration.

The institutions of ECOWAS are creations of laws and are established to achieve defined ends: in this case, economic integration. Integration, in this respect, could mean, according to Haas, a process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new centre, whose institution poses or demands jurisdiction over the pre-existing national states.[5] Therefore, if independent states should relinquish some part of their governance and expectations to such a centre, then the centre must be efficient, strong and competent; otherwise, the whole states in allegiance will crash with it. To fortify the centre of governance, ECOWAS has devised laws through which it created different institutions to achieve the integration goals of the Community. But what are the conditions of these institutions created to shoulder the economic integration policies of ECOWAS?

[3] EBID in brief 2009, p. 2; see also Article 27 Revised Treaty as amended by Additional Act A/SA.9/01/07.

[4] ECOWAS (www.ecowas.int/insitutions).

[5] Mubarik (2015), p. 3.

In regard to the Commission, this institution may not be the highest decision-making body of the Community, but it is the fulcrum upon which every other institution revolves. It may be proper to acknowledge that the Commission has relatively fared well given the circumstances militating against its efforts and performances. However, these restrictive situational factors are so impactful that they wouldn't let the institution perform its functions efficiently. The Commission, for instance, neither has the right skilled personnel it deserves, nor do the officers have the privilege of continuous skill upgrade. Also, the headship of the Commission is selected based on geographical representation among the Member States rather than on merit solely. Obviously, the Commission has inadequate fund to execute the excessive projects it undertakes yearly. Another militating factor is the lack of co-ordination in dealing with all the programmes and policies it manages.[6]

With regard to the ECOWAS Parliament, it has become a political agora where parliamentarians from all the Member States take the 115 seats reserved for them to discuss issues on democracy, human right, freedom, infrastructure development, etc. through various seminal platforms and to develop strategic plans and mechanisms. But this unique institution, despite its name and composition, does not make laws; this creates some democratic deficit in the governance scheme of ECOWAS. Again, none of them at the agora was elected by the citizens of the Community to represent them at that level.[7] This invariably deepens the disconnection between the citizens and the parliamentarians of ECOWAS and makes the parliamentarians unaccountable to the people.

With reference to the Community Court, this institution is appreciated by a few that know it; the Community Court, in spite of its new nascency, has shone like a faint star among the other institutions with some of its decisions and institutional integrity. However, its works are bedeviled by lack of logistics, modern technology and awareness among the Community citizens. Chiefly, its major institutional output—judgments—is rarely appreciated and implemented within the territories of the Member States.[8]

On the part of ECOWAS Bank for Investment and Development, this arm has been playing principal roles in the infrastructural development of the Member States. In fact, it is credited with contributing over $1 billion to developmental projects all over West Africa.[9] It has not only provided short- and long-term loans to private and public sectors but has been one of the major financiers of New Economic Partnership for Africa's (NEPAD's) programmes in West Africa.[10] However, it has neither the appropriate structure nor financial ability to extend credit to a large percentage of the public and private sectors in order to cure the infrastructure and economic gaps in West Africa. In spite of these enumerated challenges, the major institutions of the Community will be studied, in detail, below.

[6] Ibid., p. 4.

[7] Ibid.

[8] Mubarik (2015).

[9] Ibid., p. 7.

[10] EBID in brief, p. 10.

3.2 Authority of Heads of State and Government[11]

The Authority was established originally by the Treaty of 1975. The Revised Treaty also provided for its existence in Article 7.[12] The Authority consists of all the Heads of State and Government of Member States; it is also the supreme institution of the Community. The Treaty gave the Authority the responsibility of generally directing and controlling the Community, and it is its responsibility to take all measures to ensure the progressive development of the Community and the realisation of its objectives.[13]

3.2.1 Functions

The Authority has been empowered to perform numerous functions; some of them include to[14] (a) determine the general policy and major guidelines of the Community, give directives, harmonise and co-ordinate the economic, scientific, technical, cultural and social policies of Member States; (b) oversee the functioning of Community institutions and follow up the implementation of Community objectives; (c) prepare and adopt its Rules of Procedure; (d) appoint the President of the Commission in accordance with the provisions of Article 18;[15] (e)[16] appoint the external auditors based on the recommendation of the Council; (f) delegate to the Council, where necessary, the authority to take such decisions as are stipulated in Article 9 of the Treaty; and (g) 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. It also refers where an institution of the Community has acted beyond the limits of its authority or had abused the powers conferred on it by the provisions of the Revised Treaty, by a decision of the Authority or a Regulation of the Council.

Paragraph g[17] has empowered the Authority to refer the abuse of power by any institution to the Community Court. It literally limited the power of referral to acts of abuse or "act beyond limits" flowing from powers conferred on the institutions by the provision of the Revised Treaty, decision of the Authority or a regulation of the Council. It is very doubtful if the Community Court would give this provision its literal interpretation. There are other acts which the Authority or the Council could use in legalising or giving effect to Community's policy. It means that, going

[11] The Authority.

[12] (1) Revised Treaty.

[13] *Ibid.,* Art 7(2).

[14] *Ibid.,* (3)(a)–(i).

[15] Revised Treaty as amended by Supplementary Protocol A/SP.1/06/06.

[16] Article. It now reads Article 7(3)(e) Revised Treaty.

[17] Article 7.

by the ordinary meaning of the acts mentioned, violation of any instruction in any of the other supplementary acts would not warrant referral under this head.[18]

For instance, Directive C/DIR.3/12/88 issued by the Council directed the President of the Commission, *inter alia*, to prepare a detailed inventory, in collaboration with the competent authorities in Member States, of existing road taxes with a view to harmonising them at the regional level. Where the Commission fails to implement these instructions, could the Authority refer the violation to the Community Court under paragraph g?[19] In other words, does the omission of other legislative acts, like directive, in paragraph 'g' inhibit the Authority from referring any action, originating from breach of other acts, to the Community Court? Considering the purposive interpretation approach which regional courts normally adopt,[20] it is very likely that it would extend "the power to refer" to cover contravention of other legislative acts.

3.2.2 Meetings

The Authority holds two kinds of meetings.[21] The first is the ordinary session, which holds at least once in a year. However, by virtue of the amendment of some part of the Revised Treaty by Supplementary Protocol,[22] the ordinary session should be held at least twice a year. The second kind of meeting which the law permits the Authority to hold is extraordinary session, which is convened by the chairman of the Authority. Extraordinary meeting can also be convened at the request of a Member State. It was provided in the Revised Treaty, prior to the amendment, that where the request is made for the convention by a Member State, the request would only succeed if it is supported by a simple majority of the Member States.[23]

3.2.3 Chairman

The office of the chairman of the Authority is established by the Revised Treaty.[24] The election for the office of the chairman is conducted by the Authority, and the tenure will normally last for one year. One of the duties of the chairman is to

[18] Art 7 (3) (g) Revised Treaty.
[19] *Ibid.*
[20] Koschniske v Zwolle 1979, p. 2724.
[21] Article 8 Revised Treaty.
[22] Art 2 Supplementary Protocol A/SP.1/06/06 Amending the Treaty.
[23] Art. 8 Revised Treaty.
[24] *Ibid.*

convene extraordinarily session of the Authority; another is appending signature on decision for the Authority.

3.2.4 *Acts of the Authority*

The Authority, as provided by the Revised Treaty, shall act by decisions.[25] All Member States and institutions of the Community are bound by the Authority's decision.[26] The Authority adopts its decision by unanimity, consensus or a two thirds majority of the Member States,[27] and the employment of any of these voting systems will depend on the subject matter under consideration. The Revised Treaty provides that[28] a protocol will be made which shall set out a system that will be used in respect of any measure, but until that protocol is made, the Authority is limited to adopting its decision by consensus.

The President of the Commission has the responsibility of publishing the decision 30 days after the date of their signature by the chairman of Authority.[29] Originally, decisions were meant to enter into force automatically 60 days after the date of the publication in the official journal of the Community.[30] However, by virtue of the 2006 amendment,[31] decisions should be communicated to the persons designated therein and shall enter into effect on the date of notification. The Member States shall also publish the decision in their national gazettes within 60 days from the date of its publication in the Community journal.[32]

It is a common knowledge that the Treaty is *trait cadre*; therefore, it is not expected to provide, in detail, everything that would relate to the Authority. There is nothing precluding the Authority, at least in Article 9,[33] from making use of other, known, forms of acts. For instance, the Authority can also issue resolutions. A good example is the Resolution on the Implementation of the First Phase of the Protocol Relating to the Free Movement of Persons, the Right of Residence and Establishment.[34] The Authority also can give directives; a good example is Directive A/S1R.1/5/79.[35] In this Directive, the Authority, inter alia, directed each

[25] Article 9 (1) Revised Treaty.
[26] *Ibid.*, (4).
[27] *Ibid.*, (2).
[28] *Ibid.*, (3).
[29] *Ibid.*, (5).
[30] *Ibid.*, (6).
[31] Art. 2(3) Supplementary Protocol A/SP.1/06/06 amending the Treaty.
[32] *Ibid.*, (7).
[33] Revised Treaty.
[34] A/RES.2/11/84.
[35] On the Implementation of the Protocol Relating to the Free Movement.

diplomatic mission of all Member States within the Community to register its nationals residing in its country of accreditation.

3.3 Council of Ministers

The Treaty established Council of Ministers of the Community,[36] which consists of the minister in charge of ECOWAS affairs and any other minister of each Member State.[37] It is very possible that all the Member States may not have created a portfolio for ECOWAS affairs, so the government of such countries would normally send their ministers for foreign affairs to the Community Council. This, it is believed, may not, in substance, offend the provision of the Treaty.

3.3.1 Responsibility[38] and Functions

The Council of Ministers sees to it that the Community develops and functions appropriately. Some of its specific functions include (a) making recommendations to the Authority on any action aimed at attaining the objectives of the Community, (b) appointing all statutory appointees other than the President of the Commission, (c) issuing directives on matters concerning co-ordination and harmonisation of economic integration policies—where the Authority delegates to it the appropriate power to do so and (d) making recommendation to the Authority on the appointment of the external auditors.

3.3.2 Meetings[39]

The Council holds two kinds of meetings: ordinary session and extraordinary session. The ordinary session can be held as often as it is possible. The law provides that this kind of meeting shall take place at least twice in a year. Consequently, if the meeting should be held not less than two times in a year, it can be inferred that holding ordinary session thrice in a given year would not be an aberration of the law. The law mandates that one of the ordinary sessions held in the year must precede the ordinary session of the Authority.[40] This may have been informed by

[36] Art. 10 Revised Treaty.
[37] *Ibid.,* (2).
[38] *Ibid.,* (3) (a)–(e).
[39] Art. 11(1)–(2) Revised Treaty.
[40] *Ibid.*

the importance of giving the Council the opportunity to prepare its recommendation[41] for the Authority. Such recommendation might be considered at the session of the Authority. The Council is empowered to hold extraordinary session. The power[42] to convene this kind of meeting belongs to the Chairman of the Council. However, a member has power to request for such convention provided that the request is supported by a simple majority of the Member States.

3.3.3 Chairman

There is an office of chairman of the Council.[43] To assume this office, the minister must hail from the same country as the chairman of the Authority.[44] If the chairman of the Authority of the Heads of State, for instance, is from Liberia at a given year, consequently, the chairman of the Council of Ministers must hail from Liberia in that same year.

3.3.4 Acts of the Council[45]

The Revised Treaty obviously provides that the Council shall act by regulation.[46] On this ground, the Council has acted through several regulations.[47] The Council adopts regulation, depending on the subject matter under consideration, by unanimity, consensus or a two thirds majority of Member States. Similar to the provision in Article 9(2), (3) of Revised Treaty, a protocol ought to be made for the purpose of defining at what point, or in what circumstances, should any voting system be employed. However, the Council is empowered to adopt its regulation by consensus until the protocol is made—and enters into force.

It is interesting to note that the binding nature of a regulation differs from that of a decision. Regulation binds all institutions under the authority[48] of the Council. Therefore, a regulation made by the Council will not have a binding effect on the Authority of Heads of State because it is not an institution under the Council. Regulations will bind[49] Member States after their approval by the Authority.

[41] Art. 10(3) (a) Revised Treaty.
[42] Art. 11(1) Revised Treaty.
[43] *Ibid.*, (2).
[44] *Ibid.*
[45] Art. 12 Revised Treaty.
[46] *Ibid.*
[47] Regulation C/REG.2/06/06 cited in Falana (2010), p. 19.
[48] Art. 12(3) Revised Treaty.
[49] *Ibid.*

However, where the power to make the regulation is delegated to the Council from the Authority, such regulation binds forthwith.[50] It means there wouldn't be a need to take the regulation to the Authority for approval, and it binds all and sundry.

The President of the Commission publishes the regulation 30 days after the date on which the chairman of the Council signs it.[51] Prior to the 2006 amendment, a regulation would automatically enter into force 60 days after the date of its publication in the official journal of the Community.[52] Now, a regulation shall enter into force after publication by the Commission on a date specified therein.[53] Regulations shall, also, be published in the national gazette of each Member States within 60 days after the date of their publication in the official journal of the Community.[54] In addition, note that the Council may, on delegated powers, issue directives and can also make recommendation in certain circumstances. Therefore, regulation is not the only act which the Council of Minister can make.

3.4 ECOWAS Parliament

The Revised Treaty established a Parliament of the Community.[55] However, the Treaty did not specify the composition, functions, power and organisation. In fact, it left the details to a text that ought to be made for that purpose.[56] A Protocol[57] was actually made in 1994 for that purpose but was also amended, later, by Supplementary Protocol A/SP.3/06/06. Article 3 of the amended Protocol provides that the house of representatives of the people of the Community shall be designated "ECOWAS Parliament". But New Article 13 of Supplementary Protocol (A/SP.1/06/06) amending the Treaty had earlier dubbed the house as Parliament of the Community; however, the latest in time, ordinarily, prevails, so it can now be referred to as ECOWAS Parliament. Furthermore, the new Article 4 of the same Protocol provides for the life span of the legislature: "The life span of the legislature shall be four years from the date of its inauguration by the chairman of the Authority." "The representatives shall be elected for a period of four (4) years from the day of swearing in. Their mandate shall, without any exception, end on the last day of the legislature."[58] Note that the first session of each new legislature shall

[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] Art. 2 (2) Supplementary Protocol A/SP.1/06/06.
[54] Article 9 (5) (6) (7) Revised Treaty.
[55] Article 13 (1).
[56] Protocol A/P.2/8/94 Relating to the Community Parliament.
[57] *Ibid.*
[58] Article 7—New Paragraph 2(1) Supplementary Protocol A/SP.3/06/06.

be convened by the current chairman of the Authority upon the recommendation of the President of the Commission.[59]

In regard to the members of the ECOWAS Parliament, they are meant to hail from all the Member States of the Community. Under the new Article 14, the President of the Commission shall, 3 months prior to the end of each legislature, request Member States to elect their parliamentarians to the Community (ECOWAS) Parliament.[60] As soon as the President of the Commission receives the names of at least three quarter of the members of Parliament forwarded by the States, he shall inform the chairman of the Authority who shall take necessary measures to convene the Parliament.[61]

3.4.1 Structure of the Parliament

The Parliament is divided into political and administrative wings. The political wing has three sections: the plenary, the bureau of parliament and the conference of *bureaux*.

3.4.1.1 The Plenary

It is the highest body and its decision binds every structure of the Parliament. It is the responsibility of the plenary to adopt all resolutions intended to be sent to the decision-making body of the Community. Generally, the plenary is guided by the Revised Treaty and other legal texts of the Community.

3.4.1.2 The Bureau of Parliament

This section consists of the Speaker, the First Deputy Speaker, the Second Deputy Speaker, the Third Deputy Speaker and the Fourth Deputy Speaker.[62] The tenure of all deputy speakers shall be the same as the Speaker, and their elections shall be conducted in accordance with the Rules of Procedure of the Parliament. Where for any reason the Speaker is absent during a session or sitting, the deputy speakers shall preside in their order of precedence.[63] However, some of the functions of the

[59] *Ibid.*, New Article 14 Paragraph 1 (a).
[60] *Ibid.*, Paragraph 1 (b).
[61] *Ibid.*, Paragraph 1(c).
[62] Article 16(1)(2) Supplementary Protocol.
[63] *Ibid.*

Bureau include (1) to determine with the Conference of Committees Bureaux and the Speaker the draft agenda and all programmes or business of the session, taking into account the approved Community programmes; (2) to authorise meetings, hearings, fact finding and study tours of committees away from the headquarters; and (3) to determine, with the assistance of the selection committee, the composition of the standing committees; in carrying out this assignment, due regard shall be given to linguistic, gender balance and nationality.

3.4.1.3 Conference of Committees *Bureaux*

This conference is made up of the Speaker, chairman or deputy chairman, and the rapporteur of each standing committees. The conference represents all the committees collectively, helps to organise works with national and other regional parliaments and is chaired by the Speaker who also convenes it.

3.4.1.4 Speaker of the Parliament[64]

He is elected for the life of the legislature and performs the following functions: (1) presides over proceedings; (2) opens, suspends or closes sittings of Parliament; (3) determines the admissibility of papers brought to Parliament; (4) represents the Parliament; and (5) follows up on implementations of Parliament decisions.

Currently, the Speaker is not required to reside at the seat of the Parliament—Abuja—until the members are elected by direct universal suffrage. Therefore, he/she attends proceeding from country of nationality. It is important to clarify that in the meantime ECOWAS has not been using direct election or universal suffrage for its Parliamentary seats. The members of the Parliament are still pooled from the members of the parliaments of the Member States.

3.4.1.5 General Secretariat of Parliament

This organ headed by Secretary General performs the administrative tasks of the Parliament. The Secretary General, at the end of life of each legislature, continues to carry out the daily administration of the Parliament; the office of Secretary General is ably assisted by directors.

[64] See Articles 15 and 16 Revised Treaty.

3.5 Commission

The Revised Treaty established the Commission.[65] It is situated in Abuja, the capital of the Federal Republic of Nigeria. It is headed by the President of the Commission[66] and assisted by the Vice President and commissioners. It has different departments occupied by employed staff[67] working to keep the Commission functional. The entire Commission ensures the smooth functioning of the Community.

3.5.1 Appointment of the President of the Commission

It is the sole duty of the Authority of Heads of State to appoint the President of the Commission.[68] The person is to be appointed for a 4-year term. Initially, the term was renewable until Article 2 of Supplementary Protocol pegged it at a single term of 4 years.[69] At the end of the term, the President becomes ineligible to be appointed to the office. The process of selection can be located in Article 18 of the Revised Treaty, as it were before the amendment, because the new Article 18, as introduced by Article 2 of the Supplementary Protocol amending the Revised Treaty, did not state a new selection process. First, the office would be allocated to a Member State. The idea of such allocation is to allow Member States the opportunity of producing President in turn.

The Member State to whom the Community has allocated the office of President shall nominate three candidates. The candidates shall be evaluated by the Ministerial Committee on the Selection and Evaluation of the Performance of Statutory Appointees; after the evaluation, the Committee would proceed to make its recommendation to the Council of Ministers.[70] The Council of Ministers shall, having considered the recommendation, propose to the Authority the appointment of the candidate which it adjudged the best.

The President of the Commission[71] should be a person of proven competence and integrity with a global vision of political and economic problems and regional integration. The Revised Treaty did not provide how the appointing[72] and recommending[73] personnel would arrive at a conclusion that the competence and

[65] Article 17(1) Revised Treaty as amended.
[66] *Ibid.,* (2).
[67] *Ibid.*
[68] Article 7 (3) (d).
[69] Supplementary Protocol A/SP.I/06/06.
[70] Art. 18(2) Revised Treaty.
[71] *Ibid.,* 3.
[72] Authority.
[73] Council.

integrity of the proposed candidate are proven. In that light, where an aggrieved person has verifiable reason to query the allocation or appointment of a President, could he invoke the jurisdiction of the Court? There is no record of challenge as to whether an appointed person is a good fit for the Community role. Nonetheless, in Oserada v ECOWAS Council of Ministers,[74] an application challenging the allocation of the office of Secretary General of the Parliament to Guinea failed on the ground of right of standing. At least, the legal reasoning of the Community Court, in respect of actions challenging institutional appointments, might be deduced from this case. It appears that applications of this kind would not pass the right of standing test. Procedurally, one of those ways to circumvent "lack of right of standing" is to cause the Member State to litigate on behalf of an aggrieved person. But where an aggrieved person is personally and directly concerned, and he is not only affected by the decision but can also show a link between the decision and damage suffered by him, his action might succeed

3.5.2 Vice President

The New Article 17[75] did provide that the Commission shall have nine commissioners, inclusive of the President and the Vice President. The office of Vice President is allocated to a Member State at a given period.[76] The State, to which the office has been allocated, would nominate three candidates. All the candidates nominated would be considered by the Ministerial Committee on the Selection and Evaluation of the Performance of Statutory Appointees.[77] The Committee would then propose the candidate to the Council of Ministers, which has the power to appoint the Vice President. The term shall be for a period of 4 years,[78] with no option of renewal.

3.5.3 Commissioners

The establishment of a Commission came with the creation of the posts of commissioners. The commissioners shall be appointed by the Council of Ministers on the recommendation of the Ministerial Committee on the Performance of Statutory Appointment for a single term of 4 years.[79] The States to which the posts are allocated shall nominate three candidates each for interview and subsequent

[74] 2008, pp. 177 and 178.
[75] Supplementary Protocol A/SP.1/06/06 Amending Revised Treaty.
[76] *Ibid.*, (3) (a).
[77] *Ibid.*
[78] *Ibid.*, (3)(b).
[79] *Ibid.*, (3) (a) (b).

appointment. These commissioners may not be removed from their offices except on the grounds of serious misconduct and incapacity.[80] And where their mandates are interfered with, they shall be replaced, for the remainder of their terms, by nationals of those countries where the exiting commissioners hailed from.[81] Where one of the commissioners, for any reason, ceases to function in that capacity, he shall remain in office until he is replaced, but this continuity arrangement shall not apply where the commissioner is dismissed.[82]

3.5.3.1 Responsibilities and Functions of the President of the Commission

The President acts as the chief executive officer of the Community and the institutions,[83] as well as directs the activities of the Commission. The President also serves as the legal representative of the institutions of the Community in their totality.[84] Some of the functions of the President include executing the decisions taken by the Authority and implementing the regulations of the Council,[85] (2) promoting the Community development programmes and multinational enterprises of the region and (3) convening[86] as and when necessary meetings of representatives of Member States' high institution to examine sectorial issues which promote the achievement of the objectives of the Community.

However, under Article 19 new paragraph 4 of the Revised Treaty, he is also in charge of external relation of the Community, international cooperation, strategic planning and policy analysis, as well as the regional integration activities. In the same vein, the entire Commission, as provided in the new paragraph 5 of the same Article 19, shall exercise its power with a view to ensuring the smooth functioning of the Community and safeguarding the latter's general interest.

3.6 Other Statutory Appointments

Observably, the President has no power to make statutory appointments;[87] statutory appointment refers to employment in respect of offices or positions that are provided in the Revised Treaty, protocols or other laws of ECOWAS. Normally,

[80] *Ibid.,* (3)(b).
[81] *Ibid.,* (3) (d).
[82] *Ibid.*
[83] Article 19 (1) Revised Treaty.
[84] *Ibid.,* (2).
[85] Article 1 Supplementary Act A/SA.5/01/08.
[86] *Ibid.*
[87] Art. 19 (3) (g) Revised Treaty.

the law would define the procedures to be taken, qualifications, powers, tenure or removal of the officer from office. A good example would be the office of the Vice President. Any statutory appointment can only be made by the Council of Ministers, based on proposals made to it by the Ministerial Committee on the Selection and Evaluation of the Performance of Statutory Appointees.[88] Vacancies for such positions ought to be advertised in all Member States to which statutory posts have been allocated.[89]

Where a Member State fails to advertise the vacant position and the citizens of that country lose the opportunity and rights created by the Community law, it will not be out of place to initiate action in court. Article 9 of the Protocol Relating to the Court provided that the Court has competence to adjudicate on disputes flowing from failure by Member States to honour their obligations under the Treaty, conventions and protocols, regulations, directives or decisions of ECOWAS. Such failure to advertise the vacant position is a good ground to hold that a State has failed to honour its obligations, and a State, ordinarily, can be held liable for damages, in such circumstance, in favour of an individual.[90] It seems that the proximate forum for such application ought to be the national court if the provisions of the Revised Treaty, decision or other acts were directly effective.

Where the facts constituting the dispute can ground an action for violation of fundamental rights, then the Community Court can be approached under Article 9 (4).[91] However, if the individual cannot sue in his national court because doubt is cast on the direct effect and applicability of the ECOWAS acts in a Member State or the facts cannot ground an action for violation of the rights of individual, then he has one option. He can approach the President to bring an action on his behalf for failure on the part of that Member State to fulfil an obligation.[92] It is still doubtful whether the President can muster the courage to engage in such sensitive litigation.

Finally, appointments of this kind must be made in line with geographical representation. But the intention to have a geographical spread does not warrant appointing incompetent persons to sensitive offices merely to fulfil equitable distributions of post among nationals of all the Member States. This is because the law clearly provides that the Community and the institutions, when appointing any professional staff, shall do so subject to ensuring the highest standards of efficiency and technical competence.[93] Nevertheless, the appointing institution must adhere to geographical spread of professional positions among the nationals of all the Member States.

---

[88] *Ibid.,* (3)(h).

[89] *Ibid.,* (3)(i).

[90] Andrea Francovich, Danila Bonofaci and Anor. v Italian Republic 1991, p. 5415.

[91] Supplementary Protocol Relating to the Court.

[92] Ibid., Art 10 (a).

[93] Article 18 (5) Revised Treaty.

3.7 Technical Committees

The Revised Treaty included special Technical Commissions as institutions of the Community.[94] Article 22 established the Commissions, and they were later renamed committees.[95] The committees are (a) Administration and Finance; (b) Agriculture, Environment and Water Resources; (c) Human and Gender Development; (d) Infrastructure; (e) Micro Economic Policy; (d) Political Affairs, Peace and Security; (e) Trade, Custom, and Free Movement of Persons; (f) Legal and Judicial Affairs; (g) Communication and Information Technology.

It is clear from this provision that new technical committees (commissions) were added to the committees created by the original Treaty. The Authority can still, whenever it deems appropriate, restructure the existing committees or even establish new ones.[96] Every technical committee shall be made up of representatives of each Member State.[97] These committees have the authority to set up subsidiary committees to assist them in carrying out their works.[98] Each of the various committees shall have the power to determine the composition of the subsidiary committee it puts in place.[99] Under the law,[100] every committee, within its field of competence, prepares Community projects and programmes and submits them for consideration of the council; ensures the harmonisation and co-ordination of projects and programmes of the Community; monitors and facilitates the application of the provisions of the Revised Treaty and related protocols pertaining to its area of responsibility; and carries out any other functions assigned to it for the purpose of ensuring the implementation of the provisions of the Revised Treaty.

3.8 ECOWAS Bank for Investment and Development

In 1999, during the 22nd session of the Authority of Heads of State held on the 9th and 10th of December; the Authority transformed the former Fund for Co-operation, Compensation and Development into a regional holding entity called ECOWAS Bank for Investment and Development. The bank had, then, two subsidiaries, namely ECOWAS Regional Development Fund and ECOWAS Regional Investment Bank. The bank was expanded to open up the capital of the Fund to non-regional investors for the purpose of improving on its financial resources. However, in 2006, in order to unify the groups to create a single governance system,

[94] Article 6(2).
[95] Revised Treaty.
[96] *Ibid.*, (2).
[97] *Ibid.*, (3).
[98] *Ibid.*, (4).
[99] *Ibid.*
[100] *Ibid.*

the three entities were merged into a single institution known as ECOWAS Bank for Investment and Development.[101] The bank, created by the new Article 21 of the Revised Treaty,[102] with office located in Lome Togo, is purely an international finance corporation; its initial authorised capital is put at 603 million units of account (UA)* representing 945.3 million US dollars. The Regional members hold 70 % of the capital, while non- regional investors may subscribe to the remaining 30 %. The bank is reputed to have committed about $1.95 billion to implementation of projects within the Community between 2010 and 2014.[103]

The main object[104] of the bank is to leverage economic development of ECOWAS by financing its programmes, as well as the projects of the New Partnership for African Development (NEPAD) in the areas of transport, energy, infrastructure, poverty alleviation, to mention but a few. Specifically, the bank grants loans, receives and manages some portion of the Community levy, mobilises fund within and outside the Community to finance its projects, provides technical assistance and carries out commercial, agricultural and industrial activities to support its main objective or to recover debts.[105] With a view to achieving an effective governance system that will help realise the object of establishment, the Community created two decision-making bodies: board of governors (highest decision-making organ) and board of directors (in charge of general operation of the bank). There is also the president, who is supported by two vice presidents for finance and corporate services.[106]

3.9 Intergovernmental Action Group Against Money Laundering in West Africa (GIABA[107])

This institution, created in 2000, is a specialised organ of ECOWAS responsible for strengthening the capacity of the Member States to prevent and control money laundering and terrorism financing (AML/CFT[108] systems) within the Community. The objectives of the institution include protecting banking and financial systems of the members from proceeds of crime and combating financing of terrorism, intensifying measures to prevent laundering of proceeds of crime, as well as strengthening co-operation among its members.[109] It is designed to function as financial

[101] EBID in brief 2009, p. 2, see also Article 27 Revised Treaty as amended by Additional Act A/SA.9/01/07.

[102] Revised Treaty 1993 as amended by Additional Act A/SA.9/01/07.

[103] EBID in brief 2009, p. 9.

[104] Ibid., p. 3.

[105] Ibid., p. 4.

[106] Ibid., p. 7.

[107] French acronym.

[108] Anti-money laundering/counter-financing of terrorism.

[109] Article 2 Statutes of GIABA 2006.

action task force (FATF) within the Sub-region. Specifically, the functions of the GIABA are tailored to meet the institutional development needs of the Member States; the group also ensures that the Member States are in compliance with international norms and standards on anti-money laundering and terrorism financing. GIABA conducts conventional and specialised researches (including typologies which study the method, trends and impact of money laundering and terrorism financing on Member States), as well as provides technical support to the Member States by assisting in developing their finance intelligence units and other agencies created to combat money laundering and terrorism financing.[110]

The organogram of GIABA is structured into four parts. There is an Ad Hoc Ministerial Committee consisting of three ministers responsible for finance, justice and interior/security of each Member State. It also has a Secretariat, which is located in Dakar, Republic of Senegal, and a Technical Commission, made up of experts from above-listed ministries of Member States. It also relies on another arm referred to as Network of National Correspondents for some of its operations. These four arms work together to achieve the objectives of GIABA through resources derived from voluntary contribution from signatory State and third countries, a percentage from the Community levy, annual contribution from Member States and other approved sources.[111]

3.10 Community Court of Justice

The Treaty of 1975 did not provide for a Court of Justice of the Community; rather, it created what it referred to as the Tribunal of the Community.[112] However, the Revised Treaty provides for a full Court of Justice for the Community instead of a tribunal.[113] In addition, it establishes an Arbitration Tribunal for the Community.[114] The Revised Treaty provides that the details of the Community Court's functions and organogram will be contained in a protocol. Also, it clearly protects the independence of the Community Court to enable it to discharge its judicial and judicious duties, without allegiance to the Member States or Community institutions.[115] The Revised Treaty also ensures the bindingness of the judgments of the

[110] GIABA (website).

[111] Article 15 Statutes of GIABA 2006.

[112] Art 11 Treaty 1975.

[113] *Ibid.,* Art 15.

[114] *Ibid.,* Art 16.

[115] *Ibid.,* Art 15(3).

Community Court of Justice.[116] Such judgments given by the Community Court bind individuals, corporate bodies, institutions of the Community and Member States. In 1991,[117] the Community made the Protocol Relating to the Community Court of Justice to provide for the composition, functions and powers of the Court, and in 2005[118] the Community amended it in an outstanding manner.

3.10.1 Composition

The Community Court is composed of seven independent judges selected and appointed by the Authority from nationals of the Member States who are persons of high moral character and possess the qualification required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognised competence in international law, particularly in areas of community law or regional integration law. Furthermore, the candidates nominated for the posts of judges should have a total of no less than 20 years of experience.[119]

The first limb of the relevant provision appears simple, while the second limb employs the word "jurisconsult" to express the class of professionals who may be qualified for appointment as judges of the Community Court. The Protocol did not explain what a jurisconsult means. It only states that "jurisconsult of recognized competence in international law may be appointed". Ordinarily, a jurisconsult is a jurist especially one learned in international and public law.[120] In this context, unless the Community Court has reasons for giving it any special interpretation, it means an expert in international law. However, there is an expansion as to the competence of a candidate, which was not included in the original provision.[121] Now, under the revised text, every prospective candidate is required to have knowledge in community law or regional integration law.

Furthermore, all the seven members[122] of the Court, existing at a time, ought to hail from different Member States. Where any judge might have been taken to be a citizen of more than one Member State, for the purpose of appointment, he shall be deemed as a national of that country in which he ordinarily exercises civil and political rights;[123] and they are appointed by the Authority of the Heads of State.[124] Previously, it was the duty of the Executive Secretary to prepare a list of all the

[116] *Ibid.,* Art. 15(4).
[117] (A/P1/7/91).
[118] Supplementary Protocol A/SP.1/01/05.
[119] Art 2 Supplementary Protocol A/SP.2/06/06.
[120] Merriam-Webster Dictionary.
[121] Supplementary Protocol A/SP.2/06/06.
[122] A/P.1/7/91.
[123] Supplementary Protocol A/SP.1/1/05.
[124] Art 3(4) Protocol A/P.1/7/91.

persons nominated for appointment. The list is then forwarded to the Council of Ministers, which will reduce the list to 14 persons. It is from that final list that the Authority will appoint the judges.[125] Currently, the process has changed and must pass through the scrutiny of the Judicial Council.

Also, any person appointed as a judge shall not be below the age of 40 nor shall be more than 60 years. An existing judge shall not be qualified for the appointment if he is above 65 years.[126] The provision on preparation of list for appointment has been amended; now, the Judicial Council has the duty of short listing three candidates per Member State to which the positions have been allocated; they will interview them[127] and recommend their appointment through the Council of Ministers. After such recommendation, the Authority of the Heads of State would appoint them.

3.10.2 Quorum

The Court sits in the quorum of three comprising the President and at least two other judges. It means, however, that the Court could sit with more judges present, provided that any sitting of the Court shall consist of an uneven number of its members.[128] The sitting of the Court shall be in public, although it may hear its matter in camera at the request of one of the parties or for reasons which only the Court may determine.[129]

3.10.3 Terms of Office[130] and Resignation

The members of the Community Court are meant to serve for a term of 4 years, which is not subject to renewal. Having served this number of years, the judge may not be entitled to another term of service, although he shall remain in office until the appointment and assumption of office of his successor. But it seems the appointment should be made as soon as possible to avoid the waiting period extending to another full term of years.

As respects resignation, a member of the Community Court can resign from his office at any time. The Protocol of 1991 provided that all he needs to do is to tender a letter of resignation to the President of Commission, who shall forward the letter

[125] *Ibid.,* (5) (6).
[126] Art. 2 Supplementary Protocol A/SP.2/06/06.
[127] *Ibid.,* Art 3.
[128] *Ibid.,* (3).
[129] *Ibid.,* (4).
[130] Art 4 Supplementary Protocol A/SP.2/06/06.

to the Authority.[131] With the establishment of the Judicial Council, the procedure has been affected to some extent. Now the procedure, in case of resignation, is that the President of the Community Court shall inform the President of the Commission, who shall report to the Chairman of the Judicial Council of the Community. The Judicial Council shall recommend a replacement in accordance with the selection procedure.[132] The new judge shall serve the unexpired term of the predecessor and also be a national of the same country.

3.10.4 Immunities[133]

The judges during the subsistence of their terms of service shall have the privileges and immunities identical to those enjoyed by diplomatic missions and agents in the territory of Member States, as well as those normally accorded to members of international courts. It means that they should enjoy immunity respecting prosecution or arrest for acts carried out or statements made in the exercise of their functions.[134]

3.10.5 Jurisdiction of the Court

The term "jurisdiction" may be employed both generally and technically. Again, it must be observed that the term may also be used by lawyers, in practice, in a very peculiar form. For instance, where a particular feature or act ought to be done by a lawyer or counsel, as prescribed by a rule, before he can move an application in court, failure to fulfil the condition or perform the act might inform the other counsel to query the jurisdiction of the court to hear the application. For elucidation, the consideration, here, is (a) the power of a court to exercise authority within a defined geographical area; (b) the power of the court to determine a case in respect of a defined subject matter; (c) whether the court was properly constituted to hear the matter; or (d) whether the court has the power to make a decision about someone or a person.

Jurisdiction may be defined[135] as "the authority that an official organisation has to make legal decisions about somebody or something; an area or a country in which a particular system of law has authority". However, the decision in Falana v

[131] Art 7(1) Protocol Relating to the Community Court.
[132] Art 4(1) Decision A/DEC 2/00/06.
[133] Art 6 Protocol (A/P1/7/91).
[134] *Ibid.,* (2).
[135] Hornby (2001), p. 647.

The Republic of Benin[136] paints a clearer picture of when the Community Court would seise jurisdiction of a matter. "For the court to exercise jurisdiction, the case must have come before it properly initiated by due process of law and upon the fulfillment of any condition precedent to the exercise of its jurisdiction namely: (1) that it is properly constituted as regard members and qualification of the members of the bench and no member is disqualified for one reason or another; (2) 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 (3) that the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of its jurisdiction." Consequently, where a matter meets these requirements, the Community Court would seise jurisdiction to entertain it.

3.10.6 Jurisdiction Under the 1991 Protocol

The jurisdiction of the Community Court of Justice under the 1991 Protocol[137] was significantly slim. The Court was mandated to ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty.[138] Furthermore, the Court dealt with disputes referred to it by Member States or the Authority when such disputes are between the Member States and the institutions of the Community on the interpretation or application of the provisions of the Treaty.[139] Under that law, Member States were given powers to institute proceedings on behalf of their nationals or citizens, against other Member States or institutions of the Community, when the matter related to interpretation and application of the provisions of the Treaty.

For the Community Court to seise jurisdiction under that head, there must have been an attempt to settle the dispute amicably and the attempt must have failed.[140] In Parliament of the Economic Community of West African States v Council of Ministers of the Economic Community of West African States,[141] the Community Court interpreted Article 76 of the Revised Treaty, which is similar, in principle, to the last leg of Article 9(3) of the 1991 Protocol. In that case, the Community Court, presided over by Justice H.N. Donli, ordered the applicant to fulfil the formalities of Article 76(i) of the Revised Treaty. The facts were that the parties did not comply with the above-cited articles because there was no attempt at amicable settlement of the case before they approached the Community Court; consequently, the applicant's case failed.

---

[136] 2010, pp. 128–129.

[137] A/P1/7/91.

[138] *Ibid.,* Art. 9 (1).

[139] *Ibid.,* (2).

[140] *Ibid.,* Article 9 (3).

[141] 2005, pp. 35–36, paras. 12–16.

Furthermore, the Community Court, under the old jurisdiction provided in the 1991 Protocol, had powers which the Protocol specifically conferred on it.[142] In line with conferment of specific powers, it has powers to give advisory opinion[143] at the instance or request of the Authority of Heads of State, Council of Ministers, one or more Member States or the Executive Secretary (now President of the Commission). Notably, examining the jurisdiction under the old law, it would be observed that an individual cannot approach the Community Court unless a Member State brings the claim or requests on behalf of the aggrieved individual. That restrictive jurisdictional condition imposed hardship on the lives of citizens of the Community. With a view to enlarging the jurisdiction of and access to the Community Court by individuals, the ECOWAS institutions amended the old rule in 2005.

Prior to the amendment, a Nigerian businessman brought an action for violation of his right because, as he claimed, the acts of the Federal Republic of Nigeria restricted his freedom of movement and occasioned some financial loss. When the Community Court[144] considered the matter, it declined jurisdiction because an individual, at the time, has no right to bring a case, in his personal capacity, against a Member State; consequently, the case failed in its entirety. In Ukor v Laleye and Another,[145] although the major issue in the case turned on retroactive application of a text, the Community Court had another opportunity to adjudicate on a case brought by an individual against another individual.[146] In that case, the Community Court refused to apply the new Article 9, which has extended jurisdiction to individuals in human right cases, even though at the time of hearing the law had entered into force. The reason for the refusal was that the case was filed in 2004, at a time the new law was not in force.

3.10.7 Jurisdiction under the 2005 Supplementary Protocol[147]

The jurisdiction of the Community Court under the new law[148] has been widened. A new Article 9[149] replaced the previous Article 9 of the 1991 Protocol. In addition, the Community introduced a new Article 10 that provides for easier access to the Community Court. By virtue of this jurisdictional expansion, the Community Court has competence to adjudicate any dispute relating to (a) the interpretation and application of the Treaty, conventions and protocols of the Community; (b) the

[142] Art 9(4).

[143] Art 10.

[144] Olajide Afolabi V Federal Republic of Nigeria 2004, p. 16, para. 62.

[145] 2005, pp. 24–28.

[146] The matter was brought under the old law and against an individual.

[147] Supplementary Protocol (A/SP.1/01/05).

[148] *Ibid.*

[149] Ibid., Art 3.

interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS; (c) the legality of regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS; (d) the failure by Member States to honour their obligations under the Treaty, conventions and protocols, regulations, directives or decisions of ECOWAS; (e) the provisions of the Treaty, conventions and protocols, regulations, directives or decisions of ECOWAS Member States; (f) the Community and its officials; and (g) the action for damages against a Community institutions or an official of the Community for any action or omission in the exercises of official functions.[150] In the same vein, it has power to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparation for official acts or omissions of any Community institution or Community official in the performance of official duties or functions.[151]

The new Article 9(4) has now solved the limitation which the plaintiff in Afolabi v Federal Republic of Nigeria experienced in these terms: "The Court has jurisdiction to determine cases of violation of human rights that occur in any member state." To remove every element of doubt, the new Article 10 creates access to the Community Court in favour of individuals in this wording: "individuals on application for relief for violation of their human rights".[152] On the strength of these two legal provisions, the Court had seised jurisdiction in cases[153] brought by individuals for damages in respect of violation of their human rights.

Furthermore, the jurisdiction of the Court also extends to power to act as an arbitrator pending the establishment of the Arbitration Tribunal provided for under Article 16 of the Treaty. The Community Court, also, has jurisdiction over any matter contained in an agreement where the parties provided that the Community Court shall settle disputes arising from the agreement. Also, the Community Court has all the powers conferred upon it by the provisions of the Protocol on the Community Court, as well as any other powers that may be conferred by subsequent protocols and decisions of the Community. Furthermore, the Authority of Heads of State has the power to grant the Community Court new jurisdiction to adjudicate on any specific dispute that it may refer to it other than those specified in Article 9 of the Protocol as amended by Supplementary Protocol of 2005.[154]

[150] Art 9(1) (a)–(g) Supplementary Protocol A/SP.1/01/05.

[151] *Ibid.,* Art. 9(2).

[152] *Ibid.,* Art. 10(d).

[153] Hadijatou Koraou v The Republic of Niger 2008, p. 217, Prof. Essien v The Republic of The Gambia and University of the Gambia 2007, p. 95.

[154] See Article 9(5)–(8).

3.10.8 Limitation of Time

Individual action should be brought before the Court as soon as it is possible. Any action brought after 3 years from the date when the right of action arose shall be barred.[155] There is another provision on limitation of time found in the Rules of the Court.[156] Under that provision, where an interested person intends to intervene in a matter, he shall forward his application within 6 weeks of the publication of the notice of the case. When he fails to do so, his application will be discountenanced. In Ukor v Laleye,[157] the Community Court held that voluntary application for intervention from J.I. Alinnor was inadmissible for lack of merit and non-observance of time limit.

It is trite that the rules of reckoning the 3 years within which one can bring an action will not be different from common rules of reckoning (time) in other civilised legal systems. Where the Community Court chooses to import "rules for reckoning time" under Article 38 of the Statutes of International Court,[158] it would be proper for it to look into the legal systems of Member States for existing rules on that subject—after all, they are part of the civilised nations with tested legal systems.

3.10.9 Access to the Community Court of Justice

A Member State and the President of the Commission[159] can access the Court in any action brought for failure by a Member State to fulfil an obligation.[160] Member States, Council of Ministers and the President can bring or become parties to matters for the determination of the legality of an action in relation to any Community text.[161] Text, in this respect, means Community instruments like regulation, decisions, etc. Individual or corporate bodies can also bring or be part of proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies.[162] An individual can also bring an application to the Court for the violation of his human right.

However, there are two conditions[163] upon which an individual may bring an application: (1) the application should not be anonymous, and (2) the same matter

[155] Art. 9(3).

[156] Art 89 of the Rules of the Community Court of Justice.

[157] 2007, P 28, para 33.

[158] Art. 21 of the Revised Treaty.

[159] Unless otherwise provided in a protocol.

[160] Article 10(a) Supplementary Protocol A/SP.1/01/05.

[161] Article 10(b).

[162] Article 10(c).

[163] Art 10(d)(i)(ii).

should not have been instituted before another international court for adjudication. The corollary, as respects the first limb, is that the Community Court would not take an application in which the applicant had failed to disclose his identity and particulars; as to the second limb, it is not clear what will qualify as an international court for this purpose. If the International Court of Justice passes for international court, would a criminal tribunal set up by agreement between two member states qualify as international court, especially when they have agreed to apply their criminal laws and procedures? Assuming that this kind of tribunal succeeds as an international court, it must be because of the international character of the bilateral agreement and the court.

Moreover, it seems that the Community Court would not allow an individual application when the same matter, for which the individual approached it, had been heard or is still being heard at the national court. It may be argued that if the Community intended to exclude cases pending in or determined by national courts, it could have used the same vent of Article 10(d)(ii)[164] to foreclose the opportunity of bringing such actions. However, to appreciate the attitude of the Community Court to pending cases in the national court, one ought to consider the case of Tidjani v Federal Republic of Nigeria.[165] In that case, a Nigerien, residing in Benin Republic, was arrested in his country of residence and taken to Nigeria for arraignment, based on charges of receiving stolen property, etc. He brought a preliminary objection, touching on jurisdiction, but was overruled. He, then, appealed against the ruling. In order to protect his right of fair hearing, he hauled three countries to the Community Court.

The defendants contended, in their preliminary objections, that the applicant's case should be dismissed. According to them, the application before the Community Court was an abuse of court process since an appeal touching on the same points is pending before a court of appeal in Nigeria. In reaching its decision, the Community Court upheld the common argument of the defendants to the effect that the Community Court cannot hear an application on an issue that had been determined by a court in a Member State—hence, it is estopped. Again, it held that the plaintiff's only recourse is to appeal against the decision—which he had done. According to the Court, "Any contrary decisions by this court will amount to this court acting on appeal in respect of the decision by Nigerian domestic courts, which this court has no power to do and will at any rate not embarked on any such venture for the sake of judicial comity". It is safe, therefore, to say that the Community Court would not want to attack the judicial comity existing between it and courts in Member States by (1) taking application on the same subject or issue that had been determined by national courts (issue estoppel) or (2) re-hearing a heard matter which outcome had been pending in an appellate court in a Member State.

[164] (A/SP.1/01/05).

[165] Tidjani v Nigeria 2007, p. 77.

To digress a little, would there be any form of judicial sagacity, capable of serving the purpose of justice, in this kind of attitude, where, for instance, all that happened in the court of first instance at the national level, together with what was happening at the appellate court, amounted to clear violation and perpetuation of the violation of human right respectively? The answer, it seems, would be in the negative. But one may ask whether it is possible that a proceeding in a competent court could amount to a clear violation of human right. Yes, it is possible, especially where there are unusual and long detention, absence of skilled interpreter, denial of access to counsel of the applicant's choice, illegal removal from one sovereign territory to another for purpose of trial, non-recognition of existing and established human rights in a sovereign territory, etc. Where such scenarios exist, there is likelihood of violation of rights of the concerned litigant where the competent court overlooks any or all of the anomalies.

Furthermore, it is not very clear, in Tidjani case, whether this point was canvassed: under the Nigerian law,[166] a suspect ought not to be detained for more than 2 days without a hearing before a competent court. So if Tidjani was detained for more than 2 days before he was taken to court, then a constitutional provision had been violated. That violation is enough to entitle a victim to damages in a Nigerian court. It was stated at page 88 paragraph 31 of the judgment[167] that "the defendants contend that the arrest, detention and trial of the plaintiff are in accord with laid down law". On the contrary, the nature of the law under which he was arrested appears to be in doubt. Also, an expert in ECOWAS law has raised concerns[168] about the legality of Mr. Tidjani's arrest; he has suggested that arrest in a foreign territory and the subsequent arraignment in another territory would amount to illegality where there exists no extradition treaty between the two participating countries.[169] It appears, therefore, that Mr. Tidjani's arrest and detention might not have been conducted under an existing legal basis.

Taking into account the decision in Tidjani and the attitude of the Community Court to national laws, it is suggested that any matter that is grounded in violation of human right should be treated boldly and differently. No national law should be used as a justifiable platform for violation of rights. The question should not be whether a proceeding was brought or initiated under a law, or whether the conduct was done within the law, but in initiating and conducting the proceedings under the law, whether the authorities respected the human rights of their victims. Surprisingly, and in the same spirit of respecting national law, the Community Court had once held[170] that the detention of some citizens by the Government of Cote d'Ivoire for 7 months did not go beyond a reasonable time limit. This is disturbing!

[166] See sections 35 and 36 of the Nigerian Constitution (for rights of persons in such situations).

[167] Tidjani v Federal Republic of Nigeria *supra*.

[168] Falana (2010), p. 32.

[169] Regina v Horseferry Road Magistrates Court 1993, pp. 13–15.

[170] Amouzou Henri & ors V The Republic of Cote D'Ivoire 2009, p. 304, para 95.

To appreciate how national laws should be considered in the face of human right regime, a quick glance at the provisions of section 3 of the Human Right Act of United Kingdom will be helpful. The Act was enacted to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.[171] The Convention, which the Act intended to give effect to, is a regional instrument similar to the African Charter on Human and Peoples' Rights which the Community Court applies. The Act provides thus "So far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the Convention rights".[172] Additionally, the Act provides that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right". It further provides that public authority includes "a court or tribunal; and any person certain of whose functions are functions of a public nature. . .."[173] Clearly, the law considers it an unlawful act for a court to interpret a national law in such a way that fails to agree with the human rights provisions of the Convention. It means that if Amouzou Henri had been decided in that jurisdiction, the result would have been different. The effect of that provision is that the application of national law would not justify the violation of human right as provided under the Convention.

This progressive trend in legal reasoning is not an isolated one; in fact, a study of the European Union law helps one to appreciate the status of human and community rights within that jurisdiction. In Rinner-Kühn case,[174] a German law provided that workers should be given 6 weeks' pay when they fall ill; discriminatorily, the pay was not made available to part timers. When the matter came before the Court of Justice, it held that the practice is discriminatory because it did not agree with the Community rights on non-discriminatory act or behaviour towards the citizens of its members.

However, with respect to access to Community Court, there is another class of litigants that could bring an action before the Court. Article 10(e) of the Protocol[175] provides for access to staff of any Community institution, after the staff has exhausted all appeal processes available to the officer under the ECOWAS Staff Rules and Regulations. Some staff members[176] of the Community whose appointments were terminated have relied on this provision in bringing their claims to the Community Court.

Furthermore, there are special institutions—national courts—that can refer issues to the Community Court. The Protocol on the Community Court provides that "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

[171] See the long title of the Human Right Act 1998.

[172] Section 3(1) Human Right Act 1998.

[173] Section 6(1)–(3) Human Right Act 1998.

[174] Rinner—Kűhn v FWW Spezial Gebaudereinigung Gmblt & CO. KG 1981.

[175] (A/SP.1/01/05).

[176] Qudus Folami &anor. V Community Parliament and ors. 2010, p. 50.

refer the issue to the court for interpretation".[177] A similar provision is also found in the European Union Treaty, and that has been the fulcrum upon which judicial acceptance, by the national courts, revolves. Regrettably, in the meantime, the national courts within ECOWAS have not been relying on this beneficial provision, probably because of absence of legal basis upon which to make the reference.

3.10.10 Applications Brought Under Article 9 of the Protocol[178]

Prior to the amendment of the 1991 Protocol Relating to the Community Court, some actions were initiated under the old Article 9. For instance, Afolabi v Federal Republic of Nigeria[179] was brought under the old Article 9; however, the action failed for want of jurisdiction of the Court. In Ukor v Laleye & Anor, the Court refused to apply the new Article 9 of the Protocol retrospectively, because the application,[180] originally, was brought under the old Article 9 of the Protocol of 1991.

Importantly, this segment will consider, briefly, some of the applications brought under the new Article 9, after the amendment of 2005. It is observed that most of the cases which the Community Court heard were initiated by individuals. Consequently, they have no other choice than to rely on Articles 9(4) and 10(d) of the Protocol. Howsoever, gratifying this opportunity might appear to natural persons, it still introduces some form of monotony to the kind of applications the Court receives. Interestingly, some of these cases have given the Court opportunities to either interpret or apply protocols, regulations or other acts of the institutions of the Community.

In regard to Article 9(1)(a), which provides that the Court has powers to adjudicate on disputes relating to the interpretation and application of a treaty and protocol, the Court relied on this provision to apply both Article 7(2) of the Revised Treaty[181] and Article 19(2) of the Protocol of 1991[182] in Professor Essien v Republic of Gambia & Anor.[183] In Request[184] for Advisory Opinion by the President of ECOWAS Commission on Renewal of the Tenure of Director General and Deputy Director General of GIABA, the Court was specifically requested to interpret Article 18 paragraph 3(f) of Supplementary Protocol A/SP1/06/06, but it

[177] Art. 10(f) Supplementary Protocol.
[178] (A/SP.1/01/05).
[179] *Supra*.
[180] *Supra,* p. 23, para. 5.
[181] *1993*.
[182] Relating to the Community Court.
[183] 2007, p. 120.
[184] 2007, pp. 214–215.

seised the opportunity to consider the effect of the content of Regulation C/REG.21/01/05 and Regulation C/REG 1/05/06 in the face of Article 18 paragraph 3(f) of Supplementary Protocol.[185]

The Community Court had another opportunity to decide on the legality or otherwise of a regulation in Odafe Oserada v ECOWAS Council of Ministers & Other.[186] In that case, the applicant brought an action questioning the legality of a regulation that allocated the post of Executive Secretary General of ECOWAS Parliament to Guinea. In refusing the application, the Court held that "In order for an application seeking to contest the legality of an act to be deemed admissible, it is not sufficient for the act in question to affect the applicant in whatsoever manner that it may be; there should exist, as an additional condition, a sufficiently direct relationship of cause and effect".

With reference to Article 9(d),[187] a Member State can bring an action against another Member State for failure to honour its obligations under the Revised Treaty. The President of the Commission can also bring such application under the law.[188] In reality, it is not very common for a Member State to sue another Member State, because of the intention to keep diplomatic ties. That may be one of the reasons why sovereign states in an economic community arrangement had been reluctant to bring such actions. However, under the European Union law, two cases had been brought by Member States against other Member States.[189]

Furthermore, the Community Court can adjudicate on any dispute that concerns the Community and its officials under Article 9(f) of the Protocol. In Lijadu Oyemade v Executive Secretary ECOWAS (No. 1),[190] Oyemade (applicant) sought for declaration against her summary dismissal which she claimed to have offended Article 65 of the ECOWAS Staff Regulation, and the Community Court granted her application.[191] However, for a staff to bring an action under this head, the staff must comply with Article 10(e) of the same Supplementary Protocol, which provides that access to court is open to "staff of any Community institution, after the staff member has exhausted all appeal processes available to the officer under the ECOWAS Staff Rules and Regulations".

Regarding action for damages against a Community institution or an official of the Community, both individuals and artificial persons (like companies) can bring it to the Court. The actions or inactions of the official, for which the applicant is approaching the Court, should have violated the rights of the individual or corporate bodies.[192] It is very interesting to note that "right" as used under this head must not,

[185] A/SP.1/06/06.

[186] 2008, p. 177, para 33.

[187] Supplementary Protocol.

[188] *Ibid.,* Art. 10 (a).

[189] France v United Kingdom 1979 P2924; Case 388/95 Belgium v Spain 2000 PI-3146.

[190] 2008, p. 25.

[191] See Lijadu Oyemade v Executive Secretary ECOWAS (2) 2008, p. 50.

[192] Art 10 (c) Supplementary Protocol.

necessarily, be the conventional human right. It means that where the action or inaction of the Community officials violates any of the Community or other rights of the plaintiff, a case can be brought to the Court.

However, there was a latent twist in the decision of Odafe Oserada v ECOWAS Council of Ministers & Ors[193] that merits evaluation. Was the Court right when it stated that "in order for an application seeking to contest the legality of an act to be deemed admissible, it is not sufficient for the act in question to affect the applicant in whatsoever manner that it may be, there should exist, as an additional condition, a sufficiently direct relationship of cause and effect. The act made by the Council of Ministers, that is the regulation complained of, must affect the legal status of the applicant. . .." Assuming that the additional condition was in existence, that is, "there was a sufficiently direct relationship of cause and effect", would the Court have acted rightly if it had granted the relief of Odafe Oserada? In other words, assuming that the act made by the Council of Ministers, that is Regulation, affected the legal status of the applicant, would the Court have granted him his relief?

From the tenor of the decision, it seemed that the Community Court's reasoning was in that direction. It is helpful to consider whether an individual can challenge the legality of regulations, directives, etc. even if it affects his or her legal status under the ECOWAS jurisprudence. Article 9(c) of the Protocol (as amended)[194] provides that action on the legality of regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS may be heard by the ECOWAS Court. Nonetheless, Article 10(b) of the same Protocol[195] clearly specified the parties which can access the Community Court in regard to action for legality of Community texts. The Article reads "Member States, the Council of Ministers and the Executive Secretary (now President of the Commission) in proceedings for the determination of the legality of an action in relation to any Community text".

Obviously, it never included individuals within that bracket. Individuals have two channels of access under Article 10 of the Protocol.[196] The first is when their human rights are violated.[197] The second is in proceedings for the determination of an act or inaction of a Community officials (and not Community institution) which violates the rights of the individuals.[198] The Protocol did not mention in that article "action or inaction of a Community institution". In Oserada case, the wrong was done by a Community institution (and not community official), so under what head was the Court considering the point of "sufficiently direct relationship of cause and effect"? It seems that the Court had to broaden Article 10(c) in order to cover acts of the institutions of ECOWAS. It means therefore that Article 10(c) applies both to Community officials and institutions. Because of this expansive approach, if

[193] *Supra*.

[194] A/SP.1/1/05.

[195] Ibid.

[196] This access was not included in the old law.

[197] Article 10 (d).

[198] Article 10 (c).

the Regulation, indeed, had violated Oserada's right he could have relied on Article 10(c) successfully.

Nevertheless, the Community Court of ECOWAS in justifying that Oserada was not a person that was "individually concerned" in regard to the Regulation that allocated the post to Guinea relied on Plauman v Commission.[199] It would be interesting to point out quickly that the law which the European Court of Justice interpreted was hugely different from the provisions of Articles 9 and 10 of the Protocol Relating to the Court. At the time Plauman was decided, the Lisbon Treaty had not amended Article 230 of (EC) the Rome Treaty. Plauman was decided under that old law; surprisingly, the old law even gave individuals the opportunity to challenge the legality of any European Union decision or decision in the form of regulation if they can show that the instrument or measure is of direct and individual concern to them. For clarity the law is reproduced below:

> Any natural or legal person may under the same conditions, institute proceedings against a decision addressed to that person or against a decision which although in the form of a regulation or a decision addressed to another person is of direct and individual concern to the former.[200]

That law differs hugely from Articles 9 and 10 of the Protocol, which generally gave only the Member States, Council of Ministers and the President of the Commission access to the Court on matters bordering on the legality of an action in relation to any Community text. It is likely that the Community Court, in Oserada, arrived at the right conclusion through a teleological approach. In deciding whether to grant access to individuals or corporate entities to bring action for determination of the legality of an ECOWAS text, it is hoped that the Court would always interpret "Community official" as contained in Article 10(c)[201] to include "Community institutions".

Respecting an action for damages[202] which can be brought against a Community institution or an official of the Community where the former or latter acts or omits to act in the exercise of official functions, the Court would certainly seise jurisdiction and could award damages to the aggrieved litigants. This head[203] may be used to bring action in tort or breach of contract by the Community institution or officials. In Qudus Folami & Anor v Community Parliament & Ors,[204] the applicants alleged that their employment contracts with the Community Parliament were wrongfully terminated; hence, they brought an action asking, among other reliefs, for arrears of salary. The Community Court, having heard the matter on merit, dismissed their applications. However, in another case, the Court went

[199] Case 25/62 [1962] ECR 95.

[200] Art. 230 (4) Treaty of Rome (EC).

[201] Supplementary Protocol A/SP.1/1/05.

[202] *Ibid.,* Article 9 (1)(g).

[203] *Ibid.*

[204] 2010, p. 51.

ahead to award damages to an applicant whose appointment was improperly terminated.[205]

Furthermore, the Court has power, under Article 9(2), to entertain action for civil wrong done to any person or body by the Community institutions or officials either by act or omission in the exercise of their official duties. It should be observed that Article 9(2) of the Protocol Relating to the Court specifically states that the Court shall have power to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparations for wrongs done either by the institutions or their officials. Two points are salient: first, if any of the institutions becomes liable, the Community pays; second, if the liability was as a result of the action of any of its officials, the Community pays. In this vein, the Court has indicated in David v Uwechue[206] that any action brought under this head should be against the Community (defendant).

Under Article 9(6),[207] parties can bring action for the determination or resolution of contractual disputes provided that there is an agreement between them that any issue arising from their contract shall be determined by the Community Court. Unfortunately, in Linas International Nigeria v Ambassador of Mali & Ors,[208] the applicant brought an action for breach of contract under the Protocol as amended. The facts were that the applicant facilitated the allocation of a plot of land to the Republic of Mali in Nigeria. The terms of the agreement included that the applicant should pay 10 % of what the land is valued at to the applicant; when the Malian authorities failed to pay, the applicant had to bring an action under Article 10(c). The Community Court, while refusing the application, pointed out that there existed no agreement between the parties that dispute resulting from their transaction should be heard in the Community Court as provided in Article 9(6).[209]

3.10.11 Procedure

Article 14 of the 1991 Protocol[210] provides that proceedings before the Court shall consist of two parts: written and oral. In between the written and oral procedures, there would be preparatory inquiries which should be conducted by the judge rapporteur. Who then, one wonders, is this judge rapporteur?

---

[205] Edoh Kokou v ECOWAS Commission ECW/CLJ/JUD/03/2010 cited in Falana (2010), p. 33.
[206] 2010, p. 161.
[207] Supplementary Protocol 2005 *op.cit.*
[208] 2009, p. 271 at 280, para. 24.
[209] Supplementary Protocol 2005.
[210] A/P1/7/91.

3.10.11.1 Judge Rapporteur

The word "rapporteur" etymologically has a French origin. It is a technical term referring to a person officially chosen by an organisation to investigate a problem and report on it.[211] Under the ECOWAS law, a judge rapporteur means a judge nominated by the President of the Community Court to summarise or give a report on a case or an issue.[212] So his duties are to summarise the cases brought by the parties, write and present reports touching on the entire cases or the issues distilled from the processes. He also participates in the deliberation done by the judges in regard to cases.

The judge rapporteur has the duty to conduct measures of inquiry which the Community Court has ordered. For instance, if the Community Court, before the oral proceedings, wants an expert to present a report (or would want a document or series of documents to be presented to it), it is the judge rapporteur that would take charge of this assignment. In this regard, he would play a supervisory role over the expert. Where the Court had ordered oral testimony to be conducted or that a place or thing should be inspected, before the oral procedure, it is the judge rapporteur that would carry out these responsibilities.[213]

Bearing in mind the similarity of the Community Court with the Court of Justice of the European Union, a similar role exists in that jurisdiction, also known as judge rapporteur. But this is not the same as Advocate General. The latter is more popular than the former. The duty of an Advocate General under procedure of Court of Justice of the European Union is to, in each case, deliver his opinion before the Court would hear and determine the case. He has the duty to present a reasoned submission in respect of cases brought before the Court. He considers both the facts and law of the cases and gives his legal opinion on how the matters should be decided. The Court would normally be influenced by the weight of his opinion; however, the Court is not bound to apply it.[214]

3.10.11.2 Written Procedure

Written proceedings consist of the application entered in the Community Court, notification of the application, the defence, the reply or counter-statement, the rejoinder and any other briefs or documents in support.[215] "Application" is used to initiate the action, while a "defence" can be filed where the defendant intends to defend the claim. There is room for reply, and a rejoinder can also be used to bring further counter-facts. The procedure gives both the applicant and the defendant

[211] Hornby (2001), p. 965.

[212] Article 1 Rules of the Community Court of Justice.

[213] Articles 41 (2)(3), 45(2) Rules of Court.

[214] Harris and Horspool (2008), p. 56 relying on Paola Facini Dori V Recreb SRL 1994.

[215] Article 14 Protocol A/P1/7/91.

space to bring in additional facts. The application should state (a) the name and address of the applicant, (b) the designation of the party against whom the application is made, (c) the subject matter of the proceedings and a summary of the pleas in law on which the application is based, (d) the form of order sought by the applicant, (e) where appropriate, the nature of any evidence offered in support.[216]

The drafting of the process would not pose difficulty for any counsel in practice. As usual, the process must be headed in court, for instance, "In the Community Court of Justice of the Economic Community of West Africa States"; then it should subsequently state where the court is holding, for example, "Holden (Holding) in Abuja". It is trite that lawyers in common law countries are conversant with "Holden" as a term describing where the court is sitting. The prospective litigant should proceed to reproduce the laws upon which the application was brought; after that, the litigant or counsel will follow the requirements (a–e)[217] listed above. The application, defence, replies, etc. must be signed by the party's agent or lawyer. The original of the process, accompanied by all annexes, should be lodged together with five copies for the Community Court and a copy for every other party to the proceeding. The party lodging them shall certify the copies.[218]

The process should also state the address for service; however, 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.[219] Article 33(2) of the Rules created a difficult requirement: it provides that application shall state an address for service in the place where the Community Court has its seat and the name of the person who is authorised and has expressed willingness to accept service. It means that litigants should arrange with a person or firm in Abuja, Nigeria, to receive processes on their behalf. However, it is likely that the provision of Article 33 which allows the agent or lawyer to receive processes by telefax or other technical means of communication may have solved the problem to an extent.

Where the applicant fails to provide an address for service within the place where the Community Court has its seat, service shall be deemed to be duly effected by lodging of registered letter at the post office of the place where it has its seat.[220] Note that where the originating application does not comply with paragraphs 1–4 of Article 33, the Chief Registrar should 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.[221] If the applicant fails to put the application in order or to produce the required documents within the prescribed period, the Court would, after hearing the judge

[216] Article 33 Rules of the Court.

[217] *Ibid.*

[218] *Ibid.,* Article 32.

[219] *Ibid.,* Article 33(3).

[220] *Ibid.,* Article 33(4).

[221] See Article 16 of the 1991 Protocol as amended: At any time the Court may request the parties to produce any document or information.

rapporteur, decide whether the non-compliance with these conditions renders the application formally inadmissible.[222]

Once the application has been served on the defendant, he shall, within 1 month of getting the service, lodge a defence. The structure of the defence may not differ so much from the structure of the (originating) application which applicants file. In line with the Rules, the defence should state the following particulars of fact and law: (1) the name and address of the defendant, (2) the arguments of fact and law relied on, (3) the form of order sought by the defendant and (4) the nature of any evidence offered by him.[223]

Where[224] the defendant has lodged and served his defence on the applicant, the latter may within 1 month file his reply. Assuming the defendant, too, intends to respond to the reply, he shall within 1 month from the date he received the reply file his rejoinder. It is also possible for either the applicant or defendant to request for extension of time within which to file the process; such request for time enlargement can be granted by the President.[225] A party filing a reply or rejoinder may be allowed to introduce new pieces of evidence; however, the Community Court expects the party to give reasons for the delay in introducing them.[226] An applicant, in the course of the proceedings, may not be allowed to introduce new plea, unless it is based on matters of law or of fact which came to light in the course of the procedure.[227]

3.10.11.3 Close of Pleading

Where parties have exchanged pleadings, the President will fix a date on which the judge rapporteur is meant to present his preliminary report to the Community Court.[228] For the purpose of fixing a date to receive the report of the judge rapporteur, pleadings are either deemed to be closed or closed in any of these circumstances: (1) after the rejoinder has been lodged or (2) where no reply or rejoinder has been lodged within the time limit fixed in accordance with Article 36 (1) of the Rules or (3) where the party concerned has waived his right to lodge a reply or rejoinder.[229] There is another procedural approach that would determine close of pleadings. Under Article 59 of the Rules, any of the parties may bring an application for expedited procedures. Where the Community Court decides to apply this procedure, then pleading would be closed after the defendant has filed his

[222] Article 36 (6) of the Rules of Court.
[223] *Ibid.,* Article 35(1).
[224] *Ibid.,* Article 36 (1).
[225] *Ibid.,* Paragraph (2).
[226] Article 37(1) of the Rules of Court.
[227] *Ibid.,* Paragraph (2).
[228] Article 39 of the Rules of Court.
[229] *Ibid.,* para (a)–(c).

defence. Ordinarily, under this procedure, the use of reply and rejoinder may not be permitted unless the Community Court considers them necessary. In such a case, then, pleading would be closed after the reply and rejoinder had been filed.

3.10.11.4 Nature of Judge Rapporteur's Report

At the close of pleadings, the judge rapporteur should present a report to the Community Court. The report would be preliminary in nature and should contain recommendations as to whether a preparatory inquiry or any other preparatory step should be undertaken. It should also contain a relief, if any, as to the possible omission of the oral part of the procedure.[230] However, it is the Community Court that determines which of the recommendations should be accepted.[231]

3.10.11.5 Preparatory Inquiries and Measures

This procedure is sandwiched in between the filing/exchange of pleadings (written procedure) and the oral procedure. At the close of pleadings, the judge rapporteur is mandated to produce a report that would contain a recommendation for this procedure to be undertaken. Where the report presented by the judge rapporteur did not recommend the use of this intermediate procedure, his report would still be in line with the Rules, in as much as, in his judgment, he sees no reason why the Community Court should embark on such pre-trial exercise or meeting.[232] But where it is recommended that the procedure should be applied, it is the Community Court that will decide the appropriate measure or inquiry that would be employed. Although the Community Court has the power to decide what measure would be adopted, yet it must, first, hear the parties before reaching a conclusion.[233] It is important to observe that whatever happens at this preliminary stage forms part of the proceedings. Significantly, this procedure helps the Community Court to deepen its knowledge about the parties, as well as the information, documents and reports that would be used during the hearing. It also helps the Community Court to clarify some facts from the parties or litigants before the actual hearing or trial. Clearly, this stage is not the same as the oral procedure (which is the trial), especially if ones consider the fact that, as provided in Article 41, it should be conducted by the judge rapporteur.

Moreover, there are different kinds of inquiry that may be adopted by the Community Court and conducted by the judge rapporteur. These patterns of inquiry which may be adopted are (1) requiring the personal appearance of the parties

[230] Article 39 (2) of the Rules.
[231] *Ibid.,* (3).
[232] Article 39 (2) of the Rules.
[233] Article 41 (1) of the Rules.

before the Community Court, (2) requesting for information and production of documents, (3) taking of oral evidence, (4) commissioning an expert in a field relevant to the issues before it to write a report and (5) ordering that a place or thing be inspected.[234] But the place or thing should be relevant to the issues or the case before the Community Court.

3.10.11.6 Examination of Witness and Experts at Preparatory Inquiry

The Community Court may order a party to prove certain facts based on the application by a party or its own motion.[235] The same order compelling a party to prove certain facts must set out the exact facts that the party should establish.[236] Where an application is made at the preparatory inquiry stage by a party for the purpose of ordering a witness to attend and be examined, the application shall state precisely what facts and for what reasons the witness should be examined.[237] When the witness has given his evidence, the President,[238] the other judges[239] and, subject to the control of the President, the representatives of the parties may put questions to him.[240] The Chief Registrar of the Community Court, at the end of the examination, should draw up minute which should contain the evidence of the witnesses, and the minute would constitute an official record of the Community Court.[241]

Under Article 45 of the Rules, the Community Court may, also, order that an expert report be obtained. That order appointing the expert shall define his task and the time frame within which to conclude his report. Also, at the instance of the expert, the Community Court can order the examination of witness. It seems that this examination must have bearing or connection with the expert's report, observation, result or knowledge or that the examination would help, according to the expert, to clarify facts for the purpose of achieving justice. The expert, in giving his opinion, may restrict it to the points which have been expressly referred to him.[242] The expert can also be examined by the parties where they have been given notice to attend. This kind of examination shall be by the order of the Community Court.[243] In fact, the word used in the paragraph is "may"; the full rendering is reproduced for quicker appreciation: "After the expert has made his report, the Court may order that he be examined, the parties having been given notice to

[234] Articles 41 (a)–(e) of the Rules.
[235] Articles 43 (1) of the Rules.
[236] *Ibid.*
[237] Article 43 (3) of the Rules.
[238] *Ibid.,* (8).
[239] *Ibid.,* (9).
[240] *Ibid.*
[241] *Ibid.,* (11) (12).
[242] Article 45 (5) of the Rules.
[243] *Ibid.,* (6).

attend."[244] The question, obviously, would be since the word "may" is employed, does it mean that the Community Court, in some circumstances, may decide not to order for the examination of the expert? It seems that the Community Court would never be in a hurry to refuse an application for examination of an expert witness, especially where one of the parties may be yearning for clarification of some grey areas in his report, or to question his skills and competence or to discredit the report where it is clear, based on other scientific evidence or knowledge, that the report left more to be desired. The only limitation is that, in line with paragraph 7 of the same article, the examination should be done subject to the control of the President.

Generally, there is a provision in the Rules[245] which empowers a party to raise an objection against an expert: "if one of the parties objects to a witness or to an expert on the ground that he is not a competent or proper person to act as witness or expert or for any other reason, or if a witness or expert refuses to give evidence or, to take the oath or to make a solemn affirmation equivalent thereto, the matter shall be resolved by the Court". Whether the objection raised under this head would be upheld or overruled will depend on the decision of the Community Court. Where a party intends to raise such an objection, he must do so within 2 weeks after service of the order summoning the witness or appointing the expert.[246] In terms of procedure, the statement of objection must set out the grounds of objection and indicate the nature of any evidence offered.[247]

To reduce the cost of attendance, the witnesses and experts summoned by the Community Court should be entitled to reimbursement of their travel and subsistence expenses. The Registry of Community may make payment to them in regard to these expenses in advance. Notice that the reimbursement, under this head, is for witnesses and experts summoned by the Community Court. It does not mean that every person who attends proceeding as a witness should be reimbursed. Where a party invites a witness, ordinarily, it should bear the costs. In Musa Saidhykhan[248] v Republic of Gambia, the costs of bringing both the principal witness from United States and the expert witness, Doctor Dialo, from Senegal were shouldered by Media Foundation for West Africa.[249] However, where a party applies to the Community Court to summon a witness for examination, such application might be granted provided that the party deposits with the Registry a sum sufficient to cover the taxed costs.[250] This reimbursement is different from the earlier point discussed: where the summoning is solely made by the Community Court, then the

[244] *Ibid.,* And paragraph 7 clearly states that subject to the control of the President, questions may be put to the expert by the representatives of the parties.

[245] Articles 46 (1) of the Rules.

[246] *Ibid.*

[247] *Ibid.,* (2).

[248] *Supra.*

[249] A non-profit organisation based in Accra, Ghana.

[250] Article 43 (6) of the Rules.

Registry shall advance the funds necessary to take care of the expenses of the witness.[251]

Furthermore, the President of the Community Court should at the close of the preparatory inquiry proceed to fix the date for the opening of the oral procedure. But the Community Court may, prior to fixing the date for oral procedure, prescribe a period within which the parties may lodge written observations. At the expiration of such period prescribed for lodging the written observation, the Community Court should proceed to fix the date for the opening of the oral procedure.[252]

3.10.11.7 Preparatory Measures

The Community Court may request the parties to do certain things or take some other steps before the oral procedure is opened. Under Article 51,[253] the Community Court is empowered to request the parties to submit within a specified period all such information relating to the facts and all such documents or other particulars as it may consider relevant. The information and documents provided should be communicated to the other parties. Notably, there are some similarities between the procedural rules found in Article 41(2) and the rules found in Article 51. Article 51 may serve some of the purposes of Article 41(2) and vice versa.

3.10.11.8 Oral Procedure

This is the stage where the matter is tried properly. There would be room for examination in chief, cross-examination and re-examination of parties. The President opens and directs the proceedings, as well as ensures the proper conduct of the hearing.[254] There would be an opportunity given to each of the parties to address the Community Court, but it must be done through their lawyers, advisers or agents.[255] The President may, during the hearing, put question to any person who is addressing the Community Court.[256] When the parties have been given opportunity to present their cases orally, the Community Court will declare the oral procedure closed.[257] It has power, too, to reopen it.[258] In summary, when the term 'oral proceeding' is used under ECOWAS law, it refers to hearing of the parties, agents, witnesses, experts,

[251] *Ibid.*

[252] See Article 50 (1) (2) of the Rules.

[253] Rules of the Court.

[254] *Ibid.,* Article 53.

[255] *Ibid.,* Article 55.

[256] *Ibid.,* Article 54.

[257] *Ibid.,* Article 56.

[258] *Ibid.,* Article 58.

advocates or counsel—as shown in Article 14(4) of the Protocol Relating to the Court.

3.10.11.9 Argument (Brief)

Argument constitutes a part of the procedure of the Community Court, and where the argument has been reduced into writing at the time of filing, it would make up the written procedure processes.[259] In explaining what will constitute written proceeding, the Protocol provides that "Written proceedings shall consist of the application entered in the court, notification of the application, the defence, the reply or counter-statement, the rejoinder and any other briefs or documents in support".[260] Furthermore, there could be some elements of argument in the defence which a defendant is expected to file as shown in Article 35 of the Rules, which reads: ". . . defendant shall lodge a defence stating (b) the arguments of fact and law relied on". However, there is a slight difference between Article 33, which listed what an application should contain, and the provision of Article 35. In the former, the inclusion of argument in the application is left out, while in the latter, it was clearly written that the defence should contain arguments of facts and law relied on.

Conventionally, the application should not contain legal argument,[261] and in practice, so long as the court agrees, parties may file their written addresses after the oral proceeding. Also, an applicant (or the defendant) may rely on Article 14(2) of the Protocol to bring in brief in support of his case. In addition to using the procedures in the Rules to bring written arguments or briefs, a party may also through his counsel or representative present his or her argument orally.[262] Normally, where a written argument, brief or address is filed, the address or argument proffered orally would be very brief. Sometimes, it could be an opportunity for clarification and emphasis on vital points.

3.10.11.10 Expedited Procedures

A party may also bring an application, in addition to the initiating application, for the case to be heard under the expedited procedures. Where such an application succeeds, the proceeding may not be conducted strictly in accordance with the Rules of Court. Under this procedure, the pleadings would be limited to the original application and the defence. However, if the Community Court considers it necessary, it may permit the use of reply and rejoinder. Also, an intervener, in this kind of

[259] See Article 35 (b) of the Rules, Article 14 (2) of the Protocol Relating to the Court as amended.

[260] *Ibid.*

[261] In Manneh v Gambia (2004–2009) CLJELR, p. 181, the application filed by the plaintiff's counsel did not contain arguments (in that singular process); see Falana (2010), pp. 120–127.

[262] Article 14(4) Protocol Relating to the Court as amended, Article 55 of the Rules.

proceeding, would only be allowed to lodge a statement in intervention if the President considers it necessary. Once the decision to adjudicate under expedited procedure has been made, the Community Court should proceed to fix the date for hearing and would give its ruling after hearing the parties.[263] The rationale behind this procedure is to offer litigants the opportunity to litigate their cases speedily in some exigent circumstances.

3.10.11.11 Judgments

A judgment of the Community Court becomes binding from the date of its delivery[264] and will contain a statement that it is the judgment of the Court; the date of delivery; the names of President, judges taking part in it, chief Registrar, parties, agents, advisers and lawyers. It will also contain the statement of the forms of order sought by the parties and a statement that the parties have been heard. The grounds of decision and the operative part of the judgment should also be included.[265] Where the Community Court omits to give a decision on a specific head of claim or on costs, any party may within a month after service of the judgment apply to it to supplement the judgment.[266] The certified copies of the judgment should also be served on the parties.[267] Furthermore, the unsuccessful party would be ordered to pay cost if it formed part of the relief sought by the successful party, and where there are several unsuccessful parties, the Community Court would decide how the costs should be shared.[268]

3.10.11.12 Third Party Procedures

Another interesting provision in the Rules of the Court is the opportunity created under Article 91[269] to enable third parties to bring an application for stay of execution or total variation of judgment given in respect of the parties to the suit.[270] However, any prospective third party wishing to exploit this procedure must be prepared to show how the judgment is prejudicial to his rights and indicate the reasons for which he was unable to take part in the original case.[271] Such application must be made against all the parties to the original case.[272]

---

[263] Articles 59 (1)–(8) of the Rules of Court.
[264] Article 61 of the Rules of Court.
[265] Article 60 of the Rules of Court.
[266] Article 64 of the Rules of Court.
[267] Article 61 (4) of the Rule of Court.
[268] Article 66 (3) of the Rules of Court.
[269] Rules of Court.
[270] *Ibid.,* (4) (6).
[271] *Ibid.,* (1) (b) (c).
[272] *Ibid.,* (2).

3.10.11.13 Intervention

The procedure described above is totally different from an application brought merely for the purpose of intervening during the subsistence or pendency of a matter. In intervention proceedings, the matter must be pending and the intervener would ordinarily be seeking to intervene in the existing and not concluded matter,[273] while the third party proceeding is brought after a judgment had been given in respect of a matter brought at the Community Court. An application to intervene should be made within 6 weeks of the publication of the notice in the official journal of the Community in accordance with the Rules.[274] Such application should describe the case and parties and state the form of order sought by one or more parties, in support of which the intervener is applying for leave to intervene.[275] The intervener should also file a statement of the circumstances establishing the right to intervene.[276] Such application should be served on the parties, and they should be permitted to submit their written or oral observations.[277] Where the application succeeds, the intervener will receive copies of documents served on all the parties. However, the Community Court may, based on the application of any of the parties, decide to omit secret or confidential documents from the pack the intervener would receive.[278] Also, the intervener must accept the case as he finds it at the time of his intervention. He would not be at liberty to disrupt or stir the concluded procedures or demand for procedures to be started afresh.[279]

In regard to the "statement in intervention" which the President would expect the intervener to file within a limit, it should contain a statement of the form of order sought by the intervener which supports or opposes, in whole or in part, the form of order sought by one of the parties. It should also state the pleas in law and arguments relied on by the intervener and, where appropriate, the nature of any evidence offered.[280] Note that this process is not meant to accompany the application to intervene. It would only be filed after the application to intervene had been granted.[281] But in practice, drawing analogy from municipal practice in common law countries, counsel may, for convenience, include the substantive document while filing their application for leave, though the rules may have stated otherwise, knowing that their motions would certainly succeed.

[273] Articles 89 of the Rules.
[274] Articles 13 (6), 89 (1) of the Rules.
[275] Article 89 (1) (a) (b) (e).
[276] *Ibid.,* (f).
[277] *Ibid.,* (2).
[278] *Ibid.,* (3).
[279] Article 89 (4) of the Rules.
[280] *Ibid.,* (5).
[281] Compare Article 89 (i) with Article 89 (5).

3.10.11.14 Judgments by Default

Similar to practice prevalent in some jurisdictions, where a defendant on whom an application, which initiates proceedings, has been duly served fails to lodge a defence to the application in the proper form within the prescribed time, the applicant may apply for judgment by default.[282] However, before giving the judgment by default, the Community Court would, after considering the circumstances of the case, deliberate on whether the application initiating proceedings is admissible, whether the appropriate formalities have been complied with and whether the application appears well founded.[283] The Community Court, notwithstanding that it is an application for judgment by default, has power to order a preparatory inquiry,[284] as well as to decide to open oral procedure on the application.[285] Expectedly, any judgment given based on such application should be enforceable.[286] Where judgment is entered, an application to set it aside may be brought within 1 month from the date of service of the judgment on the defendant. After the application to set aside has been served, the President will prescribe a period within which the other party may submit his written observation.[287]

3.10.11.15 Revision and Interpretation of Judgment

The Community legal order has no general appellate structure—although the Community Court may take special appeal from certain administrative organs of the Community in respect of employment relations of a Community staff and competition cases.[288] Therefore, where a party is displeased with a given judgment on some points, his only option might be to bring an application for the contested judgment to be reviewed by the Community Court. The judgments which it has been empowered to review are those judgments it gave in its original jurisdiction and not decisions emanating from municipal courts. An application for revision of judgment should be made within 3 months of the date on which the facts, grounding the application, came to the applicant's knowledge.[289] An application for review should specify the judgment contested, indicate the points on which the judgment is contested, set out the facts on which the application is based and indicate the nature

[282] Article 90 (1) of the Rules.
[283] Article 90 (4) of the Rules.
[284] *Ibid.,* (5).
[285] *Ibid.,* (3).
[286] *Ibid.,* (6).
[287] *Ibid.,* (8)–(13).
[288] These special appeal jurisdictions are discussed in chapters 9 (staff actions) and 14 (competition policy).
[289] Article 92 of the Rules of Court.

of the evidence to show the facts justifying revision of the judgment and that the time laid down in Article 92 has been observed.[290]

The Community Court should, without prejudice to its decision on the substance, in closed session, give in the form of a judgment its decision on the admissibility of the application. This would only be done after the parties had been heard and the Community Court had considered the written observations of the parties.[291] Where such application is found admissible by the Community Court, it should proceed to consider the substance of the application and should give its decision in the form of a judgment in accordance with the Rules.[292] Note that there are two kinds of decisions that take place in regard to intervention procedure: the Community Court would first consider and decide on whether the application is admissible, and where admissible, it would then consider and decide on the substance of the application, which would be the ultimate decision.

3.10.11.16 Interpretation

If the meaning or scope of a decision or advisory opinion is in doubt, the Community Court will construe it on application by any party or any institution of the Community establishing an interest in it.[293] Such an application shall be made as though it were an ordinary application. The provisions of Article 32 of the Rules (written procedure) should apply. The content must reflect all the points listed in Article 33 of the Rules.[294] In addition to what the application would show, it must specify the judgment in question and the passages of which interpretation is sought.[295] This procedure may be used by a person where the judgment or opinion or some portions of the judgment or opinion appear unclear to the person. The person applying for interpretation must bring his application against all the parties to the case in which the judgment was given.[296]

3.10.11.17 Opinions

Under the ECOWAS law, the Authority, the Council of Ministers, the President of the Commission and the Member States are empowered to request the Community Court to give legal opinion on questions relating to the Revised Treaty.[297] Where

[290] Article 93 of the Rules of court.

[291] Article 94(1) of Rules of Court.

[292] *Ibid.,* (2).

[293] Article 23 Protocol A/P1/7/91 as amended by A/SP.1/1/O5.

[294] Article 95 of the Rules of Court.

[295] *Ibid.*

[296] Article 95 (2) of the Rules.

[297] Art. 11(1) Protocol A/P1/7/91 as amended by Protocol A/SP.1/1/05.

any of these eligible applicants elects to make such request, it should reduce it in writing and include in it the statement of the questions upon which advisory opinion is required. It must be accompanied by all relevant documents likely to throw light upon the question, and the Community Court would render its opinion in public.[298] The Registrar, upon receipt of request for opinion, should immediately inform Member States, notify them of the time limit fixed by the President for receipt of their written observations or for hearing their oral declarations.[299]

The Community Court had, once, been called upon by the Executive Secretary (President of the Commission) to give its opinion on the conformity of Rule 23 (11) of the Rules of Procedure of the Community Parliament with Articles 7(2) and 14(2)(f) of the Protocol Relating to the Parliament of the Community.[300] It considered the request and formed the opinion that the two legal provisions were in conformity. The summary of the fact of the case was that the speaker of the Community Parliament, who was also the head of the Bureau of the Community Parliament, continued to run the affairs of that institution after his tenure has elapsed. According to the Parliament, Rule 23(11) of the Rules of Procedure of the Community Parliament provided for continuation of the Bureau of the Parliament until the first sitting of the new President. The Parliament relied on this provision because Article 19 of the Protocol of the Community Parliament states that "All matters not provided for in this Protocol shall be determined by the Rules of Procedure".

In the thinking of the Executive Secretary, the provision of Rule 23(11) of the Rules of Procedure of the Community Parliament appeared contradictory to other provisions of the Protocol of the Community Parliament. The Secretary drew the attention of the Community Court to the provision that reads "For the duration of the transitional period, representatives who are not elected at the national level shall remain in office until the new representatives from their respective member states take up their positions".[301] In counteracting this assertion, the Parliament submitted that the period stated in Article 7(2) does not refer to the period between the terms of office of the representatives and the succession by others.[302]

Surprisingly, the Community Court did not seise the opportunity to explain exactly what the "transitional period" meant; rather, it proceeded to conclude that the Rule was in conformity with the Protocol. At least, from this opinion, the meaning of "transitional period" found in the Protocol was allowed to remain in oblivion. In Request for Advisory Opinion by the President of ECOWAS Commission on Renewal of the Tenure of Director General and Deputy Director General of

[298] *Ibid.,* (2) (4).

[299] *Ibid.,* (3).

[300] Request for Advisory opinion from the Executive Secretary of ECOWAS Relating to Article 23 (11) of the Rules of Procedure of the Community Parliament and the provisions of Article 7 (2) and 14 (2) (f) of the Protocol on Community Parliament (2004–2009) CCJELR, p. 55 at 61.

[301] Protocol Relating to the Parliament of the Community Article 7 (2).

[302] Request for Advisory Opinion supra, p. 59.

GIABA,[303] the Community Court had another opportunity to give its advisory opinion. The request was made by the President of the ECOWAS Commission (formerly Executive Secretary) seeking opinion on, *inter alia*, whether the new Article 18 paragraph 3(f) of Supplementary Protocol,[304] which limits the tenure of statutory appointees of other Community institutions to a single non-renewable term of 4 years, applies to the offices of Director General and Deputy General of GIABA.[305] The Community Court was of the opinion that Article 18 paragraph 3 (f) of Supplementary Protocol, which provides that statutory appointees of other Community institutions shall be appointed for a single 4-year term of office, would be applicable to the Director and Deputy General of GIABA.[306]

3.10.11.18 Execution/Enforcement of Decisions

One of the herculean challenges hindering the success of the Community Court has been non-enforcement or non-execution of its judgments or decisions within the territories of the Member States. Actually, the Community Court has used different forums to seek for assistance in this regard. In 2012,[307] for instance, the former President of Community Court Hon. Awa Nana Dodowa, while calling for more effective enforcement mechanism, decried the practice of relying on the goodwill of Member States for the enforcement of the judgment of the Community Court. Quite in character, since most of these decisions are given against governments, it is expected that they would not, on these occasions, use their 'goodwill'.

There are documents[308] that show that, as at 2012, out of the ten human right cases[309] completed, only three were complied with and two were partially complied with; the rest of the decisions were neither complied with nor enforced in the concerned Member States. For this reason, non-governmental organisations have been routing for a more robust enforcement mechanism to protect the value of the judgments of the Community Court.

The challenges trace their root to non-recognition of the decision or judgment of Community Court in the Member States. Like the rest of the Community laws, judgments of the Community Court do not have supranational effect within the jurisdictions of the Member States, and they are not deemed to be judgments of the

[303] 2008, p. 201.

[304] A/SP1/06/06.

[305] An acronym for Inter-governmental Action Group Against Money Laundering.

[306] Request for opinion *supra,* p. 216.

[307] ECOCOURT Newsletter 2012.

[308] Media Foundation for West Africa (2012).

[309] The following cases have not been complied with as at 2013: Musa Saidykhan v Gambia, Ebrimah Manneh v Gambia, Djot Bayi v Nigeria, Serap v Nigeria 2009, Serap v Nigeria 2012. Partial compliance: Habré v Senegal, 2010; Ameganvi v Togo, 2011. Situational compliance: Tandja v Niger 2010.

national courts in the States were they are sought to be implemented. To the domestic courts, they are as foreign as any judgment from Japan. In order to make them part of the decisions of the domestic courts, legislative steps must be taken. Unfortunately, the Member States have not considered it a priority to take off the veil of foreignness through statutory intervention.

The Community Court would not go far with its judgment unless the Member States are willing to open up their jurisdictions. Under the ECOWAS law,[310] judgments that have financial implication either for national or Member States are binding. But in order to execute any of these judgments, there shall be issued a writ of execution which the Registrar shall furnish to the concerned Member State for execution in accordance with its civil procedure rules. So the enforcement still lies in the hand of the judicial system of the relevant Member State. It is possible that under enforcement laws of a Member State there could be a reciprocity element which ECOWAS, as an international organisation, cannot fulfil or recognition requirement that has not included Community Court's judgment—thereby making enforcement unconstitutional. These hindrances can be corrected by statutory intervention.

In addition, the law leaves the Member States with the discretion to create or decide on the competent authority that will be liaising with the Community, as well as processing the execution of the judgment of the Community Court. Regrettably, most of Member States have not complied with that law; hence, there are no implementing institutions in those Member States. Conclusively, it seems, in the meantime, that the enforcement of the judgments of the Community Court will be left to the goodwill and discretion of the Member States.

3.11 Conclusion

ECOWAS has created different institutions and organs in order to achieve its integration objectives. The principal institutions include the Authority of Heads of State, Council of Ministers, ECOWAS Parliament, ECOWAS Commission, Community Court of Justice, ECOWAS Bank for Investment and Development and Inter-governmental Action against Money Laundering and Terrorism Financing in West Africa (GIABA). These institutions have been provided with institutional structures, personnel and funds to enable them fulfil their responsibilities as defined in numerous Community texts. However, there are diverse challenges that beset them, ranging from supranational governance issues, lack of funds, technological limitations, human capacity to absence of national election system for parliamentary positions.

It seems, in spite of these challenges, the Community Court has fared well since its jurisdiction has been widened to accommodate human right cases brought by

[310] Article 24 Protocol Relating to the Community Court as amended.

individuals. It has heard more cases under its human right jurisdiction than under any other jurisdiction created by Articles 9 and 10 of the Protocol Relating to the Community Court as amended in 2005. Although the Community Court's judgments are binding when they have financial implications, yet the record of enforcement or execution of these judgments within the territories of the Member States leaves more to be desired. The reasons for the poor record of execution may be attributed to constitutional restrictions, lack of political will to open up national legislative space for ECOWAS texts and failure, on the part of Member States, to establish national authority for the execution of the judgments.

References

Laws

Constitution of the Federal Republic of Nigeria 1999
Decision A/DEC2/00/06 Establishing the Judicial Council of the Community
Directive A/S1R.1/5/79 on the Implementation of the First Phase of the Protocol Relating to Free Movement of Persons, the Right to Residence and Establishment
Directive C/DIR.3/12/88
Human Right Act of the United Kingdom 1998
Protocol A/P1/7/91 Relating to the Community Court of Justice
Protocol A/P.2/8/94 Relating to the Community Parliament
Regulation C/REG.1/05/06
Regulation C/REG.21/05/06
Regulation C/REG.2/06/06
Resolution A/RES.2/11/84 on the Implementation of the First Phase of the Protocol Relating to the Free Movement of Persons, the Right to Residence and Establishment
Revised Treaty of the Economic Community of West African States 1993
Rules of Community Court of Justice ECOWAS
Rules of Procedure of the Community Parliament
Statutes of Inter-Governmental Action Group against Money Laundering in West Africa 2006
Supplementary Act A/SA.5/01/08 Amending Article 19 new Paragraph 3 and Article 89 of the ECOWAS Treaty
Supplementary Protocol A/SP1/06/06
Supplementary Protocol A/SP.2/06/06 Amending Article 7 Paragraph 3 of the Protocol on the Community Court of Justice
Supplementary Protocol A/SP.3/06/06 Amending Protocol A/P.2/8/84 Relating to Community Parliament
Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P1/7/91 Relating to the Community Court of Justice
Treaty of the Economic Community of West African States 1975
Treaty of Rome 1957

Cases

Amouzou Henri & 5 Ors. v Republic of Cote d'Ivoire (2004–2009) CCJELR
Andrea Francovich, Danila Bonifaci and Or v Italian Republic, C-6/90, C-9/90 19/11/1991 eu-lex.europa.eu/Lex Uri Serv/Lex UriServi do? Uri = CELEX 61990CJ0006: EN:PDF p 15415. Accessed 18 October 2013
Falana & Anor. V The Republic of Benin & Ors. [2010] CCJLR, p. 128–129
David v Uwechue [2010] CCJLR [PT.3], p. 161
Ebrimah Manneh v Republic of Gambia (2004–2009) CCJELR, p. 181
Hadijatou Karaou v Republic of Niger (2004–2009) CC JELR, p. 217
Ingrid Rinner- Kuhn v FWW Special- Gebauderreinigung GmbH & Co. KG,C- 171/88 13/7/1981 eu-lex.europa.eu/Lex Uri Serv/Lex UriServi do? Uri = CELEX 61988CJ0171: EN:PDF. Accessed 20 October 2013
Lijadu Oyemade v Executive Secretary of ECOWAS & Ors. (NO 1) [2008] CCJLR [PT1], p. 25
Lijadu Oyemade v Executive Secretary of ECOWAS & Ors. (NO 2) [2008] CCJLR [PT1], p. 50
Linas International v Ambassador of Mali & 2 Ors (2004–2009) CCJELR, p. 28
Marriane nee Koschniske v Zwolle C-9/79 12/7/1979 eu-lex.europa.eu/Lex Uri Serv/Lex UriServi do? Uri = CELEX 61979CJ0009: EN:PDF p2724. Accessed 18 October 2013
Musa Saidykhan v The Republic of Gambia (Unreported) Suit No ECW/CCJ/JUD/08/10 16/12/2010
Olajide Afolabi v Federal Republic of Nigeria (2004–2009) CCJELR, p. 16
Odafe Oserada v ECOWAS Council of Ministers & 2 Ors (2004–2009) CCJELR, pp. 177–178
Paola Faccini Dori v Recreb SrL C-91/92 14/7/1994 eu-lex.europa.eu/Lex Uri Serv/Lex UriServi do? Uri = CELEX 61992CJ0091: EN:PDF p 3347. Accessed 21 October 2013
Parliament of the Economic Community of West African States v The Council of Ministers of the Economic Community of West African& Anor (2004–2009) CCJELR, pp. 35–36
Plauman v Commission, C-25/65 15/7/63 eu-lex.europa.eu/Lex Uri Serv/Lex UriServi do? Uri = CELEX 61962C00025: EN:PDF pp 123–125. Accessed 16 October 2013
Professor Etim Moses Essien v The Republic of Gambia & Anor. (2004–2009) CCJELR, p. 95
Qudus Folami & Anor v Community Parliament & Anor [2010] CCJLR [PT3], p. 50
Regina v Horseferry Road Magistrates Court ex parte Bennet 24/6/1993 www.bailii.org/uk/cases/UKHL/1993/10.html, pp. 13–15. Accessed 14 November 2013
Request for Advisory Opinion from the Executive Secretary of ECOWAS Relating to Article 23 (11) of the Rules of Procedure of the Community Parliament and the provisions of Article 79 (2) and 14(2)(f) of the Protocol on the Community Parliament (2004–2009) CCJELR, pp. 59, 61
Request for Advisory Opinion by the President of ECOWAS Commission on the Renewal of the Tenure of Director General and Deputy Director General of GIABA (2004–2009) CCJELR, pp. 201, 216
Ukor v Laleye & Anor. (2004–2009) CCJELR, pp. 24–28

Publications

Falana F (2010) ECOWAS court. Law and practice. Legal Text Publishing Limited, Lagos
GIABA. http://www.giaba.org. Accessed July 2015
Harris S, Horspool M (2008) EU Law (Subject Guide). University of London Press, London
Hornby A (ed) (2001) Oxford Advanced Learner's Dictionary Special Price edn. Oxford University Press, Oxford
Media Foundation for West Africa (2012) Justification for advocacy for the enforcement of ECOWAS Court Decisions, Concept Paper
Merriam Webster Dictionary via http://www.merriam-webster.com/dictionary/jurisconsult. Accessed 12 Mar 2012. www.crin.org/docs/ECOWASmeaning.doc
Mubarik M (2015) Challenges and prospects for regional integration: a case of the economic community of West Africa States (ECOWAS). http://www.academic.edu/3058362/Challenges_and_Prospect_for_Regional_A_case_of_Economic_Community_of_West_African_State_ECOWAS. Accessed 30 Dec 2015

Chapter 4
Terrorism, Conflicts and Legal Interventions

Abstract In sum, this chapter seeks to analyse critically a spectrum of legal interventions, which the Community has taken, proactively or reactively, either to curtail the organismal growth of terrorism or conflicts. In doing so, care is taken to streamline the discourse within the ambits of community law. But bearing in mind that the challenges, which the legal interventions are meant to mute, are laced with non-legal dynamics, it will make for easier appreciation if background facts about the terrorists, militants and the crisis are outlined before the dissection of the legal issues. The discourse will be limited to two contemporary or vexed issues, namely terrorism and conflicts in West Africa.

4.1 Terrorism

Man's disposition to terror is as ancient as the societies that are pelted with terrorism; however, the archival documentation of such heinous acts may not date beyond medieval or, at most, earliest writing era.[1] The premier use of the word 'terrorism' has been credited to the French Government, sometime in 1759, as a term that clearly captured its 'reign of terror' during the French revolution.[2] As to the meaning of the word 'terrorism', there has not been unity in acceptance of a common, composite and clear definition. There are as different definitions as there are varied perceptions of the United Nations' attitude to standards of treating terrorism.[3] Another twist to the dearth of a common and concise definition of terrorism is the seeming reluctance on the part of United Nations (UN) to knit together a definition of a referential importance.

Some scholars have attributed the failure, to come up with a definition, to a variety of political factors[4] that hinder the efforts of the UN, while some linked it to

[1] Proto Elamite—which has been associated with the ancestors of the people of Iran; see Lorenzi (2012).

[2] Minteh and Perry (2013), pt 1.

[3] United Nation General Assembly (2013).

[4] Minteh and Perry (2013), pt 1; see also Silke (2014), p. 5.

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_4

multiplicity of disciplines that have taken interest in framing the meaning of terrorism.[5] But prior to this contemporary debate on what should constitute terrorism in the twenty-first century, the UN General Assembly had considered it as an ". . .act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing an act".[6]

While the intellectual effort of the draftsmen may be commended, the definition is not, completely, free from criticisms. For instance, it appears that the definition centred more on inflicting injury on or causing death to a person who may not be involved actively in hostilities during a conflict situation. It does not, on the face of it, take into account killings where there exists no hostility or conflict. Again, what does the phrase 'taking part actively' mean? This appearance of incompleteness and the latent ambiguity in the definition may justify the call[7] for a more concise and comprehensive definition of terrorism.

An American institution defined terrorism, merely for work purpose, in these terms: "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives".[8] This effort is similar to the UN's definition but without much ambiguity or legal depth.

For ECOWAS, adopting[9] the African Union's in-depth definition, terrorist act means

(a) *any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:*

(i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State;

(b) *any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).*[10]

---

[5] Minteh and Perry (2013), pt 1.

[6] Article 2 (1)(b) International Convention for Suppression of Financing of Terrorism 1999.

[7] UN General Assembly (2013).

[8] Minteh and Perry (2013), pt 1.

[9] Section II para 19 ECOWAS Counter Terrorism Strategy 2013.

[10] Article 1 (3) (a)–(b) OAU Convention on Prevention and Combating of Terrorism 1999.

Obviously, the ECOWAS definition is more comprehensive and hauls into the net of culpability persons who would not have been caught by the law had the two other definitions been used, for instance, promoters, financers and contributors. However, examining the three definitions intently, it becomes clearer that they share some common features: the application of violence or force (resulting in injury or death) to persons (and their property) with the intention of cowing or forcing a government or institution to do or refrain from doing an act. Consequently, if these common features are used in weighing the catalogue of killings and abduction executed by Boko Haram or the chronicle of atrocities done by the militant groups parading the deserts of Mali or other groups that will rise in the future and commit similar atrocities, they would all qualify as terrorism.

4.1.1 Background Facts

Perhaps, at this point, a little sketch on the origin, objectives or characteristics of Boko Haram and the violent groups in Mali will aid the understanding of the uniqueness of terrorism in West Africa and sociopolitical setting in which the laws are meant to thrive. It is vital to note that the laws are not made only for Boko Haram or the groups that ravaged some parts of Mali recently; rather, they are made to tackle, generally, terrorism in West Africa.

4.1.1.1 Boko Haram

Boko Haram is a contemptuous term given, by natives of the community where the group started, to this Islamic sect, principally based in the Northeast Nigeria, which seeks to introduce a purer Islamic practice by withdrawing from the rest of the polluted society and Muslims and to introduce a system of governance based on sharia law within the northern part of Nigeria, as a replacement for the existing corrupt governance. The term Boko Haram, a blend of Arabic and Hausa languages, literally means Western education is sinful. That actually was the interpretation given to the teachings and philosophies of Mohammed Yusuf, Boko Haram's foremost leader, by the natives of the community where the sect began. But, in reality, the sect does not reject everything Western; rather, what feeds its grievance is the corruptive effect of Western values on the minds of Muslim elite.[11] The group would rather love to be known by its real name, Jama'atu Ahlus-Sunnah Lidda'Awati Wal Jihad,[12] which captures its religious beliefs and political ideology.

The origin of the group could be traced to a collection of youthful worshippers at the Alhaji Muhammadu Ndimi mosque in Maiduguri, Borno State, sometime in

[11] Walker (2012), p. 7.

[12] Ibid., p. 8.

2002. Within the same period, some of the youthful worshippers decided to withdraw from Maiduguri to settle in Kanama, Yobe State, because they considered the Islamic practice and the entire city of Maiduguri to be reeking of immorality and corruption. It seems the withdrawal was inspired by a religious practice called *Hijra*, exemplified by the withdrawal of Prophet Mohammed from Mecca and the relocation to Medina. While in Kanama, the sect had a disagreement with the host community over the right to fish in the village pond. That incidence led to scuffle between the police and the sect; in retaliation for disarming some of the police officers during the confrontation, the police, later, invaded its mosque, killing over 70 worshippers, including its leader, Mohammed Ali.[13] Strategically, the survivors left Kanama and rejoined some of the worshippers at the Alhaji Muhammadu Ndimi mosque in Maiduguri, under a new leader known as Mohammed Yusuf.

To concretise its cause, Mohammed proceeded to erect a new mosque (Ibn Taimiyyah Masjid) for the sect on a parcel of land belonging to his father-in-law, Baba Fugu Mohammed.[14] Organically, the sect grew, from that time, with its roots stretching unto Yobe, Niger and Bauchi. The sect was said to have structured its unique governance system, ran its big farm, had its police and received funds from some Salafists in Saudi Arabia at the time[15] without any restriction from the Nigerian Government. As days went by, the worshippers became more radicalised by the teachings of their leader. Event took a new turn when in 2007 a prominent cleric, Sheikh Ja'afar Mahmoud Adam, of Ndimi mosque was mysteriously assassinated; it took sometime before news filtered in that he was killed, under the instruction of Yusuf, for frowning at the radicalisation process.

Again in 2009, the sect, on its way to attend the funeral ceremony of its member, disagreed with the police over the use of helmet by cyclists and other similar road safety issues. The ensuing dispute resulted in the shooting of policemen, and subsequently they invaded police stations in Bauchi and Yobe. With a view to forestalling the lethal insurgence, the Government of Bauchi unleashed force on the sect and arrested over 700 persons. The incidence was more fatal in Borno; the police besieged its mosque and arrested some of them, while others escaped and ran amuck in the streets. In that frenzy of madness, they invaded mosques and churches, killing every being that has blood. In a bit to wipe away the sect, after having a handle on the situation, the Borno State Government embarked on a post-conflict cleansing: arresting and killing every person that has affiliation with the sect. It was in that gruesome exercise that Mohammed Yusuf, the leader, together with his father-in-law, was killed. The remnants of the sect went into hiding; some were believed to have travelled abroad, only to resurface angrily and brutally in 2010 with Abubakar Shakau, Yusuf's right hand man, at the helms of affairs.[16]

[13] Walker (2012), p. 3.

[14] Walker (2012), p. 3.

[15] Ibid.

[16] Ibid., pp. 3–4.

Ever since Boko Haram resurfaced, the group has been involved in multiple attacks and killings, especially in the Northeast. Despite numerous bomb explosions and community invasions that have resulted in death of thousands of persons, it was the abduction of over 200 adolescent girls in Chibok in 2014 by Boko Haram that caught the world's attention. However, in the first quarter of 2015, soldiers from Nigeria, Niger, Chad and Cameroun teamed up to repel Boko Haram from some of its stronghold—after the sole efforts of Nigerian army to recover the towns occupied by the terrorists came to nothing.[17]

4.1.1.2 Militant Groups in Mali

The coup that took place in Mali in March 2012 left at its wake the proliferation or growth of assorted extremist groups. The coup, indeed, destabilised and deepened the division in the Malian army and created space for the burgeoning of major militant groups. The major groups ravaging the northern part of Mali are the Ansar al Din,[18] Jama'at Tawhid Wal Jihad fi Garbi Afriqqiya (MUJWA),[19] the Al-Qaeda in the Islamic Maghreb (AQIM) and the National Movement for the Liberation of Azzawad (MNLA). Ansar al Din was formed in the fourth quarter of 2012 by a former Tuareg leader known as Iyad Ag Ghali with the primary purposes of establishing Islamic law, entrenching Islamic society and returning reverence for religion. This group seems to base its objectives and operations on Salafist ideology and practices; also, it proselytises persons who do not share its belief and embarks on jihad against people that oppose sharia rule.[20]

Regarding MUJWA, it is evident that this militant group, an offshoot of Al-Qaeda in the Islamic Maghreb, was formed in 2011. It has been involved in series of criminal activities, especially kidnappings, within Sahel region and terrorism attacks in Algeria.[21] Its mission, notwithstanding the apparent diversity of objectives, may be gleaned from its activities and name: subjugation of all persons under the umbrella of sharia law through the use of force or violence. For living up to its billings, the United States Government in 2012, by Executive Order 13224, branded it, together with two of its leaders, 'Specially Designated Global Terrorists'.[22] This designation makes their property, within the United States jurisdiction, subject to seizure[23] and their members *persona non grata* in the United States. It is

[17] Sim (2015).

[18] Meaning the Defenders of Faith.

[19] Translated as Movement for Unity and Jihad in West Africa (MUJWA).

[20] Abu al-Ma'ali (2012), p. 6.

[21] Arrief (2013), p. 9.

[22] Ibid.

[23] Ibid.

believed that the group derives its funds from proceeds of drug trafficking and ransom.[24]

Similarly, AQIM has been designated Foreign Terrorist Organisation by the United States Government. The group was hatched from the conflicts that took place in Algeria in the 1990s, and it was a bit unclear what the distinct objectives of the groups were at inception. However, its existence has been characterised by terrorist activities, especially the bombing of UN facility in Algiers in 2007, and series of kidnappings that took place in Niger, Mauritania, Algeria and Mali.[25]

Contrastingly, MNLA, as a rebel group, has no jihadist intentions. This Tuareg rebel group, which began its onslaught in the northern part of Mali in 2011, seeks to secede from Mali in order to form an independent state of Azawad. In 2012, the group made good its threat by taking control of the northern part of Mali; however, the occupation ended faster than expected because of the opportunistic extremist groups[26] that rose and conquered the area.[27]

Having sketched the origins, objectives or characteristics of the major terrorist or rebel groups in West Africa, the laws or intervention made by ECOWAS in regard to terrorism would be examined in the contexts of applicability, adequacy and effectiveness. Before looking at the laws, it should be observed that a common thread runs through all the groups except MNLA, which is the intention, based on religious beliefs, to dislodge conventional political systems virulently and, in their steads, erect new governance systems anchored on sharia law. For Boko Haram, this common thread can be justified in the light of the teachings of Ibn Taymiyyah,[28] a thirteenth-century scholar who taught that it is acceptable to Allah to withdraw from and fight Islamic political leaders that are oppressive. Nonetheless, it seems, in recent times, that Boko Haram has acquired mercenary character by taking either funds or instructions from politicians in Nigeria for purely political ends.

4.1.2 Legal Basis and Interventions

At the time the Treaty was revised in 1993, the Sub-region was not yet enmeshed in the web of modern terrorism, so the Community did not weave counterterrorism solutions into the Revised Treaty. However, there is a provision that obliges the Member States to entrench relations that are capable of sustaining peaceful, stable and secured Sub-region;[29] this is a legal basis upon which every other law on security will be made. Pursuant to the aims of the above provision, the Community

[24] Ostebo (2012), p. 2.

[25] Arrief (2013), p. 9.

[26] MUJWA and AQIM, for instance.

[27] Berkeley Center 2014.

[28] Walker (2012), p. 9.

[29] Article 58 Revised Treaty 1993.

introduced Mechanism[30] for, among other things, conflict prevention and security enhancement within West Africa. The law[31] that introduced the Mechanism for Conflict Prevention and Security scantily provided for counterterrorism measures. The reason may stem from the fact that it was drafted to respond to different societal and political disturbances that can come under the genus of conflicts, especially the type of internecine and wars that erupted in Sierra Leone in 1997, Liberia in 1989 and Guinea in 1998.[32]

The law[33] actually included the strengthening of co-operation in the area of international terrorism as one of the objectives of the Mechanism but did not spell out, in practical terms, how it could be achieved. It is conceded that the law established or identified certain institutions[34] that should implement the Mechanism, but they have not taken significant and result-driven steps to curtail the incessant proliferation of terrorism in Mali and Nigeria. Furthermore, the Mediation and Security Council, comprising nine Member States, has been given the responsibility of implementing the Mechanism. Its functions border on deciding on conflict and security matters, authorising intervention and approving mandates and terms of political and military missions. The provision on strengthening co-operation in the area of international terrorism is very relevant in the light of insurgences in Nigeria and Mali and could be a veritable ground to elicit assistance from all the 15 Member States of the Community in terms of intelligence, border control, effective policing, funding and military intervention.

But the Mechanism, as regards countering terrorism, has not been activated, and the reasons for that are not so clear. However, an expert working closely with the ECOWAS Commission has raised concerns over the status of the law because of perceived incomplete ratification process;[35] he drew attention to the nine-state requirement that must be fulfilled before the law would come into force. It seems that the issue of whether the law is in enforce or not may not have posed difficulty to the implementing institution because of the existence of Article 57 of the Protocol, which makes the instrument to come into force, provisionally, upon signing by the Member States. Additionally, the provision requiring nine Member States to ratify a protocol before it can be enforceable has also been amended, and reduced to eight Member States.[36] It therefore means that other reasons, like limited capacity, institutional reluctance, lack of effective modalities and political will, may have

[30] Protocol Relating to the Mechanism for Conflict Prevention 1999.

[31] Ibid.

[32] Uzoechina (2014), p. 1.

[33] Article 3 (d) Protocol Relating to the Mechanism for Conflict Prevention 1999.

[34] The Authority (the highest decision-making body), the Mediation and Security Council (implements the Mechanism), the Commission (initiates action for conflict prevention, security, e.g., fact finding, negotiation), and any other institution the Authority may establish.

[35] Uzoechina states, in early 2014, that Nigeria, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia Liberia, and Benin have not ratified the Protocol. See Uzoechina (2014), p. 14.

[36] Art. 89 Treaty as amended by Supplementary Protocol A/SP.1/06/06.

inhibited the activation of the Mechanism in curtailing terrorism in Nigeria and Mali. Furthermore, the reasons given above can also account for its ineffectiveness, and the scantiness of the provision on terrorism makes the law inadequate for counterterrorism purposes.

The introduction of the ECOWAS Conflict Prevention Framework (ECPF)[37] did not help a lot in improving the paucity of the provisions on terrorism. The Preamble to the Regulation[38] that adopted ECPF evinces that the Framework, as a comprehensive strategy,[39] is designed to give practical effect to the Protocol Relating to Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security. However, it neither introduced, specifically, immediate counterterrorism measures nor provided instant solutions and modalities which could impact, distinctly, the counterterrorism programmes of the Community and Member States. Being a normative instrument, the Framework aims generally at providing modalities for strengthening human security and expanding interactions among the Community, Member States and external partners with a view to infusing effective conflict prevention and peace-building strategies into the political agenda of the Member States,[40] in particular, to include conflict prevention strategy into the Community policies, strengthen the capacities of the Member States, improve anticipation and planning capabilities of the Community and, among other things, inject proactive attitude to conflict prevention into the Member States, etc.

While the ECPF may not have been made for the counterterrorism programmes of the Community, it provides for an institutional structure that will be relevant to counterterrorism activities; this is the Early Warning System, which is also contained in the principal law on conflict prevention.[41] The Framework provides that the Early Warning System would generate incident and trend reports, as well as real-time preventive response options for ECOWAS policymakers to enable them to predict or intervene in situations of international terrorism and conflicts.[42] Agreeing that this system, alone, cannot solve all the strands of terrorism problems in West Africa, proper utilisation of it would have helped in furnishing information to the Nigerian Government about the planned abduction of the school girls in Chibok in 2014. Unfortunately, there is no evidence that this institutional tool was used by the Department of Early Warning of ECOWAS.

The failure to use the tool may underscore the argument that the Community lacks adequate human capacity, in number and quality, for the programmes it has enlisted.[43] Furthermore, lack of political will, funding[44] and poor intelligence-

[37] Regulation adopting ECOWAS Conflict Prevention Framework 2008.

[38] Ibid.

[39] Uzoechina (2014), p. 8.

[40] See section VI (27) Regulation adopting ECOWAS Conflict Prevention Framework 2008.

[41] Protocol Relating the Mechanism for Conflict Prevention 1999.

[42] See section VIII (44) Regulation adopting ECOWAS Conflict Prevention Framework 2008.

[43] Uzoechina (2014), p. 14.

[44] Ibid., p. 15.

gathering practices may have contributed to the failure. Since the effectiveness of a normative instrument, like the ECPF, would be appropriately measured at implementation stage,[45] it cannot be said that, so far, the Early Warning System has been effective in combating terrorism in West Africa. It is not only the Early Warning System that has failed to prop up the counterterrorism plans; rather, all the instruments,[46] in review, lack the definite approach and holistic depth required to eradicate this societal anomaly; this view finds support in the assertion[47] that efforts put in by the Community to combat insecurity within its geo-political area have been piecemeal and the strategy adopted does not have anticipatory element capable of checking eruption of conflicts. Although the inadequacy of ECPF in strengthening counterterrorism in West Africa is obvious, yet it is excusable because it was not crafted specifically for such societal insecurity.

But as a panacea to piecemeal legal frameworks, there has been a shift in the kind of measures international communities, including ECOWAS, are ready to adopt in the fight against terrorism in contemporary times. The paradigm seems to shift, recently, towards a comprehensive legal regime that would improve human security rather than regime security. This holistic paradigm would be considered presently.

4.1.2.1 Comprehensive Counterterrorism Measures

ECOWAS adopted Strategy for Combating Terrorism and its Implementation Plan[48] in 2013 at Yamoussoukro, Cote d'Ivoire. The instrument became vital because of the deepening of terrorism in West Africa and the understanding that no single country in West Africa can amass the adequate financial strength and capacity[49] required to tackle the scourge within the geo-political area. The purposes of the instrument are to exterminate terrorisms and to lay conducive environment that would enhance economic growth and development. Also, it seeks to implement regional and international instruments on the same subject and to introduce a common framework on counterterrorism for all the Member States.[50] In drafting the ECOWAS counterterrorism strategy, the Community drew heavily on the format, spirit and purposes of the UN Global Counter Terrorism Strategy, which was adapted on 8 September 2006.[51] For this proximity to the UN model, it would

[45] Ibid.; the priority implementation plan ought to be in use between 2013 and 2015.

[46] Revised Treaty 1993 and Protocol Relating to the Mechanism for Conflict Prevention 1999.

[47] Uzoechina (2014), p. 2.

[48] Supplementary Act adopting ECOWAS Strategy for Combating Terrorism 2013.

[49] Ibid., Preamble.

[50] Ewi (2013).

[51] UN Resolution 2006.

be useful, as a background to the analysis of the ECOWAS version, to sketch an outline of the UN Global Counter Terrorism Strategy.

4.1.2.2 UN Global Counter Terrorism Strategy

It is reiterated that UN Counter Terrorism Strategy (Plan of Action) was adopted by a Resolution[52] of the General Assembly passed in September 2006 (annexed to the Resolution). It was drafted, among other things, as a follow up to the mandate of the World Summit Outcome 2005, in which the world leaders beckoned on the UN Secretary General to develop some identified elements, relating to counterterrorism, in order to achieve a strategic response to terrorism that would be comprehensive, coordinated and consistent and would also factor in the underlying conditions that feed terrorism.[53] The world leaders, in the instrument, resolved to condemn and combat terrorism extensively without letting the counterterrorism measures erode the roots of rule of law and human rights.[54]

The instrument has four major pillars. The first was crafted to take care of the conditions[55] that fuel the spread of terrorism globally. The second was designed to prevent and combat terrorism, while the third and fourth pillars border on capacity building for the States and respect, in the course of the fight against terrorism, for human rights and rule of law, respectively.[56] To achieve the first pillar, the Member States should explore the UN capacities in the areas of peace keeping and building, negotiation, mediation, conciliation, human rights and rule of law in order to prevent or resolve prolonged conflicts. The States should also, with the help of the UN, create platforms for dialogue among different peoples, cultures, religions, civilisations to enhance tolerance and mutual respect and educate their citizens on the culture of peace, justice and human development. In addition to the realisation of the Millennium Development Goals, the Member States should adopt laws which prohibit incitement to terrorism and establish national systems to re-integrate victims of terrorism into the society.[57]

For the purpose of preventing and combating terrorism, as captured in pillar two of the Plan of Action annexed to the Resolution, Member States should inhibit the actualisation of terrorist goals by refraining from facilitating, financing or encouraging terrorist activities, as well as prosecuting participants and financiers of such acts. The States should neither permit their territories to be used as breeding

[52] Ibid.

[53] Ibid., Preamble.

[54] Ibid.

[55] Viz: unresolved conflicts, dehumanisation of victim, human rights violation, political exclusions, lack of good governance and rule of law, socio-economic marginalisation and ethnic/religious/national discrimination.

[56] UN Resolution 2006.

[57] Ibid pillar I (1)–(8) of the annexed Strategy (Plan of Action).

grounds for terrorists nor fail to seek and exchange timely information that would assist in preventing and combating terrorism globally. Again, the States should exercise care in verifying an applicant's link to terrorism before processing any asylum application; also, the Member States are encouraged to create or strengthen counterterrorism mechanisms at the regional or sub-regional level. In the event of response to terrorist attack, involving the use of weapons of mass destruction, the Member State should seek help from the UN in terms of planning and co-ordination and should also protect vulnerable targets like infrastructure and public places.[58]

The Strategy also makes provisions for capacity building of the Member States and their institutions in the third pillar. In this light, the World Health Organization should step up its assistance and co-operation with Member States to prepare their health care systems for biological attack by the terrorists. International organisations (International Maritime Organization, International Civil Aviation Organization, etc.) should co-operate with States to beef up transport security or detect inherent weaknesses in the existing security arrangements. The UN Office on Drug and Crime is encouraged to scale up its technical assistance to States and, together with the International Monetary Fund and World Bank, help them to comply fully with international norms on money laundering and terrorism financing.[59]

Bearing in mind the likelihood of abuse of human rights in the cause of fighting terrorism, the Strategy re-emphasises on the importance of promotion and protection of human rights within the territories of Member States and notes that the counterterrorism measures and human rights do not pursue different conflicting objectives but rather are mutually complementary to each other. Therefore, every measure adopted should not contravene international humanitarian law, refugee law and human right law. And the UN Special Rapporteur and the High Commissioner for Human Right should continue to promote and examine issues of human rights in the States.[60]

Conclusively, the Strategy adopted by the General Assembly intends to tackle the factors that underpin terrorism, for instance, religious intolerance, marginalisation, lack of rule of law and human rights. It also envisages the likely breach or violation of suspects' rights in the implementation of the mechanism adopted for combating terrorism; hence, it makes room for adequate protection of human and peoples' rights. The Strategy also provides for capacity building of the States with the intention of equipping them to prevent and combat terrorism efficiently.

However, the Strategy is merely a legal compass that directs the States on what kind of comprehensive measures or steps to take in the fight against terrorism. It would only apply to the extent the States have transposed the Strategy into their

[58] Ibid pillar II (1)–(18) of the annexed Strategy (Plan of Action).

[59] Ibid pillar III (1)–(13) of the annexed Strategy (Plan of Action).

[60] Pillar IV (1)–(8) UN Global Counter Terrorism Strategy (Plan of Action) annexed to UN Resolution 2006.

laws and policies. Since the Strategy is embodied in a resolution, a soft law,[61] it will not have the same force as a treaty even in the jurisdictions that relate to international law from the monist perspective. While the strategy appears adequate, on paper, in that it touches on sociopolitical and economic elements, as well as correctional and punitive mechanisms, it did not consider the latent link between rule of law and institutional strength—especially in regions, like Africa, where some of the public institutions are at the brink of collapse. This link is important because the measures reeled out by the UN ought to be implemented by state institutions in collaboration with international organisations. Unfortunately, some of the public institutions are too weak to implement public or international projects without record of embezzlement or ineptitude. One of the common institutional diseases responsible for this weakness has been lack of accountability and arbitrariness—since the authorities are either above or not implementing the law.

Furthermore, the effectiveness of the Strategy should not be calibrated at global level but rather should be appraised on implementation by the various Member States. It is probable that countries with functional legal systems and efficient institutions would implement the Strategy efficiently and experience the effectiveness of this global instrument, while nations with weak institutions and bad governance record would continue to lag behind in the implementation process.

4.1.2.3 ECOWAS Counterterrorism Measures

It is not in doubt that ECOWAS requires, generally, a comprehensive counterterrorism model since the geographical area has witnessed incessant terrorism attacks between 2000[62] and 2014 and because the national legislative approaches[63] and the Community instruments have not been effective enough to stem the tide of terrorism in West Africa. It is reiterated that the Community adopted[64] the Strategy for Combating Terrorism in order to bring to life international and regional instruments[65] on terrorism within West Africa and to unify the national approaches of the Member States to counterterrorism while maintaining

[61] Note that UN Security Council Resolution may have a binding force even though other resolutions may not share same character.

[62] Nigeria, Mali, Sierra Leone, Mauritania and Niger have been affected. See Barakamfitiye (2013), p. 4.

[63] Sierra Leone 1861 Malicious Damage Act; Niger Titre VI du Terrorisme et du Financement du Terrorisme 2003; Ghana Anti-Terrorism Act 2005 and the Anti-Money Laundering Act 2007; Senegal Loi Modifiant le Code de procedure Penale et Relative à la lutte Contre les Actes de Terrorisme 2007; Gambia Anti-Terrorism Act 2008 as amended and the Money Laundering Act 2003; Nigeria Terrorism (Prevention) Act 2011 and the Anti-Money Laundering Act 2004. See generally Barakamfitiye (2013), p. 11.

[64] Supplementary Act adopting ECOWAS Strategy for Combating Terrorism 2013.

[65] For instance: United Nation Counter Terrorism Strategy 2006, African Union (then OAU) Convention on Prevention and Combating Terrorism 1999 etc.

co-operation and co-ordination among the States in the fight against terrorism. The Strategy affords ECOWAS, as an international organisation, an opportunity to step to the plate and strengthen the efforts of States and other non-governmental organisations in combating terrorism without violating human rights norms.[66]

Pillar 1 The Strategy, divided into three pillars, aims to 'Prevent, Pursue and Reconstruct'.[67] The pillar on prevention, which seeks to discourage terrorism before it occurs, is anchored on the concept of 'detect, intercept, disrupt and prevent'.[68] This pillar provides that States should imbue counterterrorism agenda into their political, socio-economic and cultural activities for the purpose of eliminating the conditions which underpin terrorism as listed in the UN Global Counter Terrorism Strategy of 2006. It also highlights the importance of preventing terrorism through the co-operation and involvement of legislative, financial, political, law enforcement, educational, social and judicial institutions.[69] Under this pillar, it is expected that steps taken should improve intelligence gathering and sharing, prevent recruitment and radicalisation, protect human rights, improve human security and reduce capacity of terrorist groups to operate.[70]

However, it may be necessary to interrogate the applicability of this pillar both to the terrorism situations in West Africa and in the jurisdictions of the Member States. Clearly, the pillar has relevance in the light of the primary causes of terrorism in West Africa, for instance, corruption, marginalisation, poverty, illiteracy, religious and cultural intolerance, political instability, bad governance, weak institutions, lack of rule of law, poor human right practices, etc. Take Mali and Nigeria for instance; in the former, the escalation of terrorism, in recent times, could be traced to political disturbances and frail institutions, while in the latter institutional weaknesses, bad governance, absence of rule of law, corruption, religious intolerance and marginalisation may have given Boko Haram a footing in the northern part of Nigeria. If the States would adhere to the guidelines in crafting and implementing their measures, it might in the long run tackle most of the root causes of terrorism in West Africa.

Nevertheless, the first pillar, together with other pillars contained in the Strategy, does not apply automatically in the jurisdictions of the Member States. This is because ECOWAS texts are not supranational in nature; their application will depend on the extent to which the States have incorporated them in their laws.[71] Even among the civil law countries,[72] like Senegal, Togo, Benin, etc., the pillar will

[66] Barakamfitiye (2013), p. 15, section II para 17 ECOWAS Counter Terrorism Strategy 2013.

[67] Barakamfitiye (2013), p. 17.

[68] Section II para 17 and pillar I para 22 ECOWAS Counter Terrorism Strategy 2013.

[69] Pillar I para 22 ECOWAS Counter Terrorism Strategy 2013, Barakamfitiye (2013), p. 18.

[70] Pillar I para 22 (c)–(f), Barakamfitiye (2013), p. 17.

[71] See section 12 of Constitution of Federal Republic of Nigeria 1999, Article 78 Constitution of Republic of Ghana 1992.

[72] Articles 98 of Constitution of Senegal 2001, Article 140 of the Constitutions of Togo, Article 147 of Constitution of Benin Republic 1990.

not apply in their jurisdictions unless common law countries reciprocate by applying the pillar in similar dimension within their jurisdictions. To address this constraint, it seems, the law[73] provides that Member States should ensure that they put in place adequate legislative framework for the implementation of the Strategy, as well as its implementation plan. Consequently, it is now within the jurisdictions of the States to decide how they would implement this important pillar. This approach, it should be warned, may not sieve the end product from disparity and inadequacy, because there is neither a Community mechanism to weigh the content of the laws of the Member States nor a format to enforce uniformity in how the States interpret Community measures.

Another inadequacy in the pillar could be the failure to spell out the importance of extending intelligence gathering to places of worship. Admitting the pillar provides for the co-operation of religious bodies in counter-radicalisation and de-radicalisation programmes,[74] it may only go as far as preventing radicalisation where the religious leaders co-opt the ECOWAS counterterrorism idea and diffusing radicalised knowledge already imbibed in similar circumstances but may not extend to monitoring the content of what will be taught to young people in every religious gathering—especially where the religious leaders have terrorism ideologies. This is important because the Boko Haram development could be traced to the teachings of Yusuf at the Ndimi mosque in Maiduguri, Nigeria. Therefore, the pillar and its implementation plan ought to have catered for this inadequacy by introducing intelligence strategy that would help monitor what is taught in every religious association which has tendency of indoctrinating worshippers with terrorism ideologies.

Extending the inadequacy argument further; since this pillar inevitably intends to attack the root causes of terrorism by improving human security, how would West African States raise funds to augment the limited aid they would get from the international partners[75] to tackle these endemic factors like poor educational system, weak health facilities and unemployment? And where the funds are made available by international institutions, how would ECOWAS monitor and ensure honest and responsible utilisation of the funds in the face of political restraint stemming from sovereignty and culture of corruption prevailing among the States?

The Strategy also anticipates the co-operation and deployment of institutional organs and machineries respectively for the purpose of arresting terrorism before it takes form. Therefore, it appears as though the Strategy reckons the existence of functional institutions in West Africa; reversely, the record is somewhat different. This reckoning in itself is a substantial weakness in the Strategy. Realistically, the institutions concerned may not have the capacity and intelligence structure to detect planned terrorist attacks. A good example of a problematic intelligence set up in West Africa is the Nigerian security apparatus; as big as it is, the institution has

[73] Article 2 Supplementary Act adopting ECOWAS Strategy for Combating Terrorism 2013.

[74] ECOWAS Counter Terrorism Implementation Plan 2013, p. 5.

[75] Listed partners include the UN, the EU, CSOs, etc. See ECOWAS Counter Terrorism Implementation Plan 2013, pp. 1–2.

been unable to detect, intercept or deter major terrorist attacks within the borders of Nigeria. Generally, the challenges of the joint enterprise of all the military institutions in West Africa in maintaining peace in the Sub-region have been logistics,[76] lack of cutting edge equipment and capacity. These challenges have not been solved and would ordinarily hamper their abilities to implement this pillar within their respective geographical territories. These impediments ought to have been addressed practically in the Strategy.

Pillar 2 The second pillar of the Strategy seeks to establish a practice of timely and active response to terrorist attack in West Africa.[77] Also, it aims at putting structures for the investigation, prosecution and punishment of all leaders, sympathisers, financiers, participators and supporters, covertly or overtly, of terrorism[78] in West Africa. The pillar aims not only at disrupting networks and activities of terrorist groups but also creating a hostile environment by cutting off funding, equipment and training facilities from such groups.[79] Categorically, the pillar is not only relevant but also vital in the fight against terrorism in West Africa. Ideally, criminal justice system should have a place in this cause, especially in regard to proper investigation, timely and quality prosecution and good custody of suspects and convicts of terrorist activities. However, the applicability of this pillar within the national jurisdictions of the Member States suffers the same fate as pillar one based on the same reason of absence of supranational governance system in ECOWAS.[80] Therefore, the application would be limited to the extent to which the Member States would transpose it into their laws.

While the pillar may have been designed to create adequate mechanism for investigation and prosecution of participators, sympathisers, supporters and financiers of terrorism in West Africa, it seems that the framers glossed over two major factors capable of fanning the embers of terrorism. One is the intermix or overlap between political decisions and technical decisions made by many public institutions in West Africa; the second is the place of religion in terrorism financing. Regarding the intermix or overlap, it is not in doubt that public institutions in West African countries are bedevilled by political control and influences; with this background, it becomes difficult for the criminal justice systems to take on the economic and political elites if they fall within the class of participators, supporters, sympathisers or financiers of terrorism unless with the tacit consent of the executive arm of government.

A fact that buttresses this assertion is the failure of the Nigerian Government to investigate and, if need be, arrest prominent politician and former military chieftain alleged[81] to have been funding Boko Haram. It has been reported[82] that some

[76] Africa Defense Forum, p. 52.

[77] Pillar 2, para 23, ECOWAS Counter Terrorism Strategy 2013, Barakamfitiye (2013), p. 19.

[78] Ibid.

[79] Pillar 2, para 23, ECOWAS Counter Terrorism Strategy 2013.

[80] Alter et al. (2013), p. 741.

[81] Arise News (2014).

[82] Ibid.

politicians were so deeply involved in the activities of Boko Haram that they could even nominate targets for destruction. The major reason why these politicians and elite are not properly investigated and hounded by the criminal justice system is because of the culture of political protectionism; however, there are reports that some military officers who had been aiding Boko Haram have been convicted by Court Martial set up by the Nigerian Army.[83] Unfortunately, the second pillar did not rope in measures to curtail this political reality into the strategy. Therefore, if political elite and top notch military personnel alleged to be involved in terrorism are not investigated and prosecuted in criminal courts, where there are pieces of evidence to sustain prosecution, then they would continue to aid terrorism for political gains.

The second point, that is the role of religion in terrorism financing, appears more sensitive and difficult to deal with. This is because the religious charities which aid terrorism financially are much more entangled with freedoms of religion and association. A perfect example would be the Islamic practice of Zakat. The word Zakat is coined from zakaar, which translates to increase, bless and purify; it represents what a believer (Muslim) should give to other Muslims in dire need.[84] Zakat is not only mandatory for men and women but could also be observed even by children and the insane, so long as they have the Nissab.[85] Under sharia law, the Zakat should be paid or made from excess assets after the fulfilment of business and economic obligations (like wages, costs, investment, etc.) and normal living expenses. What is finally paid as Zakat is 2.5 % of the Nissab; for instance, if deductions have been made and the amount in excess is N 100,000 or CFA 100,000, then 2.5 % of that amount should be paid as Zakat. In deciding the beneficiaries, the alms giver may choose from the pool of bondsmen, debtors, new converts, wayfarers (nomads) and persons satisfying the way of Allah; it is under the last category that jihadists come in.[86]

Therefore, money could be given to Boko Haram or the other militant groups in the Sahel as funds for terrorism activities under the guise of Zakat. It is expected that a holistic framework such as the ECOWAS Strategy should have taken this reality into account and make specific provisions on modalities to stop the use of Zakat and other forms of religious charities as a means of terrorism financing as has been attempted in other jurisdictions.[87] Regrettably, this point was omitted in the Strategy and its Implementation Plan.[88]

---

[83] Al Jazeera (2014).

[84] Gordon (2009).

[85] The minimum threshold that is subject to Zakat.

[86] Gordon (2009).

[87] The following charity organisations in the United States have been shut down for channeling funds to terrorist groups in the guise of Zakat or religious charities: Al Haramain Islamic Foundation—USA (Oregon); Benevolence International Foundation (Illinois); Global Relief Foundation (Illinois); Holy Land Foundation for Relief and Development (Texas); Islamic American Relief Agency—USA (Missouri); and Goodwill Charitable Organization (Michigan). See generally Gordon (2009).

[88] ECOWAS Counter Terrorism Implementation Plan 2013, pp. 3–6.

An explanation for this blatant omission may be that the Community expects the Member States to create modalities, while transposing the Strategy, to ensure that Zakat and other religious charities are not used as sources for terrorism financing. Unfortunately, that expectation does reflect in the legislative history of the key victim of terrorism in West Africa-Nigeria.[89] Examining the current law of Nigeria on terrorism,[90] one sees that there is no specific provision on 'religious charities and terrorism financing' that one would consider a proscription of this unhealthy giving.

Nonetheless, the law makes a general proscription of the act of soliciting, receiving, providing, possessing monetary or other property or entering into arrangement the result of which makes available or is to be made available for terrorism or for a proscribed organisation.[91] While it may be argued that the above provision takes care of 'charities and terrorism financing', it may not be so in Nigeria because of the religious peculiarity of the customary laws and culture of the states in the northern part of that country. For this legal and cultural uniqueness, there ought to have been specific delineation of religious charities, within Koranic context, from contemporary terrorism financing in the guise of religious charities.

Nonetheless, there are different means of financing terrorism in West Africa which the Member States and the Community institutions must tackle through institutional structures. Generally, the means through which terrorist and militant groups finance their activities in West Africa, as documented in a report,[92] come under the following four categories: (1) terrorist financing through trade and other lucrative activities; (2) terrorist financing through NGOs, charity organisations and levies; (3) terrorist financing through smuggling of arms, assets and currencies by cash couriers; and (4) terrorist financing through drug trafficking. Specifically, Boko Haram raises fund through sale of goods, reliance on compulsory and voluntary contribution from members, begging for alms, extortion, smuggling of arms and use of female cash couriers.[93] It seems, for the Strategy to be applied successfully to tackle these heads of sources of financing, the institutions of the Member States must be strengthened in regard to personnel, finance, expertise, equipment and culture of rule of law. And these areas cannot be solved solely from the Community level, but rather mainly from national level. It therefore means that combating terrorism financing in West Africa will depend much more on the strength of national institutions than ECOWAS institutions and measures.

Conclusively, it does not appear that the reasons why affected Member States have not been responding actively and timely to terrorist attacks or why they have been unable to cut off funding from and make the environment hostile for the terrorists groups in their jurisdictions are as a result of inadequate body of laws. The

[89] See the Terrorism (Prevention) Act 2011 of Nigeria.

[90] Ibid.

[91] See section 13 Terrorism (Prevention) Act 2011 of Nigeria.

[92] FATF-GIABA Report (2013), p. 17.

[93] Ibid.

reasons rather derive mainly from existence of weak public institutions, corruption, non-implementation of existing laws, lack of culture of accountability and lack of political will. These issues are entrenched in the systems of these countries. They cannot be solved by provisions of the Strategy and the implementation modalities adopted by the Community—especially where they cannot be enforced within the jurisdictions of the affected countries.

It is believed that finding a practical mode of making the Strategy and other relevant ECOWAS texts applicable within the jurisdictions of the Member States and creating a mechanism that would make Governments of the Member States accountable for non-implementation of pillar two (and other pillars) might help in curtailing the spread of terrorism in West Africa. Unfortunately, pillar 2, together with other pillars, neither introduced supranational features nor carved out mechanism for holding the government accountable for inadequate transposition or non-transposition of the Strategy—that too is a flaw.

Pillar 3 Pillar 3[94] deals with post-terrorism reconstruction programmes which the affected States should implement. It aims at establishing structures and programmes that will rebuild the society and heal social wounds which have been inflicted by terrorism and counterterrorism on the society.[95] To this end, Member States, in partnership with civil society organisations,[96] should establish and fund legal and institutional mechanisms to protect the rights of the victims of terrorism.[97] Interestingly, the States should share funds and property recovered from terrorist groups among victims of terrorism to aid their integration and security.[98]

Furthermore, the States should provide a range of support to the victims—including medical care and economic, moral and political support.[99] The States should also reconcile different communities pitched against each other as a result of terrorism attacks.[100] In order to retain public trust, at the wake of every terrorist attack, the authorities should take steps, to convince the people that they are in control of the situation, and inform them of measures taken to achieve such control.[101] States should also replicate the holistic counterterrorism model at national levels to give effect to the ECOWAS Strategy and other relevant instruments within their jurisdictions.

It is also part of the mandate to ensure that the victims are re-integrated into normal social life. Therefore, it could be inferred that the integration programmes entail the establishment of measures to ameliorate the social consequences of terrorism attack on a society. Surprisingly, there is no available information on

[94] Pillar 3, para 24, ECOWAS Counter Terrorism Strategy 2013, Barakamfitiye (2013), p. 20i.

[95] Pillar 3, para 24, ECOWAS Counter Terrorism Strategy 2013.

[96] ECOWAS Counter Terrorism Strategy Implementation Plan 2013, p. 15.

[97] Pillar 3, para 24 (a), ECOWAS Counter Terrorism Strategy 2013.

[98] Ibid.

[99] Pillar 3, para 24 (a)(b), ECOWAS Counter Terrorism Strategy 2013.

[100] Pillar 3, para 24 (b), ECOWAS Counter Terrorism Strategy 2013.

[101] Pillar 3, para 24, ECOWAS Counter Terrorism Strategy 2013.

existing comprehensive Community research relating to the social consequences of terrorism in West Africa. But a quick pick from Waxman[102] catalogue of general effects which cuts across psychological, social and economic consequences shows that they may include post-traumatic stress disorders, depression, substance abuse, impact on the ideological orientation of the victimised groups, xenophobia in the society, unemployment, depreciation of tourism industry, sparse foreign direct investment, change in public opinion, impact on elections,[103] effects on government policy, etc.

Regarding the applicability of this pillar, there is no shred of doubt that it is relevant in the counterterrorism cause of West Africans, bearing in mind that in other jurisdictions terrorists have succeeded in occupying parts of the attacked territories because of failure of governments to assert and take control of the affected territories—for instance, the Islamic State of Iraq and Syria's (ISIS's) declaration of a caliphate in occupied areas.[104] There has also been evidence of relapse to militancy after an attack or devastation of the entire institutional architecture[105] and elements of societal fabric as a result of terrorism. Therefore, pillar 3, if properly transposed and effectively implemented, would save the affected States from similar gory experience. However, the challenge to applicability lies in jurisdictional restrictions existing in the legal systems of the Member States as stated earlier.[106] Therefore, the pillar cannot be applied directly within the Member States except to the extent that they incorporate it into their systems by legislation[107] or place reliance on the reciprocity rules.[108]

While the idea of introducing programmes for protecting human rights, rebuilding and reconstructing attacked communities or regions, establishing governmental control over affected areas and sensitising affected groups or people about the impropriety of resorting to accusation and counter-accusation against other groups or people because of terrorist attack may sound adequate, the failure to highlight on funds, institutions and capacity to achieve these lofty plans leaves much to be desired. It is commonplace that funds and capacity are not in excess supply, in West Africa, both at the Community[109] and national levels. So this would pose difficulty to the actualisation of pillar 3.

It would have been relieving if the Strategy had included, specifically, strategic plans for funding and institutional capacity building for these programmes. It may

[102] Waxman (2011).

[103] The 2015 Nigeria presidential election provides a vivid example; an incumbent, for the first time in history, was defeated by an opposition party.

[104] Fields (2014).

[105] Bureau of Democracy, Human Right and Labor (2001).

[106] The same argument relating to absence of supranational governance applies.

[107] For the common law countries.

[108] For the civil law countries.

[109] Uzoechina (2014), p. 14.

not be adequate, as the Implementation Plan did,[110] to list international organisations as partners for the purpose of achieving pillar 3 because the funds and assistance flowing from them would only be limited and complementary. Since the Member States have the responsibility[111] of implementing the Strategy, inferentially they have been laden with the duty of funding and providing institutional capacity to achieve full implementation.

Honestly, the Member States do not have the financial and institutional strength to either reconstruct their attacked communities or ameliorate the social consequences of terrorism attacks in their countries. For instance, some of the psychosocial consequences of terrorism attack as listed by Waxman[112] include post-traumatic stress disorders, depression, substance abuse, impact on the ideological orientation of the victimised groups and xenophobia in the society. How then would an affected country like Nigeria deal with such social cum psychological situations in northern part of Nigeria when it is beleaguered by poor mental health system?[113] The World Health Organization studies show, at the period of study, that Nigeria had no mental health service information;[114] as little as 4 % of the health budget was allocated to mental health;[115] there were no beds specifically reserved for children and adolescent in the seven mental health facilities studied; non-governmental associations in the studied area were not involved in individual assistance projects like counselling, housing or support group; 98 % of psychologists and social workers and 95 % of the entire psychiatrist work force serve in government health facilities; and 2 % and 5 % work for other non-governmental organisations or private establishments, respectively.[116] It could be inferred from the report, given the uneven distribution of key health personnel and the lack of support system, public funding and facilities, that the mental health system in Nigeria appears incapacitated to assist the flood of victims of Boko Haram's onslaughts.

Other social consequences that stem, ordinarily, from terrorism attacks are homelessness and displacements. Report shows that more than 18,000 persons were displaced in Kidal Region of Mali in 2014 due to resurgence of conflict between terrorist groups and the military in that geographical area.[117] Mali with its antecedent economic and political woes may not have appropriate funds and institutional strength to provide homes and houses for these displaced persons in Kidal Region. If this assertion is right, it means that the country lacks the ability to

[110] African Court of Justice and Human Right, Red Cross, Development Partners, CSO's etc. see ECOWAS Terrorism Strategy Implementation Plan 2013, pp. 15–16.

[111] Section IV, para 25, ECOWAS Counter Terrorism Strategy 2013.

[112] Waxman (2011).

[113] But it is acknowledged that the Nigerian Ministry of Health did outstandingly well in fighting the Ebola outbreak in 2014.

[114] World Health Organization (2006), p. 5.

[115] Ibid, p. 6.

[116] Ibid., p. 26.

[117] Hoije (2014).

wipe out, at least, one of the social consequences of terrorism as anticipated in the ECOWAS Strategy.

It should be concluded therefore, drawing on institutional incapacity prevailing in these two countries, that the Strategy should have made specific provisions on how to tackle funds and capacity challenges for the purpose of achieving the aims of pillar 3 of the Counter Terrorism law (Strategy). It should have provided practical modalities of ensuring availability of human and capital resources that would help the Community follow through on its plans as provided in pillar 3. For this failure, given the economic difficulties prevalent in West African countries and the limited funds doled out by the development partners, it seems that the Strategy, despite an appearance of adequacy, glossed over certain fundamental issues required to achieve the targets enshrined in pillar 3.

Regarding the effectiveness of the Strategy, since the word (effectiveness) relates to 'successfully achieving an intended result', it would be inappropriate to do a survey on the subject, at this time, when the Member States have not taken steps to incorporate the Strategy in their legislation, let alone implement the provisions within their jurisdictions. But the Strategy would be considered effective if it meets the mark set in the objectives.[118] So any prospective survey on the effectiveness of the Strategy should show whether there is good transposition of the Strategy in the laws of the Member States and whether there is co-operation among them in the areas of intelligence, law enforcement and prosecution of terrorists without violation of human rights; whether the capacities of both the Community and Member States have been improved to detect, prevent and combat terrorism; whether, in reality, the Community and the Member States have been preventing and combating terrorism; and whether there is synergy or co-operation, at regional and international levels, on issues touching on terrorism—including mutual legal assistance and extradition.[119]

4.1.3 Counterterrorism Measures and Human Rights

It is important, in the fight against terrorism and religious extremism, that the rights of the citizens and the terrorists are insulated from the shock and force of any counterterrorism measure taken—whether at the Community or state level. This is because there is a natural tendency to undermine or suspend protective legal norms, like human rights and rule of law, when fighting crimes that strike at the root of human and societal existence. The proof of this tendency is mirrored in the derogation, by the United Kingdom (UK), from Article 5 of the European Convention on Human Rights, which provided for liberty of all persons.

[118] Section II, para 17, ECOWAS Counter Terrorism Strategy 2013.

[119] Ibid.

In the global war against terrorism, after the terrorist attack of September 2001 in the United States of America, the UK Government, relying on the right to derogate,[120] enacted the Anti-terrorism, Crime and Security Act in 2001, which empowered the State to detain foreign nationals certified by the Home Secretary to be suspected international terrorists who could not be deported because of the hedge in Chahal case.[121] On the authority of this law, the UK discriminatingly denied suspected terrorists of the benefit of right to liberty by holding them at its pleasure.

The argument that is always proffered as justification for this kind of suspension is that it will not be possible to protect rights of suspects and at the same time provide public security;[122] somewhat, the former may give way for the latter or, at best, should be balanced against each other. However, this argument has been flawed by Ivan Simonovic (UN Assistant Secretary General for Human Right in 2012) in these two ways: one, that protection of human rights derives from the need to provide public security, so human right protection enhances security and, two, the provision of public security to citizens within a jurisdiction is an obligation under human rights which that state ought to fulfil. Therefore, the argument that protection of human rights and the provision of security cannot be delivered simultaneously is, as shown, untenable.[123]

Relating these tendency and argument to ECOWAS counterterrorism programmes, it is highly probable that the Community and the Member States would soon be entangled in that web of creating a balance between protecting the rights of the terrorists and waging war against them. It is therefore intended to seise this segment to highlight the likely trouble spots in the Strategy, and in the entire campaign, that could dispose both the Community and the Member States, during the course of implementation, to violation of the rights of the terrorists, financiers, sympathisers and the citizens of West Africa. The highlight will be restricted to the following likely consequences and violations: torture, extrajudicial killings, violations of rights to liberty and human dignity.

4.1.3.1 Torture

The Strategy did not define what it meant by torture,[124] so, for purpose of explanation, a more generally acceptable definition is relied upon; knowing that if ECOWAS were to render its own version, given the relation between it and UN,

[120] Article 15 European Convention on Human Right 1950.

[121] Chahal v UK 1996, p. 36: Where there is risk of ill treatment to a suspect intended to be deported by a country, it will be a violation of human right to deport him to that other country where the risk exists.

[122] Gearey and Morrison (2013), p. 165.

[123] Gearey and Morrison (2013), pp. 165–166.

[124] Pillar 1, para 22 (f), ECOWAS Counter Terrorism Strategy 2013.

the definition would not depart, in substance, from the UN's version reproduced below:

> Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[125]

Operationally, torture comes in a range of practices.[126] It can be sexual in nature, involving rape or genital mutilation; it can take physical form, including water boarding, beating, inserting sharp objects into openings or burning. It may involve psychological process like witnessing other inmates being tortured. It may, also, take the form of degrading or humiliating acts like urinating into the mouths of suspects or serving them meals spiced with faeces. Torture may involve the use of sensory discomforting techniques like electrocution and exposure to excessive heat or cold; it may also include compelling the victims to take stressful positions like leaning the whole body on a finger or toe. The list is endless, so long as the practice induces pain or suffering to the body or mind of a person or a third party with the intention of eliciting information or punishing the person or a third party for what the person or the third party did or refused to do without recourse to law and due process, it is torture. Happily, the Strategy indeed prohibits the use of any of these practices and other forms of torture and inhuman or degrading treatment against terrorists.

And the Member States, accordingly to the law, should ensure that the arrest, detention, imprisonment and expulsion of terrorist suspects are conducted in such a manner that agrees with due process of the law. It also provides that the measures taken to combat terrorism, including legislation and security or police operations, should not contravene human rights. To aid the capacity of the security institutions, the Strategy provides for arrangement of training for law enforcement officers on issues touching on human right and counterterrorism operations.[127]

Notwithstanding these protective legal provisions stated above, the main objective of pillar 2 is to investigate and bring all persons linked to terrorism to book.[128] The Strategy encourages Member States to extend co-operation to each other in extradition and in criminal matters, inclusive of investigation and prosecution, whether formal and informal, in order to make the national judicial systems flexible and efficient to hunt down terrorists in a timely manner. It also provides that Member States should activate emergency police (security) power for the purposes

[125] Article 1 UN Convention Against Torture 1984.

[126] Contanzo and Gerrity (2009), p. 181.

[127] Pillar 1, para 22(f), ECOWAS Counter Terrorism Strategy 2013.

[128] Pillar 2, para 23, ECOWAS Counter Terrorism Strategy 2013.

of arresting, detaining and prosecuting terrorist suspects, albeit within the provisions of the law.

In implementing this segment of the Strategy at Community level and the transposed version at the national level, there is tendency that the protective legal provisions would certainly clash with the enforcement and investigative provisions listed above. For instance, how would the security institutions in Mali and Nigeria elicit information from suspects without the employment of torture as investigation techniques when that is the principal investigative tool at their disposal? Evidently, studies show that the Nigerian police have developed a culture of brutality and torture as operational tool and means of investigation.[129] To drop such inhuman tool would mean limiting their traditional mode of extracting information for prosecution as provided in the Strategy—since that is their principal means of investigation.[130] To continue with it would mean violating the rights of terrorist suspects. So there would always be a point of conflict, given the West African circumstances, between protecting rights and pursuing terrorists using torture as a means of extracting information.

It may be important to consider why it is very probable that the security institutions in West Africa would rely on torture as interrogation device in their quest to fulfil the mandates in pillar 2. One of the reasons why it may be used in the affected West African countries is because torture, being a device designed to break human resistance,[131] sometimes may cause the victims to give out reliable information.[132] For this lean reason, governments will easily justify the use of torture as an effective and indispensable interrogation technique that can avert future attacks and save lives.[133]

But this reason and the ensuing justification for the use of torture for purpose of intelligence gathering do not always hold much water. There are numerous reports that show that some of the supposed reliable accounts given by victims of torture were tainted with incorrect or falsified facts because, under excruciating pain, some of the victims could say anything to make the torturer to cease from inflicting pains on their bodies.[134] And the security institutions may not be able to distinguish the reliable from the unreliable information. Even where the accounts were truthful, experts argue that there is no way of establishing whether a less forceful interrogation technique would not have yielded the same or better result[135] and that it is not very simple to prevent what will happen in the future[136] based on the

[129] Duffield (2010).
[130] Ibid.
[131] Contanzo and Gerrity (2009), p. 198.
[132] Ibid., p. 182.
[133] Contanzo and Gerrity (2009), p. 199.
[134] Ibid., p. 183.
[135] Ibid.
[136] Ibid., p. 188.

information gathered. Therefore, the usual justification that such intelligence squeezed from torture makes the world safer may not always be correct.

Another reason why torture will be used, especially in West Africa, is because of the unattractiveness or absence of alternative intelligence-gathering techniques. There exist security documents establishing that helpful intelligence could be derived from prisoners when they are treated humanely.[137] Unfortunately, such humane strategy seems inappropriate in West Africa because of the lack of capacity to conduct such intelligence operation, which would require time, funds, psychological techniques, institutional patience and, perhaps, high technology. Considering the culture of brutality[138] among security units in West Africa, this method would appear unattractive to them.

The other set of reasons that could encourage the use of torture against terrorist suspects in detention centres around West Africa includes lack of monitoring and accountability mechanism for prison and investigation officers, little or no capacity building on alternative means of extracting information and lack of specific and implementable instructions about the conduct of officers either in-charge of or investigating persons in custody. These reasons have been documented, also, by researchers as some of the causes of the gruesome abuse that took place at Abu Ghraibu prison in Iraq.[139] The circumstances, namely high handedness, poor human right regime and absence of rule of law, which helped these reasons to thrive in Abu Ghraibu, are also prevalent in West African prisons and police stations. Therefore, if they are not nipped in the bud, they will breed the same or similar reasons narrated above, which in turn will likely result in the use of torture during investigations in West African prisons and police stations.

It is evident that there are other psychological reasons[140] why custodial or investigation officers find torture more appealing in dealing with terrorist suspects. In moments of stress and despair for a country, probably because of detonation of bombs in crowded cities, for instance by Boko Haram, or the destruction of innocent lives and property by the major armed groups in the Sahel, the security personnel and the government would certainly feel powerless. To ease themselves of that sense of weakness, or sometimes in pursuit of vengeance, they might engage in excessive torture of any suspect caught in connection with the attack or incidence which had brought them shame and tag of powerlessness. Therefore, it is not only an honest desire to gather intelligence that causes security personnel and governments to take the path of torture; sometimes it is their search for psychological therapy for powerlessness in the face of terrorist onslaughts and public criticisms.

Consequently, the Community and the Member States should take practical and strategic steps to check, improve on and control these reasons, whether operational or psychological, and the circumstances that feed them if they truly want to delete

[137] Ibid., p. 182.

[138] Duffield (2010).

[139] Contanzo and Gerrity (2009), p. 196.

[140] Ibid., p. 202.

torture from their investigation manual. If nothing is done in terms of monitoring, evaluating, improving (adopting alternative means of interrogation) and controlling the reasons, and the circumstances that feed them, then in spite of the prohibition of torture by the Strategy, it will still be used during investigation.

4.1.3.2 Deportation and Use of Evidence Obtained Through Torture

It is clear that the Strategy proscribes the use of torture in the fight against terrorism and provides for adherence to due process in the event of arrest, detention, deportation/expulsion of and sanction against terrorist suspect.[141] It also mandates Member States to co-operate, formally and informally, in criminal matters regarding investigation and prosecution.[142] Sanction, in this respect, will include sentencing after conviction. Since the Strategy provides for respect for due process of the law in any of this chain of events, it means that the process that will lead to the sanction, which is prosecution, must be made subject to due process. Therefore, the provision[143] on informal co-operation among Member States in matters of prosecution does not mean treading on illegal ground and violating the rights of terrorist suspects just to extend co-operation to another Member State. The Strategy frowns at violation of rights and failure to uphold due process in dealing with suspects; therefore, any act or omission, formal or informal, which contravenes the rights of suspects, should not be tolerated.

A good example of an act capable of violating the rights of a suspect will be deportation, expulsion or repatriation to any other Member State when the country effecting the expulsion or repatriation (sending State) has reasons to believe that evidence gotten from or that will be obtained from torture either from a suspect or third person will be used during the trial of the terrorist suspect in that other Member State (receiving State). In such situation, the sending State should not deport or repatriate the suspect to that other country; otherwise, the sending State would be taking an action that contravenes the provisions of pillar 1 and Article 5 of the African Charter on Human and Peoples' Rights relating to torture.

The practice of widening the proscription of torture to cover repatriation or deportation of terrorist suspects to countries and jurisdictions where evidence gotten from torture would likely be used in their trials has been explored in other jurisdictions. In Abu Qatada case, the applicant was first arrested and detained under the Anti-Terrorism, Crime and Security Act 2001 of the United Kingdom; when that law was repealed, the applicant was made subject to control orders based on Prevention of Terrorism Act 2005. While the applicant's appeal against the control orders was still pending, the Secretary of State, citing security reasons, served him a notice of intention to deport (to Jordan). The applicant, then, appealed

[141] Pillar 1, para 22 (f), ECOWAS Counter Terrorism Strategy 2013.
[142] Ibid., Pillar 2, para 23(b).
[143] Ibid.

to the Special Immigration Appeal Commission (SIAC) alleging that the deportation would be in contravention of Articles 2, 3, 5 and 6 of the European Convention on Human Rights. The appeal was unsuccessful at SIAC, so the applicant appealed the outcome to the Court of Appeal, which allowed the appeal on the ground that such deportation would offend Article 6 because evidence obtained from torture might be used during his trial in Jordan.

The House of Lords, at the time, did not agree with the decision of the Court of Appeal. One of the Law Lords, in that case, was of the opinion that 'the fact that the deportee may find himself subject in the receiving country to a legal process that is blatantly unfair cannot, of itself, justify placing an embargo on his deportation'.[144] Consequently, the House of Lords allowed the appeal brought by the Secretary of State, having considered appropriate the conclusion of SIAC on the reliability of assurances given by Jordan that the applicant would not be tortured and that his liberty right and right to fair and just trial might not be breached.[145]

The applicant then proceeded to the European Court of Human Rights (ECtHR) in Strasbourg. ECtHR agreed with the House of Lords that neither his liberty rights (Art. 5) nor his rights not to receive ill-treatment by way of torture were at risk (Art. 3). However, in admitting the application, it took the view that the deportation of the applicant to Jordan would contravene Article 6 because there was real risk of admission, during the applicant's retrial in Jordan, of pieces of evidence obtained from third persons by torture.

This principle upheld by the ECtHR can be applied in West African courts. So it behoves the Community Court of Justice (in human rights cases) and the national courts to ensure that (1) where there is real risk of admission of any piece of evidence obtained by torture at the trial of the suspect in the receiving Member State, the sending Member State should not deport and (2) evidence obtained from torture whether of the suspects or third persons are not admitted in any trial or case relating to terrorism within their respective jurisdictions. The legal basis and reasons for the application of the principle in Community and national courts are numerous. First, it can be inferred (implied) from the Strategy[146] and it is expressly stated in international instruments[147] on torture to which most of the Member States are parties that evidence obtained from torture should not be used during trials of any person suspected to have been involved in terrorism. Second, such pieces of evidence are usually unreliable, for some persons, under the weight of unbearable pain, may sell absolute falsehood to the torturer just to have a reprieve. Third, Member States should totally stand against the conduct from which the evidence is produced.[148] Fourth, such pieces of evidence smear the integrity and sanctity of the court which admits them. Because of these reasons, it will be appropriate for the

[144] Case of Othman (Abu Qatada) v United Kingdom 2012, pp. 18–19.

[145] Ibid.

[146] Pillar 1 para 22 (f), Pillar 3 para 23 (b) ECOWAS Counter Terrorism Strategy 2013.

[147] Article 15 UN Convention against Torture 2004.

[148] Case of Othman (Abu Qatada) v United Kingdom 2012, p. 19.

Community Court and the national courts to treat such class of facts as inadmissible evidence.

However, one of the challenges national courts will face, regarding admission of evidence obtained by torture or brutality, bearing in mind that admissibility of evidence is an issue of law, is the existence of adjectival rules or principles, which indirectly reckon the importance of evidence that may have been obtained in contravention of law, especially if such evidence has high probative value, it couldn't have been obtained in any other legal form, and its admissibility is overwhelmingly desirable.[149] In jurisdiction where such law exists, efforts should be made to interpret the relevant provisions in a manner that agrees with international human right norms and, perhaps, the pre-eminent constitutional provisions on human rights in those countries. The probative value of a material or evidence (or its rarity) should never outweigh the importance of protecting the fundamental human rights of all persons. If it does, it means that the court admitting such evidence of high probative value has approved the conduct or illegality from which the evidence is synthesised and has successfully diminished the uniqueness of human value. Therefore, in spite of this legal challenge, the court should resolve the issue of admissibility in such a way that adjectival rules or principles should not be allowed to destroy the human rights of the parties—including terrorist suspects.

4.1.3.3 Extrajudicial Killing

Extrajudicial killing has been defined as 'a deliberated killing not authorised by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people".[150] It implies therefore that any killing that takes place in prison, police cell, detention camp, during raids conducted by the security personnel or during clashes or confrontations between security personnel and armed or terrorist groups, irrespective of whether it was authorised by government or not, would be adjudged extrajudicial killing so long as it was not authorised by a previous judgment of a properly constituted court, for there is a consensus, among different legal families, that the law does not, generally, permit law enforcement personnel to kill criminals without recourse to due process and the sanction of a court.[151]

However, there are other types of killing, though not authorised by previous judgment of a properly constituted court that could be justified in international humanitarian law where there exist non-international armed conflicts. Non-international armed conflict, in this wise, may include conflicts which take place in the territory of a state between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such

[149] Section 14 Evidence Act of Nigeria 2011.

[150] Sinaltrainal v Coca Cola 2009.

[151] Chiesa and Greenawalt (2012), p. 1375.

control over a part of its territory as to enable them to carry out sustained and concerted military operations.[152] Within the rules, launch of attacks should be targeted at combatants or militants and their facilities;[153] if, consequent to such attacks, a person or persons are killed, then there is justification for such killings even though they have not been sanctioned by judgments of competent courts.

But the act of killing combatants, militants or prisoners of war who are unable or have ceased to take part in hostilities would generally run counter to the rules of international humanitarian law.[154] Such persons should always enjoy their right to life until a judgment of a competent court states otherwise. The same rule applies to infliction of injury on any or all persons in this class. And where a person or persons involved in hostilities have surrendered to governmental authority, it would be unlawful to kill or inflict injury on them.[155]

Under the ECOWAS human right regime, human life is inviolable and every person is entitled to respect to his or her life. It is, also, the law that no person should be arbitrarily deprived of this right to life.[156] But, generally, right to life may not be arbitrarily deprived where death occurs in the following circumstances: execution of court sentence, where the law provides for death penalty, after a conviction has been secured; legitimate defence in the face of persistent attack as defined or provided by law; use of necessary force in preventing the escape of detainees; use of necessary or reasonable force to quell rebellion and uprising; and war and conflict situations.[157] Therefore, with the exception of these circumstances and others which are provided under a written law, every other killing passes for extrajudicial killing and consequently amounts to violation of right to life.

Since extrajudicial killing qualifies as violation of right to life as protected by the African Charter on Human and Peoples' Rights[158] and the Strategy unambiguously provides for protection and respect of human rights in implementing the three pillars, it means that any extrajudicial killing by the security officers during the implementation of the Strategy would be a contravention of the letters and spirit of that instrument.[159] But it seems very imminent or likely that the Strategy would be readily contravened, particularly pillar 2, because of security and police practices existing in West Africa, especially in the two countries—Nigeria and Mali—where terrorism is prevalent.

The operational history of the Nigerian Police Force, together with the military, is replete with scores of brutal and extrajudicial killings. A report shows that

[152] Bouvier (2012), p. 25.
[153] Ibid.
[154] Bouvier (2012), p. 25.
[155] Ibid.
[156] Article 4 African Charter on Human and Peoples Right 1981.
[157] Risoğlu (1999), pp. 2–3.
[158] Article 4.
[159] ECOWAS Counter Terrorism Strategy 2013.

hundreds of innocent Nigerian citizens are killed each year by the police.[160] In one case, a mother and poultry farmer was gruesomely murdered by the police in 2008 in Makun, Ogun State. In the face of irrefutable pile of evidence showing that she was an innocent victim of police brutality, the Police Commissioner, comically, convened a press conference where he branded the victim as the leader of an armed robbery ring.[161] In another grotesque account, the Police in Kogi State, sometime in 2008, killed a man, maimed his body and displayed his remains to the public amidst gun shots and celebrations.[162] In the same year and State, the Nigerian Police Force poured out its lethal venom on the Ogaminana community and wiped out between 15 and 50 persons for the death of two police officers suspected to have been killed by armed robbers.[163]

Mali, too, has its own rich history of extrajudicial killing; in the Mopti community right in the centre of the country, there was a report[164] of how a young man from the Fulani tribe mysteriously disappeared. Some eye witnesses narrated that on the day of his disappearance, the Malian forces arrested two persons, killed and dumped them in a pit at a military base. Also it has been reported that Amnesty International has compiled documents evidencing numerous extrajudicial killings by the Malian forces. In a peculiar case, the forces rounded up 16 Islamic preachers of Mauritanian and Malian origin and executed them. The Malian army had, in one occasion, evaded and destroyed Tuareg's nomadic camps and also killed Tuareg civilians.[165] Even among the military, there had been extrajudicial killings of soldiers suspected to have been involved in the mutiny of 2013 that took place in Keti barracks outside of Mali's capital. Four soldiers were found dead near the capital; it was alleged that soldiers loyal to Gen. Amoudou Haya Sanogo might have been purging the military to forestall future revolt.[166]

Given these operational practices and culture in the two major countries prone to terrorism in West Africa, It seems more probable that the implementation of the Strategy or its transposed version in any of the Member States might be mulled by acts of extrajudicial killings and summary executions by the military and police officers. This is because the same operational practices and tools employed in dealing with armed robbers, suspected terrorists or military renegades in the past would still be relied upon during the implementation stages of the Strategy.

Again, the Strategy or its transposed version would give the security institutions more powers in order to clamp down on terrorists without, as usual, putting in place the right mechanism to check the abuse of power. For instance, pillar 2 promotes the activation of emergency power of police and other law enforcement agencies for

[160] Open Society Institute 2010, p. 53.
[161] Ibid.
[162] Ibid., p. 54.
[163] Ibid., p. 55.
[164] Hirsch (2013).
[165] Ibid.
[166] Amnesty International (2013a).

the purposes of searching, arresting and detaining terrorist suspects, albeit in accordance with the law.[167] This kind of power would likely be abused considering the absence of effective accountability mechanism for security institutions in West Africa and the existence of culture of brutality under which the police and the military function. It may not be sufficient to state that the powers should be used in accordance with the law; there must be practical steps to ensure that the personnel using such powers, specifically, or implementing pillar 2, generally, are made accountable for violations of human rights when they occur. After all, Nigeria[168] and Mali do have human right regimes yet there have been growing records of human right violations in these two countries.

Open Society Initiatives' study on extrajudicial killing by the Nigeria Police Force showed that in one incidence, no police officer was reprimanded or made to account for his or her atrocities.[169] This form of institutional irresponsibility does not only occur in Nigeria. Nigeria and Mali are only used here as examples; the same practices—that is, extrajudicial killing without culpability—somewhat exist in different dimensions and styles, in most of the security institutions in West Africa. Therefore, practical means of making the police and other law enforcement agencies accountable should be introduced at the implementation stages of the Strategy or its transposed version; otherwise, "the pillar on pursue" would be a germane ground for extrajudicial killings and other human right violations.

4.1.3.4 Rights to Liberty and Human Dignity

The implementation of the same "pillar[170] on pursue" can also serve as a breeding ground for violation of rights to liberty and human dignity for many reasons. First, given the public concern about the escalation of terrorism in West Africa, and the need for a more globalised or regionalised approach to tackling terrorism, the local police and law enforcement officers could distort or misunderstand the regional authorisation[171] as new impetus to pounce on and detain every terrorist suspect without recourse to protective norms in national or international law. Second, the content of the Strategy stresses on 'emergency police power to search, arrest and detain; exchange of co-operation among Member States in matters of investigation and prosecution, which could be formal and informal; and investigation of terrorist suspects and connected persons and bringing them to justice within the law'. If these remits are not properly measured by restrictive laws during transposition, they could result in wide powers. Third, the police, army and other law enforcement

[167] Pillar 2, para 23 (b), ECOWAS Counter Terrorism Strategy 2013.

[168] See Chapter 4 Constitution of the Federal Republic of Nigeria 1999.

[169] Open Society Initiatives 2010, p. 54.

[170] Pillar 2 ECOWAS Counter Terrorism Strategy 2013.

[171] Ibid.

agencies in most of the countries in West Africa have a reputation for violation of rights to liberty and human dignity.

Using Nigeria as a case study, bearing in mind its security strength and place in the scale of terrorism attacks in West Africa, there is a report[172] which shows the degree of unlawful detention and indignity that characterises its war against terrorism. Over 950 suspected terrorists died in detention camps ran by the Nigerian Joint Task Force (JTF) within the first 6 months of 2013. A good number of these deaths occurred in Giwa military barracks in Maiduguri, Borno State, Sector Alpha (Guantanamo) and Presidential Lodge (euphemism for detention centre) in Damaturu, Yobe State.[173] The description of the state, treatments and conditions of life in these detention centres, by survivors, showed that the right to dignity of terrorist suspects were generously violated. Some of the suspects died as a result of injury inflicted on them by the security personnel, some lost their lives as a result of suffocation and other consequences of overcrowding, some were shot in the leg during interrogation and allowed to bleed to death in the centres without medical assistance and the rest lost theirs through the agency of hunger and starvation.

Fourth, in all these abuses, regarding detention without trial and inhuman and degrading treatment meted to the terrorist suspects, no Nigerian officer has been arraigned or reprimanded for the violations of rights of these terrorist suspects—knowing that under Nigerian law there is a presumption of innocence until a competent court finds the accused (terrorist suspects) guilty.[174] However, happily though, there was a report[175] that a Nigerian court awarded the sum of N100,000,000 (one hundred million naira) to the family of a deceased person held on the pretext that he was an in-law to Boko Haram leader, who died in custody as a result of torture which the police inflicted on him. Despite this isolated case, it could be inferred, soundly, that there is lack of accountability mechanism to check the excesses of law enforcement officers in Nigeria. The same argument of lack of accountability mechanism also applies to other countries in West Africa.

Based on these reasons, it is highly probable that the police and other law enforcement agency would violate the rights of the suspects and persons connected to terrorist activities in implementing pillar 2 of the Strategy or its transposed version. After all, it is the same set of institutions, with additional impetus, working under the same operational environment bereft of accountability mechanism that would implement pillar 2. However, if the Community and Member States take practical steps to educate on the extent and monitor the use of vested powers by the officers, protect the human rights of suspects as provided in the Strategy and hold every police, military or law enforcement officer accountable for violations of rights of terrorist suspects, then the implementation process would record lesser violation of human rights.

---

[172] Amnesty International (2013b).

[173] Ibid.

[174] Section 36 (5) Constitution of Federal Republic of Nigeria 1999.

[175] Razaq et al. (2010), p. 15.

Furthermore, it may be asked whether these events that took place in Nigeria, adequately, constitute crass violation of human rights under the ECOWAS human right regime. Yes, they do. Article 6[176] protects the right to liberty and security of human persons; such right cannot be affected except as permitted by an existing law. The existing law, in this circumstance, relates more to the Constitution of Nigeria and the contemporary laws on terrorism. Under the Constitution of Nigeria, no public official or law enforcement agency has been vested with power to detain any person suspected of committing a crime without the benefit of fair hearing in court. Expectedly, such a suspect should be brought before a competent court within twenty-four hours so long as a court can be located within a radius of forty kilometres; where there is none within that prescribed limit, the suspect should be brought to a court within forty-eight hours unless a court thinks otherwise.[177]

Even where a person has committed an offence for which he is not entitled to bail, he is expected to be released, after 2 months, unconditionally or conditionally in order to secure his appearance in court.[178] Specifically, under the terrorist laws[179] of Nigeria, a terrorist suspect should be granted bail within 90 days and might subsequently be kept under house arrest. Therefore, the act of keeping terrorist suspects in underground detention centres without trial beyond 90 days and the consequent events which culminated in the death of the 950 suspects cannot be justified both in community and national laws. In the absence of any legal justification, they will be classified as total violation of the rights of the suspects under the ECOWAS legal regime.

In other jurisdictions, courts have condemned such acts of keeping terrorist suspects indefinitely as breach of right to liberty even if a national law provides for such lengthy detention. In Belmarsh case,[180] the House of Lords considered section 23 of the Anti-terrorism, Crime and Security Act 2001, which gave government powers to detain indefinitely foreign nationals certified to be suspected terrorists, to be incompatible with Article 5 (on right to liberty) as it is disproportionate and discriminatory. It went ahead to make quashing order against Human Right Act (Designated Derogation) Order 2001 with which the United Kingdom derogated from the provision of Article 5 European Convention on Human Rights. So the same wave of human right protection moving across European jurisdiction should be allowed to blow through the Community, even in the face of national laws that provide for protracted detention.

Regarding right to human dignity, the pitiable condition under which the suspects were kept in detention and the degrading treatment they received ranging from overcrowded cell structure, starvation, suffocation, untreated gun wounds,

[176] African Charter on Human and Peoples Rights 1981.

[177] Section 36 (5) Constitution of Federal Republic of Nigeria 1999.

[178] Ibid., section 36(4).

[179] Section 28 Terrorism (Prevention) Act 2011 as amended by Terrorism (Prevention) (Amendment) Act 2013.

[180] A and Others v Secretary of State for Home Department 2004, p. 47.

torture to other different shades of indignity poured on their persons certainly constitute violation of the right to human dignity under the ECOWAS human right regime. Article 5 of the African Charter protects the right to respect of the dignity inherent in man and prohibits inhuman and degrading treatment to any person. As to what will constitute degrading treatment, ECtHR has explained it, in Ireland v UK,[181] thus: "in the present context it can be assumed that it is, or should be, intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt". In another case, Basu v State of West Bengal,[182] a superior court held that custodial torture is a naked violation of human dignity and degradation which destroys to a very large extent human personality. Relatively, it is proper to conclude that the act of torturing or treating the suspected members of Boko Haram in such a manner that lowered their human worth or value or destroyed their human personality amounts to violation of right to human dignity.

4.2 Conflicts and Legal Interventions

This segment simply examines conflicts and peace agreements in West Africa, especially as they relate to Sierra Leone, Liberia, Guinea-Bissau and Cote d'Ivoire. It briefly evaluates, also, a set of conflict prevention and management laws which ECOWAS has made, from the perspectives of the purpose, applicability, impact and implementation challenges. The segment begins with a brief outline of events that happened in the above-mentioned countries and the roles ECOWAS played; the outline sets the context under which the legal issues will be examined.

4.2.1 Outline of Events

Sierra Leone has never kept a clean slate in regard to conflict and skirmishes, beginning from the fracas that usually erupted between the militias created by the Sierra Leone Selection Trust[183] and the illegal native miners of diamond to the intermittent violence that characterised the leadership of Siaka Steven between 1968 and 1985.[184] Things came to a head in 1990 when Siaka's successor, General

[181] 1978, p. 25.

[182] Basu v State of West Bengal 1997, p. 416.

[183] A company created in 1934 to manage mining and exportation of diamond: see Cooker (2005), p. 4.

[184] Cooker (2005), p. 6.

Joseph Momoh, permitted ECOWAS forces to create a base in Sierra Leone for the purpose of possible intervention in the Liberian war. Charles Taylor, then a warlord and leader of a large militia in Liberia, was greatly grieved by that arrangement. It is believed that he trained and financed a disruptive unit of militia made up of persons of Sierra Leone origin ranging between 10,000 to 28,000 forces, later to be known as Revolutionary United Force (RUF).

RUF, led by Foday Sanko, indeed ruffled the peace in Sierra Leone in 1991 when the forces entered through the Liberian border to begin their onslaught, which they claimed was designed to rid the country of corruption. Unfortunately, the members of the group also left their venom on the bodies of ordinary citizens: cutting their limbs, rapping the girls, abducting the boys, killing their parents and stealing their property.[185] On the pretext that General Momoh was doing little in terms of adequately funding the military to combat RUF, Captain Valentine Strasser and his brigands struck in April of 1992 and overthrew General Momoh. Without wealth of experience either in governance or civility, these forces went on rampage, looting mining operations, cities and industries. In restraint, people of Kaneme, a city with heavy presence of mining operation and infrastructure, and Bo formed their own defensive military unit and banned both the Sierra Leone Army and RUF from their territories.

RUFF attacked the mining city of Kaneme in 1993; killed thousands of children, mothers and fathers; and occupied the area until ECOWAS forces came to their rescue in 1998.[186] Prior to the recapturing of Kaneme by the ECOWAS forces, Strasser abdicated his office and conducted an election in 1996 in which Ahmed Tejan Kabbah won to the chagrin of the RUF's helmsman. In response, he (RUF helmsman) ordered his brigands to cut the limbs of every living being. Cannibalistically, those amputated limbs were parcelled to Ahmed T Kabbah in protest to his victory.[187] In that spate of rage, the Government of Sierra Leone People's Party, led by Ahmed Tejan Kabbah, was toppled on the 27 May 1997 by the military, which subsequently established the Armed Forces Revolutionary Council (AFRC). In the wake of the coup, Nigeria stepped in to restore Ahmed Kabbah's Government but experienced huge challenges which derailed the intention. After a series of negotiation with AFRC, the ECOWAS forces[188] intervened and restored Ahmed Tejan Kabbah to power in 1998. Surprisingly, the ousted AFRC formed a coalition with RUF and unleashed further mayhem in 1999. In response, the UN sent its troops known as United Nations Missions in Sierra Leone (UNAMISIL), which took over from ECOWAS, based on the Lome Accord of 1999,[189] to curtail the escalation of conflicts in Sierra Leone.

[185] Ibid., pp. 7–8.

[186] Ibid., pp. 8–9.

[187] Cooker (2005), p. 9.

[188] ECOWAS Cease fire Monitoring Group (ECOMOG).

[189] Frempong (2005), p. 8.

Liberia, on her part, has a chequered history of conflict. Subsequent to the rice riots that took place in Liberia, precisely on the 12th of April 1980, a band of soldiers carried out a coup, in which the President, William Tolbert, was cruelly murdered at the executive mansion. The band, quickly, constituted the People Redemption Council (PRC) and handed the rein of leadership to one Samuel K Doe of the ancient Krahn tribe in Liberia. Samuel Doe was wicked, for it took him merely 4 months to decide to spill the blood of 13 former cabinet members of the Tolbert administration at the beach. On the 22nd of August 1980, these former public officers were taken to the beach, made naked and executed by firing squad.[190]

Having ruled autocratically for 5 years, Samuel Doe conceded, under the weight of international and national pressure, to the idea of re-institution of civil and democratic rule in Liberia. In 1985, he conducted an election that was neither free nor fair; in that mix of confusion and impasse, Samuel K Doe declared his puppet party, the National Democratic Party of Liberia (NDPL), successful in the 1995 election. One month after the unconstitutional declaration, Thomas Qwiwonkpa, a founding member of the PRC, returned from exile in the United States and attempted a coup in November. Having successfully and violently subverted the coup, Samuel Doe inaugurated himself as the President in January 1986.[191] After the inauguration, Liberia witnessed increase in violation of human rights and decrease in the application of rule of law.

So when Charles Taylor, a former public officer under Doe's Government, invaded Liberia with his militia, known as the National Patriotic Front of Liberia (NPFL), from Cote d'Ivoire on 24 December 1989, some Liberians-yearning for a change-lent their support. NPFL increasingly began to acquire and occupy territories outside the capital; 6 months later, it took over Monrovia. The conflict resulted in wide violation of human rights and humanitarian problems within and outside the capital; to quell the situation, ECOWAS sent its forces[192] in August 1990, but that did not eradicate the conflict. The conflict came to a climax when a faction of NPFL, known as Independent National Patriotic Front of Liberia, led by one Prince Johnson captured, tortured and lynched Samuel K Doe.

Subsequently, series of peace agreements were signed: first, there was a ceasefire agreement between Samuel Doe's loyalists and the NPFL; second, there was another peace agreement among the interim government, NPFL and Samuel Doe's loyalists. The peace agreements neither restored peace nor stopped the proliferation of armed groups. In fact, a new group known as United Liberation Movement for Democracy, made up of Doe's loyalist in Sierra Leone and Guinea, emerged to confront Charles Taylor headlong. And in April 1991, the group waded into the murky conflict in Liberia. Irrespective of series of peace agreements made between 1993 and 1994, among the different armed groups, the conflict continued

[190] Foster et al. (2009), P56.
[191] Ibid.
[192] ECOMOG.

and produced more factions.[193] Nonetheless, in 1995, Charles Taylor agreed to the demobilisation and disarmament of his group, and a new collective transitional presidency, made up of Charles Taylor and five other faction leaders, was established.[194]

In 1997, Liberia conducted an election and Charles Taylor won the presidential seat. However, that victory did not wean Liberia off conflicts. As a matter of fact, in 1999, new armed groups consisting of Liberians in exile were established: Liberia United for Reconciliation and Democracy (LURD) and Movement for Democracy in Liberia (MODEL). Those two armed groups virulently attacked Taylor and Liberia so much so that Charles Taylor buckled under the pressure and abdicated his office on 11 August 2003 for an offer of asylum in Nigeria.[195] Shortly after Taylor's resignation, the interim government signed the Comprehensive Peace Agreement in Accra. The agreement made provision for the establishment of National Transition Government of Liberia, headed by Gyude Bryant, which should administer the governmental affairs until 2006.[196]

Guinea-Bissau, on its part, has a sad history of conflict; once a colony of Portugal, the country fought between 1963 and 1974 to wrench power from the colonialists. That war resulted in loss of lives, breakdown of economy and devastation of infrastructure.[197] When the Portuguese administrators and army left in 1974, the African Party for the Independence of Guinea and Cape Verde (PAIGC),[198] led by Luis de Almeida Cabral,[199] took the rein of leadership and oppressed the citizens and military groups in Guinea-Bissau some more. The continuous struggle for dominance at the political level, after independence, led to numerous conflicts, failed coup d'etat and further repression from PAIGC. The repression took a horrendous turn, some years later, when President Joao Bernado Vieira, having overthrown Luis Cabral on the 14th of November 1980,[200] lynched some military officers, mostly of Balante tribe, for what he considered an attempt by that tribe to dominate the government.[201]

On the heels of the collective resentment that followed the killings of soldiers of Balante tribe, a small group of soldiers loyal to General Ansumane Mane began to rebel against the government in 1998.[202] The reasons for the rebellion have been linked to an arm trafficking case involving Casamance Freedom Movement—a group, based in southern part of Senegal, which opposed President Abdou Diouf of

[193] Foster et al. (2009), P57.
[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] Voz di Paz (2010), p. 12.
[198] Portuguese acronym.
[199] Yabi (2010), p. 15.
[200] Ibid., p. 16.
[201] Voz di Paz (2010), p. 12.
[202] Yabi (2010), p. 17.

Senegal. At the time, General Ansumane was the Chief of Defence Staff in the Viera's administration but was shamefully removed from office and placed under house arrest on 6 June 1998 by the latter on the ground that he was responsible for involvement of some military personnel in arm trafficking deals with Casamance Freedom Movement. Twenty-four hours later, soldiers loyal to General Ansumane grouped together and sought for the resignation of President Vieira. They also requested the formation of a transitional administration that would conduct fresh elections.[203] The rebellion first grew into massive violence before it metamorphosed into a war.

Both Senegal and Guinea Conakry, backing President Joao Bernado Vieira, intervened in the crisis by sending 2200 troops and 2400 troops, respectively; however, the intervention was perceived by some persons in Guinea-Bissau as foreign interference; therefore, that spurred on some sense of nationalism among them. Consequently, some former combatants who took part in the liberation war joined the fray in support of Ansumane, so the war took a new dimension. It raged on until ECOWAS, under the leadership of Gnassingbe Eyadema, relying on its diplomatic strength lured the warring parties to sign a peace agreement on the first day of November 1998.[204]

The agreement provided, among other things, for withdrawal of troops, deployment of ECOWAS Monitoring Group (ECOMOG) and inauguration of a government of national unity that would conduct fresh election as soon as possible.[205] Per terms of the agreement, ECOMOG also had the responsibility of providing security for the President and Prime Minister, as well as disarmament of the warring troops. Unfortunately, despite appeals for international support and fund, ECOWAS was unable to muster, quickly, resources and personnel for the assignment; in fact, it had only 400 footmen without logistical and financial resources to implement the arduous tasks allocated to it in the agreement.

While the Community was sourcing for assistance, Ansumane and his group renewed attack against President Vieira and the soldiers loyal to him on 6 May 1999; by the following day, the junta had overthrown President Vieira completely. That event rendered the ECOWAS agreement void. ECOWAS, unexpectedly, withdrew its mission from Guinea-Bissau, citing financial constraint and the coup as reasons. At the wake of the withdrawal, UN Security Council in March 1999 approved the establishment of Peace Building Support Office in Guinea-Bissau, which took over from ECOWAS. UN, with assistance from funding partners, helped the transitional government that took over from President Vieira to organise election between November 1999 and January 2000 successfully, which saw Kumba Yala of Party for Social Renovation emerge as the President.

Cote d'Ivoire is another West African country that has upgraded her conflict credentials lately. The conflict that ravaged Cote d'Ivoire, recently, has an ethno-

[203] Ibid.

[204] Ibid., p. 18.

[205] Ibid.

political mix to it. Between 1960 and 1993, Cote d'Ivoire, under the leadership of Houphouet-Boigny, experienced enviable economic growth and political stability. However, in between that period of boom and perceived peace, the dichotomy between étrangères (Ivorien citizens of foreign descent) and Ivoiritè (pure Ivorien citizens without link to foreign parents) grew sporadically.[206] When Houphouet-Boigny died in 1993, his successor, Konan Bedie, did as badly in his attempt at curtailing the rebellion of the over five million étrangères as he did at improving the economy. Bedie, of the Boule tribe, once a Finance Minister under Houphouet-Boigny, took some drastic steps. Driven by his xenophobic inclinations, he removed étrangères from top governmental positions and replaced them with citizens of Cote d'Ivoire without link to foreign nationality. Also, he restructured Ivorien electoral laws to limit presidential positions to citizens (by birth) whose parents were citizens by birth. That discriminatory move was designed to restrain Alassane Dramene Ouatara, who has a Burkinabe genealogical link, from contesting the election.[207]

Robert Guei, a retired general, like lightning, struck in December 1999 and overthrew Bedie from office. Because Bedie rule was characterised by discrimination, economic downturn and corruption, most Ivoriens applauded the forceful wrench of power. However, Guei's administration was no different from other military junta; consequently, in spite of his crave to hold onto power, he lost the presidential election, subsequently, to Laurent Gbagbo. Gbagbo, on his part, plied the discrimination route; he enhanced the segregation between Ivoiritè and the étrangères and made it difficult for electorates from the northern part of the country to register for the elections. Persons and communities in that part of Cote d'Ivoire also were maltreated regularly by the police and security personnel. When, in October 2002, they couldn't bear the political manoeuvre, hardship, discrimination, disqualification of Alassane Ouatara and brutality anymore, the northerners, together with some parts of the west, revolted angrily and left the country in turmoil.[208]

Specifically, the crisis peaked in the presidential election of 2002, when the result of the outcome was keenly contested by the opposition parties; there emerged deadly clashes between the south, controlled by Gbagbo's administration, and the north, which was controlled by General Guei. However, the Supreme Court, by an order, declared Laurent Gbagbo the winner of the election.[209] Subsequently, there were attacks, by some rebel forces, on military facilities in Abidjan, Bouake, and the northern town of Korhogo, and General Guei was lynched during the attack in Abidjan. The attack did not only target military facilities; the attackers also destroyed houses of immigrant workers mainly from Sierra Leone, Burkina Faso

[206] Kirwin (2006), p. 44.
[207] Ibid., p. 47.
[208] Ibid., p. 48.
[209] Dadson (2008), p. 4.

and Liberia, which resulted in the displacement of over 20,000 persons in Abidjan.[210]

Prior to the presidential election, the rebel forces, known in English as Patriotic Movement of Cote d'Ivoire, led by Gaullaume Soro, had begun to take towns and cities, especially in the northern part of Cote d'Ivoire. All efforts by the national army to end the military occupation by the rebel forces proved abortive. Later, two new rebel groups emerged: the Movement for Justice and Peace and the Ivorian Popular Movement of the Great West; subsequently, they were merged into one terror unit called *forces nouvelles*.[211] And in November 2002, they captured the towns of Dananne and Man. The objectives of the terror unit were clear: to avenge the death of General Guie, who was killed during the Abidjan attack, and to push for the resignation of Laurent Gbagbo. The emergence of these groups, which later unified as one terror entity, aggravated the crisis.

However, the efforts of ECOWAS to de-escalate the crisis did not go unnoticed, for after the attempted coup or mutiny of 19 September 2002, some countries in the Community propped up Laurent Gbagbo with political and military support. Apart from receiving solidarity statements from the Governments of Nigeria Ghana, Togo, the Nigerian Air Force released three of its alpha jets to Cote d'Ivoire to assist in quelling the insurgence carried out by some seven hundred and fifty soldiers who were refusing demobilisation of their unit.[212]

In furtherance of steps taken to restore peace, ECOWAS constituted a six-nation mediation group, made up of Nigeria, Ghana, Mali, Niger, Togo and Guinea-Bissau, to reach out to the insurgent for dialogue. On 29 September 2002, ECOWAS, led by its former Chairman and the President of Senegal, Abdoulaye Wade, held an emergency summit in Accra to consider the possibility of negotiating a peace agreement between the Government of Cote d'Ivoire and the rebels and to prepare for the actual negotiation.[213] After the subsequent summit, Laurent Gbagbo initially refused to sign the peace agreement arguing that the appendage of his signature would legitimise the rebels and could deepen the division in the country. However, through the mediation effort of former Senegalese Foreign Minister Cheikh Tidiane Gadio, former Executive Secretary of ECOWAS Dr. Mohamed Ibn Chambas and UN Secretary-General's Special Representative to West Africa Ahmedou Ould-Abdallah, Laurent Gbagbo finally appended his signature to a version already signed by the Patriotic Movement of Cote d'Ivoire.[214]

In summary, ECOWAS helped in the peace process by facilitating the emergency summit in Accra, the Abidjan Ceasefire Agreement of 17 October 2002, the Lome Agreement spearheaded by Foreign Minister of Senegal Cheikh Tidiane Gadio and the late President of Togo, Gnassingbe Eyadema, which was designed

[210] Ibid.

[211] Translated as New Forces.

[212] Dadson (2008), p. 7.

[213] Ibid.

[214] Ibid., pp. 7–8.

to bridge the political difference between the Gbagbo and the rebels. The Lome Agreement necessitated the deployment of 1300 ECOWAS (and 3800 French) troops to Cote d'Ivoire and the establishment of buffer zone. Since the previous summits and agreement did not achieve absolutely their objectives, ECOWAS also facilitated a meeting, chaired by former President of Ghana John Agyekum Kuffour with support from African Union (AU) representatives during which the parties signed Accra II Agreement of 3 March 2003. That agreement aimed at reinvigorating Linas-Marcoussis Peace Accord and creating new opportunities of mediation. There was another agreement (Accra III) signed in Accra on 30 July 2003 with the view to implementing Accra II and Linas-Marcoussis Peace Accord. When these Community efforts couldn't solve the hydra-headed conflict in Ivory Coast, AU, led by former South African President Thomas Mbeki, stepped in and took the rein of mediation.[215] Nonetheless, the recent crisis that rocked Cote d'Ivoire in 2011 has been deliberately left out of this outline of events, principally because of the little role ECOWAS played in restoring relative peace to that country.

Conclusively, it can be seen from the outline of events that in all the conflict situations in these four Member States under study, ECOWAS intervened and helped the warring parties to agree to certain reconciliatory terms or road map to peace, irrespective of whether the terms or road maps survived the heat of the crisis. Most of these terms and road maps were documented or embodied in numerous peace agreements. Therefore, it will be prettily appropriate to explain what a peace agreement is, its types and the status of these peace agreements which ECOWAS helped to facilitate for the four countries under review.

4.2.2 Peace Agreement

The term peace agreement has become as common as ethno-political conflicts in West Africa lately. Whenever crisis sprouts within the Community, ECOWAS will, in pursuit of peace process, facilitate, sometimes in collaboration with other international organisations, meetings and forums which may produce some kind of compromise suitable to come under the genus peace agreement. There is no doubt that ECOWAS, as an international organisation, could trace the legal basis upon which it organised or facilitated peace process or dispute settlement meetings that resulted in peace agreements. In addition to its economic integration responsibilities, its principal text[216] mandates it to co-operate with Member States to fashion a mechanism for prevention and resolution of intrastate and interstate conflicts, especially to employ good offices, conciliation, mediation and other methods of dispute settlement[217] to fulfil its legal duties.

[215] Dadson (2008), p. 8.

[216] Article 58 (2) Revised Treaty 1993.

[217] Ibid (e).

However, it is not every outcome of a peace process meeting facilitated by ECOWAS that can qualify as a peace agreement; it may be a decision, a statement or a communiqué. Nonetheless, it is noted that some statements or declarations often issued at Heads of State meetings, with warring parties in attendance, may have the attribute of a preliminary agreement which stipulates the parties' intention to go into negotiation with each other.[218] Distinctly, what then would qualify as a peace agreement? Watch International[219] sees peace agreement as a contract intended to end or significantly transform a violent conflict so that it may be addressed more constructively. For Bell,[220] the label "peace agreement" is attached to documented agreement between parties to a violent internal conflict to establish a ceasefire together with new political and legal structures.

It is important to note that Bell limited the explanation to internal conflict. Can it, then, be inferred from this intellectual approach that agreement, relating to external conflict, necessitating a ceasefire between two West African States cannot be described as a peace agreement? No, for the writer[221] had, subsequently, clarified the legal status of such agreement and described it as a treaty. Such clarification is totally in sync with the definition of treaty as contained in Article 2 of the Vienna Convention.[222] Being a treaty does not disqualify it from being a peace agreement since a treaty generally, notwithstanding its content and purpose, is an agreement per se between states.[223] But if one considers the intellectual controversy over the legal status and connotation of peace agreement, one then appreciates the importance of keeping agreements whose status had been established by law and practice (for instance, peace agreement between states which would ordinarily qualify as treaty) from the intellectual fray.

Another helpful approach to understanding what a peace agreement is will be to examine different types or classifications of peace agreement. Keeping it simple, Bell grouped them into three different heads: pre-negotiation agreements, framework/substantive agreements and implementation/re-negotiation agreements.[224] Pre-negotiation agreement normally precedes the actual negotiation between the disputing parties and acts as a structure or foundation upon which the superstructure of ceasefire agreement is built. It is an agreement that sets the terms for the expected negotiations between the parties. Therefore, such an agreement would state the negotiators and under what status they would be performing their duties. Where, for instance, the named negotiators are in prison or exile, it would provide for their

[218] Watch International (2009).

[219] Ibid.

[220] Bell (2006), p. 374.

[221] Ibid., p. 380.

[222] Vienna Convention on the Laws of Treaty 1969.

[223] Article 2, note that based on the 2006 amendment to the Treaty of 1969 and international law principles, a treaty can be concluded between states and other subjects of international law.

[224] Bell (2006), p. 376.

release or return.[225] It can also provide for temporary ceasefire or redefine the rules of engagement while negotiation is in progress. Because the possibility of compromise at this pre-negotiation stage is still dim and remote, and the warring parties distrust each other's willingness to respect the outcome of the meeting, the pre-negotiation agreement is couched in loose manner without creating an impression or effect of peremptoriness. A good example of such agreement is Agreement on Ceasefire in Sierra Leone of 18 May 1999 signed in Lome.

Furthermore, substantive or framework agreement builds on pre-negotiation agreement, if there is any. Normally, it lays down plan to end violence permanently, sustains ceasefires and confronts the primary causes of the conflict.[226] It may provide for schemes for demobilisation and demilitarisation of the warring groups and may go further than that to treat issues of constitutionality, elections and political governance. Substantive or framework agreement is worded differently; unlike pre-negotiation agreement, the language is peremptory in nature and the drafting style is legal. The structure has an outlook of a normal international agreement and may contain preambles, articles, annexes, etc.[227] Such an agreement can be very comprehensive, often including all warring parties, unlike the pre-negotiation agreement. Examples of this kind of agreement are Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front done at Lome on 7 July 1999 and Liberia's Comprehensive Peace Agreement done at Accra on 18 August 2003.

On the other hand, implementation/re-negotiation agreement helps to develop or build some of the terms or parts of the substantive/framework agreement and provides extensive details to the existing terms or parts that may be vague or scanty. So, generally, it is an improvement on the existing framework agreement. Such agreement often entails fresh negotiations or re-negotiations between the parties. Bell suggests that the reason for the re-negotiation may be linked to parties' intentions to vacate some of the positions they, previously, took by way of concessions. Implementation/re-negotiation agreement may or may not be cast in strict legal form and often includes all parties to the dispute.[228]

In summary, peace agreement could be explained as an agreement, which is written in compliance or in non-compliance with legal drafting language or structure, either loose or peremptory in terms and content, aimed at creating a road map to peace or establishing a ceasefire or changing the nature of lethal or violent conflict with a view to addressing it comprehensively in the future. Such agreement could be classified as preliminary or pre-negotiation or substantive/framework or implementation/re-negotiation agreement.

[225] Ibid.

[226] Ibid., p. 378.

[227] Ibid.

[228] Ibid., p. 380.

4.2.3 *Legal Status of Peace Agreement*

It becomes imperative to consider the legal status of these peace agreements facilitated by ECOWAS within the Sub-region. Would they qualify as treaties or, at least, international agreements under international law or domestic agreements within the jurisdictions in which they were made or agreement *sui generis*?

First, are they treaties? A treaty, under international law, is an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation is.[229] Therefore, for an agreement to qualify as a treaty, under Article 2 of the Vienna Convention, it must possess international character or feature, must be in written form and must be regulated by international law; chiefly, it must have states as parties to the agreement.

It may be argued that the participation of different ECOWAS countries, which are subjects of international law, in the process, sometimes witnessing the agreements; the fact that one of the parties to the peace agreement is a sovereign state; the intention of the parties that the agreement should remain within the international plane, often lend such peace agreement an international character. It can also be established, by the language of the agreement, the level at which it was executed,[230] participation of subjects of international law and the intention of the parties that the agreement would be regulated by international law. It may further be shown that the agreement met the writing requirement as stipulated in Article 2.[231]

These three elements would not still elevate such peace agreement to the status of a treaty; for such agreement to climb to that status, the fourth requirement of "concluded between states" must be satisfied. That one of the parties is a sovereign state may not suffice in this context; all the parties must be sovereign states for the agreement to be a treaty at least under Article 2 rules. Therefore, the peace agreements facilitated between the four Member States of ECOWAS—Liberia, Sierra Leone, Guinea-Bissau and Cote d'Ivoire—and the warring factions or rebels cannot qualify as a treaty under Article 2 of the Vienna Convention of 1969.

However, by virtue of the Vienna Convention of 1986,[232] a state can enter into treaty with international organisations and an international organisation, in turn, can enter into treaty with other international organisations. For this purpose, international organisation is limited to intergovernmental organisations[233] like ECOWAS, AU, etc. Therefore, the rebels or insurgents from West Africa do not qualify under this head to enter into treaty under Article 2 of the 1986 Convention.

---

[229] Art 2 Vienna Convention on the Law of Treaties 1969.

[230] For instance, where they are concluded at international or regional summits comprising different sovereign states.

[231] Vienna Convention on Law of Treaties 1969.

[232] Vienna Convention on Law of Treaties 1986.

[233] Ibid., Article 2 (1) (i).

Nonetheless, it must be observed that prior to these restrictive conventions, some non-state actors with international personality were able to conclude treaties with states. For instance, Sovereign Order of Malta, established as a military and medical association, was able to enter into treaty in 1530 with King Charles V of England. And the Holy See, the seat of administration of the Catholic Church, enters into treaty (termed concordant) with other states and participates in multilateral treaties with sovereign states in contemporary times.[234] It is also possible for a state and entities seeking for self-determination or succession to enter into treaty in an internal conflict situation; often in this kind of situation, the entities end up becoming sovereign states by the time the peace agreement (treaty) is concluded. A good example will be the General Framework Agreement for Peace in Bosnia and Herzegovina.[235] Conclusively, it can be said that though the two Vienna Conventions of 1969 and 1986 limit the capacity to conclude treaty to states and international organisations, there have been some exceptional circumstances where parties to treaties fall short of the requirement of Article 2.

Second, would they qualify as international agreements? It is clear that the Convention of 1969[236] limited treaty to international agreements entered between states, and the 1986 version limited the same to agreement between states and intergovernmental organisations or between intergovernmental organisations. However, does the 1969 Treaty recognise the existence of other international agreements that do not meet the "concluded between states" requirement? Yes, for it provided in Article 3 that the non-application of the Vienna Convention to international agreement concluded between states and other subjects of international law shall neither detract from their legal force nor affect the application of rules contained in the Vienna Convention to which they would be subject under international law independently of the Vienna Convention nor affect agreements between states where other subjects of international law are also parties to the agreement.

It seems, from the wording of Article 3, that the recognition of the force or existence of such international agreement is based on whether the other party or parties are subject of international law. Before considering whether rebels or armed groups from the four West African countries could qualify as subjects of international law for the purpose of elevating their peace agreements to the level of international agreements, it may be helpful to locate a simple definition of an international agreement. Encyclopaedia Britannica defined it as an 'instrument by which states and other subjects of international law such as certain international organisations regulate matters of concern to them. . .but they are all governed by the law of treaties which is part of customary international law'.[237] Again, from this definition, the requirement of being subjects of international law before parties can

[234] Abdulrahim (2015).

[235] Bell (2006), p. 380.

[236] Vienna Convention on the Law of Treaties 1969.

[237] Encyclopaedia Britannica 2015.

conclude international agreement is raised to the fore. Consequently, a brief examination of international subjectivity in relation to the West African rebels and armed groups follows.

4.2.4 Concept of International Subjectivity

A subject of international law has been defined as a person who possesses international legal personality, i.e., capable of possessing international rights and obligations and having the capacity to take certain types of action on the international level.[238] The rights and actions which a subject could enjoy and perform respectively depend on the nature of the capacity of the subject. Generally, subjects of international law have capacities to enter into treaty or relations with other subjects, attend UN conferences and summits or maintain observer status, exchange diplomatic representations or legations, perform legal acts and invoke provisions of treaty in international court or tribunal.

Sovereign states are major subjects of international law; they derive their personality from international law architecture. International law, primarily and originally, is structured to regulate the rights, duties, responsibilities and interests of sovereign states.[239] Therefore, all sovereign states, considering the principle of equality among them, are at liberty to enjoy the full benefits of international personality within the plane created for them by international law.

Another example of subjects of international law is international or intergovernmental organisations. They emerged as persons in the international plane in the nineteenth century. International organisations may be structured along regional lines, e.g. ECOWAS, AU and EU, or along universal purpose lines, e.g. UN, or along universal function lines. They normally derive their international personality from their establishing treaties[240] or instruments, and such treaties or instruments would define the extent of their powers, rights and duties. However, they do not have the same international personality which sovereign states have. This point was settled by the International Court of Justice in its Advisory Opinion in the Reparation for Injuries case,[241] where it held that the United Nations has international personality but it would not have the same rights and duties attributed to sovereign states since it is not a state.

There are other non-state actors that possess some kind of capacity in international law. As stated earlier, both the Sovereign Order of Malta and the Holy See

[238] Abdulrahim (2015).

[239] Ibid.

[240] E.g., UN derives its personality from United Nations Charter, the Headquarters Agreement between the United Nations and the United States of America of 1947, and the 1946 Convention on the Principles and Immunities of the United Nations. See Abdulrahim (2015).

[241] 1949, p. 174.

have some form of international personality in international law. Although formed as a military and medical association, the Sovereign Order of Malta ruled Rhodes from 1309 to 1522 and in 1530 entered into treaty with the King of England for the purpose of ruling Malta, which it did until 1798. However, in 1834, it repurposed as a humanitarian organisation and established its headquarters in Rome. The Holy See's international status may be attributed to being the legal personality of a global and empire-like church (Catholic) with members from all over the continents of the world and its occupation of a defined territory in Vatican devised to it by the Lateran Treaty of 1929[242] and, maybe, the willingness of other international law subjects to engage it at that international level.

Other non-state actor that has been attributed with or considered as subject of international law, to an extent, is a unit or state in a federal arrangement, but the existence of international personality would depend on the constitution and practice of that federal state on the one hand and the recognition of the unit's personality by the third state on the other hand.[243] So federalism alone cannot vest every unit, in a federation, with international personality. Examples of units in a federal arrangement that were treated as international subjects include Soviet Republics of Byelorussia and the Ukraine. They were admitted as members of the UN in 1945.[244]

International liberation movements have been recognised as persons, with limited capacities, in international law. Most of these movements held sway during the period of emancipation from colonial rule. Since the UN and other regional intergovernmental organisations, like Organisation of Africa Unity (OAU),[245] were encouraging independence of states at the time, they were willing to grant those movements some international status to aid their campaigns. So the derivation of their international status could be linked to international practice and recognition by intergovernmental organisations. Both the UN, in 1974, and OAU recognised the Movement of Rhodesia, Angola and Mozambique as international persons, while the UN and Arab League recognised Palestine, to some extent, as a person in international law.[246] The UN accorded the Movement of Rhodesia, Angola and Mozambique observer status in forums organised by the UN, while the UN Security Council, during its debates, also accorded Palestine similar participatory rights that it normally accords sovereign states.[247]

Individuals are not generally subjects of international law; however, in certain cases relating to human rights and crime, international law tends to cloth them with some capacities either for enforcement of rights or attribution of criminal responsibility. It would have been a bit impractical should international law provide otherwise. It would have meant that persons whose rights have been violated

[242] Abdulrahim (2015).
[243] Ibid.
[244] Ibid.
[245] Now AU.
[246] Abdulrahim (2015).
[247] Ibid.

would not enforce them where their states of nationality refuse or neglect to enforce their rights in international court or arbitration. It would have meant also that international war crimes committed by individuals can only be attributed to their states of nationality, since the individuals cannot be brought before international courts or tribunals for prosecution and punishment because of lack of capacity. The Nuremberg International Tribunal properly reasoned, while justifying why international law extends duties and liabilities to individuals, that crimes against international law are committed by individuals and not by abstract entities; therefore, it is only by punishing individuals who perpetrate these crimes will international law norms be enforced.[248] And in line with this principle, lately, the International Court of Justice tried and convicted Laurent Gbagbo, former President of Cote d'Ivoire, for his involvement in war crimes committed during the political crisis that recently took place in Cote d'Ivoire.

While there are still numerous international instruments (like the International Covenant on Civil and Political Rights of 1966 and the International Covenant on Economic, Social and Cultural Rights of 1966[249]) that extend protection to individual human rights without vesting them with the capacity to appear before international courts or tribunal unless their claims are brought by their states of nationality, some international texts[250] on human rights or international crime vest individuals with the capacity to appear before international courts. It seems that treaties made by regional groupings are more likely to lend capacities to individuals than any other international instrument. For example, ECOWAS law empowers the Community Court to hear cases of violation of human rights and individuals to bring application for relief for violations of their human rights.[251] Also, the European Convention on Human Rights vest individuals with capacity to appear in the European Court of Human Right in Strasbourg to enforce their rights. So it can be inferred that the growth of regionalism has strengthened the position of individuals, as subjects, within the international plane.

Furthermore, there are other entities that have been either vested with or considered to have some capacity or status within the international plane. First, international territories have been given some kind of status in international law. International territories cover territories or geographical entities that were placed under international regimes to enable a state or the UN to administer their affairs pending their independence, especially under the mandate system introduced by the League of Nations or under the trusteeship system introduced by the Charter of the United Nations.[252] The reasons for placing these territories under transitional

[248] International Military Tribunal (Nuremberg) 1947, p. 220.

[249] Abdulrahim (2015).

[250] Art 25(2) Rome Statute of International Criminal Court 1998; see also Charters of London 1943, Charters of the Nuremberg International Tribunal 1946, Four Geneva Convention of 1949.

[251] Articles 9(4) and 10(d) Protocol Relating to Community Court of Justice 1991 as amended in 2005.

[252] Abdulrahim (2015).

administration may be to help them prepare their independence, draft new constitutions, conduct elections or perform certain civil duties.[253] So when entities or territories are placed under international administration, the UN will accord them certain protection and status within the international plane; in some cases, their people enjoy rights related to advancement, self-governance or, ultimately, independence.[254] Bosnia and Herzegovina, East Timor and Cambodia at one time or the other had been placed under international administration.[255]

Second, the status of indigenous people in international law has been the subject of controversy recently. Indigenous people are the descendants of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived.[256] Often, the groups that arrive later dominate the territory through conquest, occupation, settlement or other means.[257] They are characterised by distinct culture, beliefs, language, political and economic system.[258] Examples of indigenous people include Aymara (Bolivia), Mayas (Guatemela) and Aborigines (Australia).

Bell thinks that indigenous people can claim to be subjects of international law by relying on historical precedence that considers indigenous people as nations in pre-modern international legal system and on the strength of the fact that they are often considered to be entitled to some kind of self-determination that is not aimed at statehood,[259] while Abdulrahim thinks that such groups although may have received certain treatment yet do not qualify as international legal persons. He asserts that international law accords the rights to individuals who make up the groups and not the groups *per se*.[260] Nevertheless, indigenous people may be attributed with some form of capacity in international law, bearing in mind that they exercise some of the rights which normally accrue to other subjects of international law; for instance, Chiapas, an indigenous people, through Zapatista National Liberation Army, once entered into agreement with Mexico.[261] The sole exercise of the right to enter into agreement with another subject of international law may not elevate indigenous people to the status of a state or intergovernmental organisation; however, the act of participating with other subjects within the international plane depicts an existence of some capacity in international law.

Third, there has been a growing tradition to accord minorities with some kind of protection in international law. This is evident in the rise of special international and regional instruments that give credence to their cultural, linguistics, historical

[253] Ibid.
[254] Ibid.
[255] Ibid.
[256] United Nation Permanent Forum on Indigenous Issues, Fact Sheet 2015.
[257] Ibid.
[258] Ibid.
[259] Bell (2006), p. 381.
[260] Abdulrahim (2015).
[261] Bell (2006), p. 381.

and religious uniqueness. For example, European countries, in 1994, made the Framework Convention for the Protection of National Minorities (Framework Convention), while the UN, in 1992, came up with United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Although there is no consensus as to which class of people constitutes minority in international law, yet it is helpful to appreciate them as "a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members—being nationals of the state—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language".[262]

But do these guarantees and protections found in different instruments show the existence or development of international personality within the international system? The reality is that these instruments tend to protect the rights of the individuals among the group rather than the collective rights of the group. This international law practice of protecting individual rights rather than collective rights has led legal writers[263] to conclude that minorities do not have international personality. Of course, the reason for the reluctance in extending those rights, by states, to minorities collectively may have been informed by the political and legal desire to keep sovereignty intact. If these guarantees and protections are targeted at the individuals and their right to retain and engage perpetually with their primordial culture, language, beliefs and ancestral land, then it becomes difficult for a minority group to lay claim to international personality successfully because a person, in law, is often distinct from its constituents.

4.2.5 Armed Groups in West Africa and International Subjectivity

It is vital, at this point, to establish whether the armed groups that operated within the ECOWAS territory were, at the time of operation, subjects of international law in order to determine the status of the peace agreements they entered into. To enrich the determination, it will be necessary to consider two other classes of entities whose features are symmetrical with conventional armed groups. The first is insurgents. They have been defined, simply, as "individuals who participate in an insurrection (rebellion) against their government".[264] Abdulrahim asserts that insurgents may, in certain circumstances, be treated as subjects of international law, especially where there is *de facto* administration of territory, and may be accorded certain international rights, like entering into relations with other subjects

[262] Tsekos (2002), p. 28.
[263] Abdulrahim (2015).
[264] Abdulrahim (2015).

of international law. They can also be bound by international obligations relating to conduct of hostilities.[265] The second is belligerents. They have been defined as body of insurgents who by reason of their temporary organised government are regarded as lawful combatants conducting lawful hostilities, provided they observe the laws of war.[266] Belligerents, he states, may, in peculiar circumstances, be accorded rights as subjects of international law—considering the existence of a *de facto* government and an occupied territory. Where such international rights have been accorded, it would entitle them to go into relations with other subjects of international law.[267]

However, Nasu[268] raises concerns about the customary international law practice of extending recognition to belligerents or insurgents in recent times; he argues that the practice has ebbed away since the end of the Second World War. He observes that the trend in modern times is to rely on the four Geneva Conventions (on humanitarian law) in determining the status of rebel (armed) groups in international law. Nasu considers recognition of belligerency under the old international customary law, strong enough to attract certain international rights and obligations. Recognition under that practice was based on the following conditions: the existence within the state of an armed conflict of a general nature, occupation and administration of a substantial portion of national territory, act of conducting the hostilities in accordance with the rules of war and through organised armed forces acting under a responsible authority, and the existence of circumstances which make it necessary for third states to define their attitude by means of recognition of belligerency.[269] However, while he confirms the recognition of belligerency as an acknowledgement of the existence of state of conflict between two groups in contention of authority, he disputes the status of insurgency and argues that it only amounts to insurrection, which will not fetch the insurgents any formal legal status.[270]

Regarding the contemporary practice of determining the status of armed groups through the route of humanitarian law as Nasu has argued, it is clear that the Geneva Conventions[271] have extended some form of protections to a broad class of parties in conflicts that are not of international character. The clause 'conflicts that are not of international character' may not have been defined by the Conventions, but a conflict between two states or between a state and an armed group which receives direct support from a foreign country will be seen as international in character.[272] Therefore, non-international conflicts cover situations where an armed or rebel

[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Nasu (2009), p. 3.
[269] Ibid., p. 4.
[270] Ibid., p. 6.
[271] Article 3 (Common to) Four Geneva Conventions 1949.
[272] Nasu (2009), p. 12.

group is in conflict with its host state or government without the direct support or involvement of a foreign state. Inferentially, the conflicts between the rebel group, led by Gaullaume Soro, and the Cote d'Ivoire Government and between the rebel group loyal to General Ansumane and the Government readily make this list.

As regards protection, the Conventions[273] provide that in a conflict that is not of international character occurring in the territory of one of the parties (states) to the Conventions, the parties (states or armed groups) in conflict shall, at least, treat humanely all persons who are not actively involved in hostilities, including combatants that are wounded, detained or have surrendered or laid down arms. The Conventions also prohibit the use of violence, employment of humiliating treatment and the act of hostage taking in respect of the class of persons described above. They also provide that the sick and the wounded shall be collected and cared for.[274] To cap it all, the Conventions gave the parties in conflict, including the armed groups in West Africa, the power to enter into agreement with each other, even with sovereign states, for the purpose of bringing part or all of the provisions of the Conventions (treaties) to force. Nonetheless, the Conventions diminished the possibility of relying on the above provisions to alter the status of the parties to the conflict by providing that the application of the above provisions shall not affect their legal status.

It is not only[275] Article 3 common to the four Geneva Conventions that extends protection to parties in "non-international armed conflicts"; Additional Protocol II also enhances the protection that should be accorded to parties to non-international armed conflicts. Albeit the Protocol did set out stringent conditions that should be fulfilled before the protection would be extended to armed groups. The Additional Protocol applies in all armed conflicts taking place in the territory of a state party between its armed forces and dissident armed forces or other organised armed groups which, under a responsible command, exercise control over part of its territory as to enable them to carry out sustained and concerted military operation and to enable them to implement the Additional Protocol.[276] And where an armed group could not fulfil the above conditions, it has been suggested[277] that it would still qualify for protection under Article 3 common to the four Geneva Conventions of 1949. And an American court[278] has even broadened the reach of Article 3 by extending the protections to Al-Qaeda, which is a terrorist group. If one applies these provisions to armed groups that operated within West Africa, one will concede that the protections either in Article 3 common to the four Geneva Conventions or Additional Protocol II extended to them, so they had international protection under international humanitarian law treaties.

---

[273] Article 3(1) (Common to) Four Geneva Conventions 1949.

[274] Ibid (2).

[275] See also Protocol Additional to Geneva Convention 1977 (Additional Protocol II).

[276] Ibid., Article 1.

[277] Nasu (2009), p. 19.

[278] Hamsden v Rumsfeld 2006, pp. 67–68; see also Nasu (2009), p. 12.

There are other disparate or connected facts that help the case of armed groups. It is agreed among international courts and tribunals[279] that Article 3 common to the four Geneva Conventions has acquired the status of customary international law and has been confirmed to be applicable to rebel (armed) groups. But importantly, protections contained in Article 3 are applied to the rebel or armed groups collectively[280] and not individually. This international practice may suggest that the group could be distinct from the individuals who make it up. Another ancillary point is the attitude of United Nations Security Council to armed groups. During the conflicts in Yugoslavia and Somalia, the Security Council, by resolutions, reminded the parties in conflict to respect international humanitarian law.[281] These events have triggered concerns over the legal implication of imploring rebel groups to respect international humanitarian law,[282] bearing in mind that international humanitarian law will vest rebel groups with more rights and obligations than Article 3 and the Additional Protocol.

And finally, in this category is the assertion of Bell that armed groups could claim to be subjects of international law because the peace agreements often show that the parties intended the agreements to be binding within the international plane. The agreements often reflect that non-state parties are subjects of international law based on recognition of such armed groups under international law and, especially, international humanitarian law.[283] To support this assertion, Bell relied on the peace agreements between the Government of Sierra Leone and Revolutionary United Force, between the Angola Government and UNITA and between the Government of Burundi and armed opposition group.[284]

Inferentially, drawing on the effect of the international protections extended to armed groups by the Geneva Conventions and Additional Protocol; the intentions of states parties that the peace agreements should be binding internationally; the power given to armed groups under Article 3 common to the four Geneva Conventions of 1949 to enter into agreements with subjects of international law for the purpose of expanding the application of international humanitarian treaties; the posture of UN Security Council to the bindingness of international humanitarian law on armed groups in conflict; the application of Article 3 common to the four Geneva Conventions and the Additional Protocol to armed groups collectively and not individually; and the extant practice of treating belligerents as entities with international rights and obligations under customary international law; it is concluded that armed groups (including those from West Africa) have international capacity, albeit limited, within the international legal order, irrespective of lack of

[279] Nasu (2009), p. 29.
[280] Ibid., p. 24.
[281] Ibid.
[282] Ibid., p. 30.
[283] Bell (2006), p. 380.
[284] Ibid.

consensus as to whether this capacity equates to international legal personality in the conventional sense as envisaged in Article 2 of the Vienna Convention.

4.2.6 Status of ECOWAS Peace Agreements

The peace agreements facilitated by ECOWAS, whether the Lome Accord between the Sierra Leone Government and RUF or the Comprehensive Peace Agreement between rebels and the Government of Liberia or the Peace Agreement of 1 November 1998 between rebels and the Government of Guinea-Bissau or Accra II and III between the Government of Cote d'Ivoire and rebels are all agreements of international character regulated by international law. This is because the armed groups involved are entities with international capacity, although of a limited kind, within the international legal plane. Therefore, these peace agreements are not domestic in nature and should never be classified as such. Consequently, their enforcement or bindingness should not be expected to be any different from what applies to other international agreements.

The principle of *pacta sunt servanda* teaches that international agreement is based on the consent of the parties and binds every entity that appends its signature. Such agreement must be executed in good faith. However, where any of the parties breaches the terms of the agreement, the only option left for the innocent party will be to relieve itself of the obligation imposed by the agreement because there is no institution or body in international law that has been equipped with power and capacity to enforce international agreement as it is obtainable in different national jurisdictions. Consequently, any breach to the terms of the peace agreements which ECOWAS helped to facilitate would entitle the innocent party to resile from the obligations imposed by the agreement.

Regarding interpretation of peace agreements or adjudication of dispute flowing from breach of their terms, since they do not constitute ECOWAS text, the Community Court will not be clothed with jurisdiction to interpret any of the terms of such agreements or determine any disputed issue even though one of the parties is a Member State.[285] However, where the parties to a peace agreement, by virtue of choice of forum clauses, selects the Community Court as the forum for settlement of dispute, the Court may rely on Article 9(6) of the Protocol Relating to the Community Court to entertain the matter.[286]

[285] Article 9 Protocol Relating to Community Court 1991 as amended by Supplementary Protocol 2005.
[286] Ibid.

4.2.7 Conflict Prevention and Management Plan

ECOWAS has recognised the importance of conflict prevention and resolution to its integration policy; this is evident in the Revised Treaty of 1993, which mandates the Community to co-operate with Member States in creating conflict prevention and management mechanism both for intrastate and interstate conflicts.[287] It has been suggested, however, that the Community might have deliberately omitted security and defence issues in the original Treaty of 1975. This is because, given the rivalry and acrimony that preceded its formation, it neither intended to include provisions that would appear as basis for pricking the sovereignty of the Member States, nor did it intend to muddle its economic integration agenda with security engagement.

However, the adoption of security and conflict management plan, by ECOWAS, predates the Revised Treaty of 1993. In 1978, for instance, the Community adopted Protocol on Non-Aggression, which, in essence, promoted the reliance on peaceful process in conflict and dispute settlement; prohibited the use of threat against territorial integrity; and condemned all forms of subversion in the Member States.[288] The Community also adopted Protocol on Mutual Assistance on Defence of 1981, which, generally, deemed attack on a Member State as an attack against the entire Community and required Member States to provide mutual aid and assistance to attacked or affected Member States.[289] It is obvious that the two laws above were founded on the Framework Agreement of the Protocol on Non-Aggression and Assistance in Defence that was signed in Abidjan on 9 June 1977. Unfortunately, these laws and the structures they created for conflict resolution and management were not implementable and operational at the time conflicts broke out in Sierra Leone, Liberia and Guinea-Bissau.[290] Consequently, the Community responded to these crises on an *ad hoc* basis[291] without following the legal templates created by the above laws.

4.2.7.1 The Mechanism

Drawing on its horrid experiences in ad hoc interventions in these countries and intending to substitute ad hoc processes with operational structure,[292] the Community introduced, in 1999, Protocol Relating to the Mechanism for Conflict Prevention, Management Resolution, Peace-keeping and Security (Mechanism). The objectives of the Mechanism, somewhat, appear too broad for the Community to

[287] Article 58(2) Revised Treaty 1993.

[288] Frempong (2005), p. 4. See Articles 1–5 Protocol on Non-Aggression 1978.

[289] Ibid.; see also Article 2 Protocol on Mutual Assistance on Defence 1981.

[290] Ibid.

[291] Ibid.

[292] Preamble to Protocol Relating to Conflict Prevention 1999.

handle, given the lean human and material resources available. However, they include preventing and managing both internal and external conflicts; implementing the previous protocols relating to defence and non-aggression mentioned above and to free movement of persons; deploying civil and military personnel to maintain peace; strengthening co-operation in areas of conflict prevention, peace keeping and early warning; and establishing institutions that would co-ordinate and organise humanitarian relief missions, etc. In brief, the Mechanism is simply a method introduced by the Community, relying on distinctly structured policies, established institutions and raisable funds to achieve collective peace and security in the Sub-region.[293]

While the Protocol did not define what conflict means for the purpose of its application, it explained when a Member State is in crisis. A Member State will be considered to be in crisis if it is experiencing armed conflict or facing serious and persistent problem or situation of extreme tension that could, if left unchecked, result in humanitarian disaster or threaten the peace and security of the Community or a Member State. It also includes a situation where a Member State has been affected by the overthrow or attempted overthrow of a democratically elected government.[294] In addition, the other conditions upon which the Mechanism may be invoked are where there is massive violation of human rights or rule of law and in other situations as may be determined by the Mediation and Security Council.[295] Consequently, when the criteria stated above exist, the Community will activate the Mechanism and intervene.[296] However, one of the issues in these crisis criteria is how to determine accurately, for the purpose of intervention, that a conflict or situation could certainly plunge the relevant country into humanitarian disaster or threaten the peace and security of that country or the Community.

The Mediation and Security Council, in this regard, is an institution created for the implementation of the Mechanism; the other institutions that have been saddled with the tasks of implementation are the Authority of Heads of State (the highest decision-making body), the ECOWAS Commission and any other institution that may be established by the Authority.[297] The institutions[298] are also supported by the Committee of Chief of Security Service[299] (formerly Defence and Security Commission), Council of Wise[300] (formerly Council of Elders) and ECOWAS Monitoring and Cease-fire Group,[301] which has now been constituted into ECOWAS Standby Force.

[293] Ibid., Article 1.

[294] Ibid., Definitions.

[295] Article 25 (d) and (f) Protocol Relating to Conflict Prevention 1999.

[296] Ibid., Definitions; see also Article 25.

[297] Ibid., Article 4.

[298] Ibid.

[299] Uzoechina (2014), p. 6.

[300] Ibid.

[301] Article 17 Protocol Relating to Conflict Prevention 1999.

The major strategic components of the Mechanism are conflict prevention, relying heavily on the Early Warning System;[302] conflict management, depending greatly on ECOWAS Standby Force;[303] humanitarian assistance;[304] and peace building.[305] The Early Warning System is run through Situation Rooms[306] stationed in Abuja and other zonal bureaux where information and data are gathered for analysis and reporting. The ECOWAS Standby Unit is made of forces and civilians from the Member States expected to be readied for deployment when crisis erupts. These major components are meant to be harnessed, by the Community, in order to achieve collective peace and security in West Africa.

Regarding applicability, it is clear from the structure, provisions and objectives that the law is designed to be applied at the Community level even though Member States have obligations under it and are the direct recipients of the peace dividends. Although Member States may ratify or take any further legislative step to fulfil their obligations if they deem it appropriate, the nature of the law does not support vesting of rights and obligations in citizens. Therefore, questions as to whether the law is of direct effect or directly applicable in matters brought by individuals need not be raised. However, it may be reiterated that its application at the Community level depends on the existence of the following conditions:[307] external conflicts or internal conflicts capable of affecting the peace and security in the Sub-region or plunging the country into humanitarian disaster, massive violation of human rights and rule of law, overthrow or attempted overthrow of a democratically elected government and any other situation which the Security and Mediation Council will consider appropriate for application. When one or more of these conditions exist, the Authority or the Security and Mediation Council may invoke the Mechanism.[308]

Nonetheless, the existence of one or all of the conditions does not necessarily translate to intervention. It may well be that the Community is politically divided, indecisive or lethargic as to whether to intervene or not. For instance, few weeks after the Mechanism was introduced, an elected President of Cote d'Ivoire was overthrown, yet the Community did not call in aid the Mechanism to restore the ousted Konan Bedie; rather, it chose to dialogue with the coup plotters. The reason for that approach could be political rather than legal because the law was provisionally in force[309] and could be relied upon at the time. Therefore, political issues could be one of the factors that can inhibit the implementation of the Mechanism.

[302] Ibid., Chapter 23.

[303] Ibid., Articles 28–39.

[304] Ibid., Chapter VIII.

[305] Ibid., Chapter IX.

[306] Uzoechina (2014), p. 6.

[307] Article 25 Protocol Relating to Conflict Prevention 1999.

[308] Ibid., Article 26.

[309] Article 57 Protocol on Mechanism for Conflict Prevention 1999.

There are other factors that could affect implementation of the Mechanism by the Community. The ECOWAS Commission may devote less attention to its duties (to the institutions responsible for the implementation of the Mechanism) because of the enormity of other integration programmes it handles. Again, the Community may not have, in number or calibre, the right personnel in all sectors and departments and the adequate resources to achieve all the objectives of the Mechanism. Furthermore, external donors may influence[310] both the content and time of delivery of specific programmes that relate to the Mechanism. For example, international donors might insist on what use their grant should be put to or might have, a different conflict resolution model for the Community. Also, some of the core provisions of the Protocol appear too wide[311] and inoperable unless they are reduced into finite details of implementable nature. In summary, these factors, together with the weak state of the public institutions in West Africa, could impinge on the implementation of the Mechanism in West Africa.

4.2.7.2 Democracy and Good Governance

The Community, with the intention of making the Mechanism more effective, introduced in 2001 a Protocol[312] that provides for democratic and good governance principles within West Africa. The Community observed[313] that the whole effort on peace and security, as provided in the Protocol on Mechanism for Conflict Prevention, would amount literally to nothing if the fundamental issues capable of reigniting conflicts—like democracy, good governance, human rights, internal crises and rule of law—were not catered for. So the 2001 Protocol appears to be an attempt at strengthening human security, political institutions and practices, human right norms, rule of law and socio-economic policies in the Member States. The Protocol made provisions on constitutional convergence, elections and monitoring, role of armed forces in a democracy, human rights, democracy, rule of law, poverty alleviation, women and children, religion, culture and education.[314] Surprisingly, some of these issues are core constitutional matters or within the legislative competences of the Member States.

The provisions of the Protocol have both Community and national elements. Certain provisions of law, for example election monitoring and assistance, can be applied at the Community level—which would pose little or no challenge, provided that the host Member State agrees. Some other provisions of the Protocol are meant to be applied internally within the Member States. Among this class are provisions

[310] Uzoechina (2014), p. 16.

[311] Article 3 Protocol on Mechanism for Conflict Prevention 1999.

[312] Protocol on Democracy and Good Governance 2001.

[313] Preamble to the Protocol on Mechanism for Conflict Prevention 1999.

[314] See SECTIONS I, II, III, IV, V, VI, VII and VIII Protocol on Democracy and Good Governance 2001.

that vest rights in individuals, which raise the issue of applicability of ECOWAS law in municipal courts in the event of violation of these vested rights. Unless Member States take legislative steps to incorporate this law in their *corpus juris* or where reciprocity rule exists, it will be difficult for individuals to enforce these vested rights in their municipal courts because ECOWAS texts do not have supranational effect.

Even if ECOWAS law were supranational, the application of some of the principles would still raise issues of supremacy at municipal courts. For instance, in the event that ECOWAS texts were supranational, from which law would judges derive their power to apply the human right norms as enshrined in the African Charter on Human and Peoples' Rights of 1981; is it the constitution of a Member State or Article 1(h) of the Protocol[315] which vests necessary powers in both civil and common law courts in West Africa to hear human right cases? Assuming the constitutions of some of the Member States protect certain rights differently from the African Charter or some of the protected rights in the Charter are not found in the national law, how would the disparity be resolved?

It may depend on which part of the divide the Member State falls; the jurisprudence of common law countries shows that the constitution is supreme over any other applicable regional law. In Nigeria, for instance, there are judicial authorities[316] that unequivocally place the Constitution at the topmost rung of the supremacy ladder. However, in Ghana a court considered the African Charter on Human and Peoples' Rights applicable even though it has not been domesticated. Nonetheless, the Constitution of Ghana applies supremely all around the territory of Ghana.[317]

In the Francophone countries, international laws may be superior to domestic legislation, but where international instruments have been considered to be incompatible with the constitutions, their ratification would depend on whether the constitutional courts have ordered the amendment of constitutions to accommodate the incompatibility.[318] Consequently, where a constitutional court has not ordered the amendment of the constitution to accommodate any ECOWAS instrument that is inconsistent with the constitution, the constitution would remain supreme.

The Lusophone countries of Cape Verde and Guinea-Bissau are monist in regard to reception of international law. International conventions, where applicable, would have superior status.[319] However, under the Constitution of Cape Verde,[320] laws made by supranational body, of which Cape Verde is a member, enters directly into force in the domestic legal order. It does not appear, taking

[315] Protocol on Democracy and Good Governance 2001.

[316] Abacha v Fawehinmi 2000, p. 228; see also Ogu v State 1994, p. 1.

[317] Articles 75(2) Constitution of Ghana 1992.

[318] For example, see Articles 146 Constitution Republic of Benin and Article 97 Constitution of Senegal.

[319] Article 11(4) Constitution of Cape Verde 1992.

[320] Ibid (3).

Article 11(3) and (4) together, that such supranational instrument would prevail over local legislation. Leaving constitutional provisions aside, the political and practice attitude among these countries is that ECOWAS law is neither applicable nor superior to their domestic laws.

Furthermore, there are constitutional barriers to the implementation of the law on good governance in the Member States; this is because some of the provisions of the law touch clearly on constitutional matters of the Member States and can alter their public law structures. For this reason, most Member States would be highly reluctant to domesticate those provisions with strong political impact. This seeming reluctance to bring the provisions of the law home would ordinarily affect their implementation within the Member States. For instance, the law on good governance makes provision for decentralisation of power at all levels of government;[321] to implement this provision in Ghana would require altering the existing constitutional pattern which, in practice, encourages the concentration of political power at the central level. Under the laws[322] of Ghana, the President, and not the electorates, determines the appointment of municipal chief executives who are meant to be the head of the third tier of government, with the head of the second tier—that is, regional minister—also appointed by the President. This political arrangement clusters power at the central which is not in sync with the ECOWAS decentralisation principles. Truly, the application of that part of convergence in Ghana would require certain constitutional amendment.

Nevertheless, the impact of the Protocol on Good Governance is seen more from the involvement of ECOWAS in election monitoring and assistance within West Africa. The ECOWAS Observer Mission, based on powers and structures created by the law on good governance,[323] played significant part in observing elections in Togo, Nigeria, Ghana, Liberia, Cote d'Ivoire, etc. The law, at least, generated political impetus and laid down principles and procedures for election monitoring and assistance. There is no doubt that the introduction of the Election Observation Mission helps to create independent accounts of election exercises in West Africa. It also imbues in the minds of the opposition parties some kind of trust in the conduct of the election exercise and serves as mild assurance to the citizens that the conduct of the election will, at least, meet the Community standards.

Nonetheless, the participation of ECOWAS in election monitoring has whipped up avalanche of criticisms lately. In 2005, for example, the Community was heavily lashed for certifying the fairness of Togo's presidential election, which appeared to have been mulled with irregularity. Also, experts are questioning the methodology adopted in these exercises; it is getting clearer that ECOWAS has not pinned its approach down to a single methodology to determine conditions for monitoring and define the scope of its mission.[324] Also, ECOWAS election monitoring credentials

[321] Article 1(d) Protocol on Good Governance 2001.

[322] Article 243 Constitution of Ghana 1992.

[323] Articles 11–18 Protocol on Good Governance 2001.

[324] Bittiger (2015).

suffer from inexperience and lack of capacity.[325] There is neither a well-trained pool of observers in each country to draw from nor a set of efficient structures at the Commission for planning and managing observation missions in the Community. Experts[326] have also blamed ECOWAS for its dual role as observer of election exercise and mediator of election disputes since this approach will ordinarily breed conflict of interest. These lapses in the monitoring portfolio of ECOWAS detract from its observer scorecard; unfortunately, some of these lapses are not evenly addressed in the Protocol on Good Governance.

4.2.7.3 Conflict Prevention Framework

With the view to solving some of the challenges limiting the implementation of the Protocol relating to Mechanism for Conflict Prevention, especially on the subject of prevention, the Community introduced the ECOWAS Conflict Prevention Framework in 2008.[327] The Framework aims at enhancing human security in West Africa and opening up space for interaction among the Community, Member States and international partners in order to encourage both the Community and the Member States to include conflict prevention and peace building in their political agenda.[328] Under the Framework, conflict prevention means 'non-violent (or creative) conflict transformation and encompasses activities designed to defuse tensions and prevent the outbreak, escalation, spread or recurrence of violence'.[329]

To achieve these aims, the Framework splits prevention into two principal elements: operational preventions and structural preventions. Operational preventions entail relying on early warning, conciliation, mediation and preventive disarmament/deployment tools to achieve peace. For preventive disarmament and deployment, the Community may rely on good office or ECOWAS Standby Force, while structural prevention depends on political, institutional and developmental reforms. It also includes the use of advocacy to entrench the culture of peace and the enhancement of capacity within the Community and Member States.[330]

Clearly, the responsibility is on each Member State to determine how to mainstream peace building and conflict prevention into their political agenda and, invariably, laws, although the application of the consultative element of the policy and other components of the Framework can be done at Community level without

[325] Ibid.

[326] Ibid.

[327] ECOWAS Conflict Prevention Framework 2008.

[328] Section VI (27) the ECOWAS Conflict Prevention Framework 2008.

[329] Ibid., Section IV (18).

[330] Ibid., 19.

legal or jurisdictional restrictions. From the nature of the components,[331] it is unarguably true that the Community would not make much impact if the Member States are reluctant to create legal and political vents for the policy to sip into their political and legal environment. For instance, it will be difficult to tackle issues on the role of media in conflict situation or human rights from the Community level if the Member States do not have effective legal and institutional arrangement for them. Unfortunately, the ECOWAS system has neither supranational force to impact directly on the legal terrain of the Member States nor mechanism for compelling States to implement the Community policies other than the rare option of suing them for failure to fulfil obligations under the Revised Treaty. So the States would likely sieve the policy and implement those components that are congenial to their political interest.

That is not all; the application of the Framework is generally fraught with initial and fundamental challenge. The Framework needed an implementation plan, which had not been completed as at 2014. The implementation plan is expected to be executed within a fixed time frame. The Priority Implementation Plan was meant to run between 2013 and 2015, but it has been reported that the implementation of some of the major components within that period has been abysmally low.[332] Two major reasons given for this underperformance were the existence of difference between budgeted funds and the available funds for implementation on the one hand and the difficulty of effectively monitoring, evaluating and reviewing their progress within the short time frame on the other hand.[333]

It appears that the Framework, generally, has not been fully operationalised.[334] It cannot be said, therefore, that it has been very impactful on conflict prevention programmes of ECOWAS. Its impact would be properly gauged when these conflict prevention tools have been developed and used over time in West Africa. In the meantime, it is obvious that the tool development process is in its nascent and turbulent stage and therefore experiencing, as Uzoechina puts it, teething problems.[335]

[331] (1) Early Warning; (2) Preventive Diplomacy; (3) Democracy and Political Governance; (4) Human Rights and the Rule of Law; (5) Media; (6) Natural Resource Governance; (7) Cross-Border Initiatives; (8) Security Governance; (9) Practical Disarmament; (10) Women, Peace and Security; (11) Youth Empowerment; (12) ECOWAS Standby Force; (13) Humanitarian Assistance; and (14) Peace Education (The Culture of Peace). 43. Given the interconnectedness of the initiatives, components and activities. The 15th component, enabling mechanism, was added in 2010. See Uzoechina (2014), p. 14.

[332] Uzoechina (2014), p. 14.

[333] Ibid.

[334] Ibid.

[335] Ibid., p. 15.

4.3 Conclusion

Finally, it can be said that ECOWAS has taken bold steps in piecing together set of laws that could help in stemming the tide of conflicts in the future and in creating platforms that helped the warring parties in the four countries under study to find common ground that resulted in a range of peace agreements. Although the existing laws on conflict prevention are inadequate for counterterrorism, yet they contain certain institutional structures—for instance, early warning system—which could strengthen the counterterrorism cause. Nevertheless, the Community raised its game by adopting the Strategy to Counter Terrorism, which has more holistic solutions to deal with the fundamental causes and immediate challenges of contemporary terrorism.

Nonetheless, this set of laws designed for preventing and managing conflict has diverse strictures strewn all over its path to success. The Mechanism, however laudable the structures appear on paper, may not be put to use where the Community is politically indecisive or lethargic to agree on intervention in moments of crisis as seen in the case of Cote d'Ivoire. The Commission may not provide the adequate technical and administrative support to the institutions implementing the Mechanism because of other complex programmes it is grappling with. The implementation of the Mechanism can also be hugely affected by lack of trained personnel in number and calibre who can seamlessly hit the ground and achieve the desired expectations. Since the Community institutions are meant to collaborate with state institutions in achieving the objectives of the Mechanism, the existence of weak public institutions in the Member States can hamper the synergy, thereby resulting in low performance.

With reference to the Protocol on Good Governance, the law is rich with provisions on human rights, democracy and rule of law, which are capable of improving human security in West Africa, but its application, within the territories of the Member States, is limited by lack of supranational governance system in the Community. There could also be, in the Member States, some constitutional issues relating to supremacy of laws that can hinder its application should ECOWAS law be considered supranational.

In the same vein, the ECPF, a subsidiary text meant to implement the conflict prevention components of the Mechanism, may not yield much because of lack of capital and human resources required to achieve full and speedy implementation. Another factor that could reduce its yield is the discretion, given to Member States, to choose how they would mainstream peace building and conflict prevention into their political agenda. This approach creates leeway for allowing internal political policies to override Community programmes—since there is no measure, at Community level, to ensure or enforce compliance.

In its quest to create a legal framework that could offer holistic solutions to contemporary problems of terrorism in West Africa, the Community adopted the Strategy in 2013. The Strategy aims at preventing terrorism before it happens, pursuing all persons involved in or connected with terrorism for purposes of

investigation, prosecution and punishment and reconstructing communities affected by terrorism. Specifically, pillar 1 is designed to improve human security, address issues of recruitment and radicalisation and enhance intelligence gathering and sharing. Pillar 2 encourages quick response to terrorist attacks, effective investigation and prosecution of suspects, while pillar 3 deals with post-attack reconstruction.

But there are different shades of problems the Community must grapple with if it intends to achieve the objectives for which the Strategy was adopted. Considering that the ECOWAS texts are not supranational, therefore they cannot be applied within the Member States without legislative or judicial aid. The Community must find a way to lure Member States to legislate adequately on these terrorism subjects or items as provided in the Strategy. There are also grave concerns about human right violations ranging from torture to extrajudicial killing and incarcerations. Absence of rule of law can also pose insurmountable difficulty to the implementation of the Strategy within the jurisdictions of the Member States.

Furthermore, the peace agreements which ECOWAS helped the disputing parties to reach in the four countries cannot be classified as ECOWAS texts, but they are instruments with international features capable of shaping or influencing the public law of the relevant countries. In addition, these instruments to some extent provided the framework for peace process, served as foundation for other peace instruments and restored some degree of peace in certain situations. So the ECOWAS political intervention, somewhat, created the platform for peace process with legal outcome, which is peace agreement. Since peace agreement can be seen as an instrument with some regulatory character, just like treaty or legislation, it will be safe to say, at least generally, that it provides some legal solutions to problems of conflicts in West Africa. Nonetheless, it is necessary to acknowledge that some of the peace agreements neither restored peace in the relevant countries nor served the purposes for which they were made.

Summarily, the legal interventions of ECOWAS—including ad hoc political intervention—were made in good faith and therefore should be commended. However, the laws would only achieve their objectives if the Community and the Member States sincerely admit the challenges and take steps to address them painstakingly. It is obvious that ECOWAS wouldn't achieve much with the Strategy if the Member States are not transposing them into their laws, nor would the other laws bear fruit when they are fraught with challenges linked to supranationality, constitutional limitations, implementation challenges, ineffectiveness and inadequacy. Therefore, ECOWAS would only succeed in winning the war against contemporary terrorism and conflict if the laws are rid of challenges and implemented aggressively.

References

Laws

African Charter on Human and Peoples Right 1981
Charters of London 1943,
Charters of the Nuremberg International Tribunal 1946
Constitution of Cape Verde 1992
Constitution of the Benin Republic 1990,
Constitution of the Federal Republic of Nigeria 1999,
Constitution of the Republic of Ghana 1992
Constitution of Senegal 2001,
Constitutions of Togo 1992
ECOWAS (2013a) Counter Terrorism Strategy
ECOWAS (2013b) Counter Terrorism Strategy and Implementation Plan
European Convention on Human Right 1950
Four Geneva Convention 1949
Regulation MSC/REG.1/01/08 the ECOWAS Conflict Prevention Framework
Supplementary Act A/SA.3/02/13 Adopting the ECOWAS Strategy for Combating Terrorism, and its Implementation Plan
OAU Convention on Prevention and Combating Terrorism 1999
Protocol Additional to the Geneva Conventions of 1949, and Relative to the Protection of Victims of Non-International Armed Conflicts 1977
Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security
Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security 1999
Rome Statute of International Criminal Court 1998
UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1994
UN Resolution A/RES/60/288 adopted on 8/9/2006 available via Accessed 11 August 2014

Cases

A v (FC) and others (FC) v Secretary of State for the Home Department [2004] UKHL 56 available via http://www.libertysecurity.org/IMG_/pdf/Law_lords_ruling_on_Belmarsh.pdf Accessed 6 October 2014
Abacha v Fawehinmi (2000) 6 NWLR (pt 660) 228.
Basu v State of West Bengal (1997) 1 SCC 416
Case of Othman (Abu Qatada v The United Kingdom [2012] ECHR 56 available via http://www.bailii.org/eu/cases/ECHR/2012/56.html Accessed 6 October 2014
Chahal United Kingdom [1996] ECHR 54 available via http://www.bailii.org/eu/cases/ECHR/1996/54.html Accessed 16 September 2014.
Hamdan v Rumsfeld, US Supreme Court, 548 US (2006), pp 67–68.
International Military Tribunal (Nuremberg) 41 AJIL 172 (1947) p 220
Ireland v United Kingdom (1978) 2 EHRR
Ogugu v State (1994) 9 NWLR (pt 366) 1.
Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. Fla. 2009)

Publications

Abdulrahim W (2015) My international law studies. http://sites.google.com/sitewalidabdulrahim. Accessed 6 Jan 2015

Abu al-Ma'ali M (2012) Al Qaeda and its allies in the Sahel and Sahara (Report). Al Jazeera Centre for Studies

Africa Defense Forum, A Conversation with General Obed Akwa, ADF Volume 6/Quarter 4

Aljazeera (2014) Generals found guilty of aiding Boko Haram. www.aljazeera.com/new/africa/2014/06/generals-found-guilty-aiding-boko-haram-20146465645506399.html

Alter K, Helfer L, McAllister J (2013) A new International Human Rights Court for West Africa: The ECOWAS Community Court of Justice. Am J Int Law 107:737. Available via Scholarship. law.duke.edu/cgi/viewcontent.cgi?article=5546&context. Accessed 13 July 2014

Amnesty International (2013a) Mali: Mutinous soldiers captured and killed in purge. Annual Report 2013. The state of the world's human right. http://www.amnesty.org/en/news/mali-mutinous-soldiers-captured-and-killed-purge-2013-10-23. Accessed 2 Oct 2014

Amnesty International (2013b) Nigeria: Authorities must investigate deaths of Boko Haram suspects in military custody. http://www.amnesty.nl/nieuwsportaal/pers/nigeria-authorities-must-investigate-deaths-boko-haram-suspects-in-military-custody. Accessed 4 Oct 2014

Arise News Report (2014) http://www.arise.tv/headline/arise-news-now-uk-28-08-8043. Accessed 28 Aug 2014

Arrief A (2013) Crises in Mali. Congressional Research Services Report

Barakamfitiye D (2013) ECOWAS counter-terrorism strategy and implementation plan, Draft. Institute for Security Studies, Pretoria. Available via www.issafrica.org. Accessed 10 Aug 2014

Bell C (2006) Peace Agreement. Am J Int Law 100(2). Available via www.jstor.org/stable/3651152

Bittiger T (2015) Election observation in West Africa: the ECOWAS experience. http://aceproject.org/today/feature-articles/election-observation-in-west-africa-the-ecowas-experience. Accessed 25 Mar 2015

Bouvier A (2012) International humanitarian law and the law of armed conflict, 2nd edn. Peace Operation Training Institute, Williamsburg

Bureau of Democracy, Human Right and Labor (2001) Report on the Taliban's war against women. Available via http://www.state.gov/j/drl/rls/6185.htm. Accessed 5 Sept 2014

Chiesa L, Greenawalt A (2012) Beyond war: Bin Laden, Escobar, and the justification of targeted killing. Wash Lee Law Rev 69:1371. Available via http://scholarlycommons.law.wlu.edu/wlulr/vol69/iss3/3. Accessed 30 Sept 2014

Contanzo M, Gerrity E (2009) The effects and effectiveness of using torture as an interrogation device: using research to inform the policy debate. Soc Issues Policy Rev 3(1):179–210. Available via www.cgu.edu/pdffiles/sbos/costanzo_effects_of_interrogation.pdf. Accessed 22 Sept 2014

Cooker C (2005) Amputation is forever: blood diamonds and the civil war in Sierra Leone. A paper presented at EDGE conference on 2 June 2005. Available via web.standard.edu/..amputation%20is%20Forever%20Blood%20D

Dadson E (2008) Examining the role of third-party mediation in Cote d'Ivoire's conflict: peace-makers or spoilers? KAIPTC Paper No. 24, September 2008

Duffield C (2010) Nigerian police routinely kill and torture. BBC News Africa. Available via http://www.bbc.co.uk/news/10124812. Accessed 22 Sept 2014

Ewi M (2013) The new ECOWAS counter-terrorism strategy and its implications for West Africa. ISS Today. Available via http://www.issafrica.org/iss-today/the-new-ecowas-counter-terrorism-strategy-and-its-implications-for-west-africa. Accessed 11 Aug 2014

Fields L (2014) ISIS declares Islamic Caliphate in occupied Iraq and Syria. Vice News. Available via https://news.vice.com/article/isis-declares-islamic-caliphate-in-occupied-parts-of-iraq-and-syria. Accessed 5 Sept 2014

Financial Action Task Force/GIABA (2013) FATF REPORT Terrorist Financing in West Africa
Foster D, Heins D et al (2009) A house with two rooms: a final report of Truth and Reconciliation Commission of Liberia in Diaspora Project, DRI Press, Minnesota. Available via http://www.theadvocatesforhumanrights.org/final_report. Accessed 27 Oct 2014
Frempong A (2005) The Economic Community of West African State (ECOWAS): thirty years on. http://www.docstoc.com/docs/164522349/_ECOWAS_Thirty-Years-On---UM-Personal-World-Wide-Web-Server. Accessed 10 Oct 2014
Gearey A, Morrison W (2013) Common law reasoning and institutions. University of London, London
Gordon J (2009) Zakat and terrorism. New English Review. Available via http://www.newenglishreview.org/Jerry_Gordon/Zakat_and_Terrorism/. Accessed 31 Aug 2014
Hirsch A (2013) Mali's army suspected of abuses and unlawful killings as the war rages. Observer. Available via http://www.theguardian.com/world/2013/jan/19/mali-army-suspected-abuses-killings. Accessed 2 Oct 2014
Hoije K (2014) Analysis: adversity in Northern Mali. IRIN. Available via http://www.irinnews.org/report/100329/analysis-adversity-in-northern-mali. Accessed 6 Sept 2014
Kirwin M (2006) Security dilemma and conflict in Cote d'Ivoire. Nordic J Afr Stud 15(1):42–52. Available via www.njas.helsinki.fi/pdf-files/vol15num1/kirwin.pdf. Accessed 11 Nov 2014
Lorenzi R (2012) Oldest writing nearly deciphered. Available via http://news.discovery.com/history/archaeology/oldest-writing-121023.htm. Accessed 31 July 2014
Minteh B, Perry A (2013) Boko Haram's evolution, strategy and affiliations. A paper presented at Mid-West Political Science Association's 71st Annual Conference Palmer House Hotel, Chicago IL, April 2013. Available via www.education.edu. Accessed 31 July 2014
Nasu H (2009) Status of rebel in non-international armed conflict. ANU College of Law Research Paper No. 10-71. http://www.academia.edu/18173223/Status_of_Rebel_in_Non-International_Armed_Conflict
Open Society Institute (2010) Criminal force torture, abuse, and extrajudicial killings by the Nigeria Police Force. Available via http://www.refworld.org/docid/4cbc44742.html. Accessed 30 Sept 2014
Ostebo T (2012) Islamic militancy in Africa. Africa Security Brief. http://www.africacenter.org/wp-content/uploads/2012/11AfricaBriefFinal_23.pdf. Accessed 28 Dec 2015
Razaq K, Mustapha I, Kamaldeen M (2010) Custodial torture: a naked violation and degradation of dignity. https://unilorin.edu.ng/publications/ismailam/custodial%20torture%20_ARTICLE%20FOR%20PUBLICATION%20AT%20KSU.pdf. Accessed 14 Apr 2015
Risoğlu S (1999) Right to life. Percept J Int Aff III(4). Available via http://sam.gov.tr/wp-content/uploads/2012/02/SafaReisoglu.pdf. Accessed 1 Oct 2014
Silke R (2014) Terrorism all that matters, Hodder and Stoughton, London. Available via www.academic.edu. Accessed 31 July 2014
Sim D (2015) Boko Haram: Nigeria and neighbours Chad, Cameroon and Niger celebrate victories over Islamic. The International Business Times. www.ibtimes.co.uk. Accessed 21 May 2015
Tsekos M(2002) Minority rights: the failure of international law to protect the Roma. Human Rights Brief 9(3):Article 7. http://www.digitalcommons.wcl.american.edu/cgi. Accessed 10 Dec 2014
United Nation (2013) General Assembly, GA/L/3453 Press Release. Available via http://www.un.org/News/Press/docs/2013/gal3453.doc.htm. Accessed 31 July 2014
United Nation Permanent Forum on Indigenous Issues (2015) Who are indigenous peoples? http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf. Accessed 26 Jan 2015
Uzoechina A (2014) Security sector reform and governance processes in West Africa: from concepts to reality. Policy Paper for Geneva Centre for the Democratic Control of Armed Forces 2014. Available via www.dcaf.ch/. . ./download/. . ./FINAL_binder_PP_35_Okey_Uzoechina. Accessed 4 Aug 2014
Voz di Paz (2010) The root of conflict in Guinea Bissau: the voice of the people. Voz di Pax/interpeace, Bissau. Available via http://www.interpeace.org/publications/guinea-bissau/

40-roots-of-conflicts-in-guinea-bissau-the-voice-of-the-people-english/file. Accessed 4 Nov 2014

Walker A (2012) What is Boko Haram? Special Report, United States Institute of Peace. www.usip.org. Accessed 10 Dec 2014

Watch International (2009) Peace Agreement. www.watchinternational.wordpress.com/peace-agreement/. Accessed 18 Dec 2014

Waxman D (2011) Living with terror not living in terror: impact of chronic terrorism on Israeli Society. Perspectives on Terrorism. Available via http://www.terrorismanalysts.com/pt/index.php/pot/article/view/living-with-terror/html. Accessed 3 Sept 2014

WHO (2006) WHO-AIM report on mental health system in Nigeria. Available via http://www.who.int/mental_health/evidence/nigeria_who_aims_report.pdf. Accessed 6 Sept 2014

Yabi G (2010) The role of ECOWAS in managing political crises and conflict: the cases of Guinea and Guinea-Bissau. Freidrich-Ebert-Stiflung, Abuja. Available via library.fes.de/pdf- files/bueros/nigeria/07448.pdf. Accessed 4 Nov 2014

Chapter 5
Human Rights and Other Principles

Abstract This chapter analyses the human right jurisdiction of the Community Court of ECOWAS, human right law and cases under the ECOWAS legal regime. It also exposes other connected or supportive legal principles which the Court has either adopted or developed in the course of its human right peregrination. The chapter begins with an introduction aimed at distinguishing human rights from Community rights and ends with a brief conclusion, which also captures the procedure for execution of human right judgments and its challenges.

5.1 Introduction

ECOWAS is an international organisation that strives to achieve economic integration by the harmonisation of different policies of its members and the creation of a common market within West Africa in order to raise the living conditions of its citizens.[1] Common market comes with a price, rights and obligations. To arrive at that goal of creating a common market, it is expected that the countries that are signatories to the economic integration treaty must be willing to pay the price, fulfil the obligation, vest and protect the rights. The laws, the institutions and the governance system of the organisation should be crafted or structured in such a manner that could entrench community rights and enhance the fulfilment of ensuing obligations.

The Community Court of Justice is one of the institutions created by the Community to achieve its integration goals. That is the reason why the ECOWAS law has empowered the Community Court to hear cases pertaining to application and interpretation of the texts of the Community.[2] In these texts, which the Court has been equipped to apply and interpret, lies a bunch of vested rights, distinct from human rights, which the Court should unwrap and protect. It presupposes that failure to unwrap and protect the bunch would likely have an inimical effect on the purpose of the integration process. The major landmine along the path of a

[1] Article 3 Revised Treaty 1993.

[2] Articles 9 and 10 Protocol relating to the Community Court 1991 as amended in 2005.

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_5

community court called upon to unwrap and protect such community rights has been how to break the walls of sovereignty and lure acceptance from the governments of the countries which are members of the organisation. Unless a different governance model is created, a community court faced with similar challenge should hit at the wall or accept failure because there is no other way to protect rights which are designed to have supranational effect—like community rights—than to confront that huge wall of sovereignty.

The European Union, at a time, found itself in similar position, but the Court of Justice of the European Union looked the governments in the eyes and held[3] that they have limited their sovereignties when they subscribed to the treaty that created the European Economic Community. The Court of Justice of the European Union knew, just like the Community Court of Justice ECOWAS, that creation of Community rights wouldn't serve any integration purpose unless the beneficiaries of these Community rights—often clustered in provisions on free movement of persons, good, services and capital—can access both their national courts and the regional court to enforce their vested rights in the event of violation.

Otherwise, it would only amount to modern mockery of the beneficiaries—citizens of the Community—for Governments of the Community to vest specific rights on free movement of goods, persons, services, capital (from one sovereign state to another) and right to establishment (in a state other than the state of nationality) when these rights cannot be enforced in any national court or at the Community Court of Justice (ECOWAS). The mockery, it seems, came to the fore in Pinheiro,[4] where an applicant sought to protect his Community rights on establishment. But the Court held that an individual has no right of access in the event of violation of Community right; rather, his options are to request a Member State to sue on his behalf or to bring an action in a domestic court where the violation occurred. Apparently, the Community Court did not consider that it is impracticable for Member States to be jostling the corridors of the Court continuously to enforce the Community rights of every citizen—what with the bureaucratic process, time and cost such state enforcement will entail for already slow and ineffective public institutions existing in West African countries. It also failed to reckon that ECOWAS texts, at least in the meantime, do not make up the body of laws of the Member States—so it becomes difficult for an individual to rely on them in a domestic court.

And any attempt at relying on the equivalent rights as provided in the African Charter to circumvent the hurdle of right of access would also founder on jurisdictional limitation, for the Community Court observed in Falana[5] that the freedom of movement as captured in the African Charter only applies within a state. Invariably, it means that freedom of movement, under the Charter, cannot be enforced at Community Court where the violation is "cross border" or transnational in nature

[3] Costa v Enel 1964, p. 593.

[4] Pinheiro v Republic of Ghana 2012, p. 9.

[5] Falana v Republic of Benin 2012, p. 17.

or where the violation took place in the course of entering the territory of another West African country.

Therefore, Pinheiro, together with Falana, has become the denominator between human rights that can be brought to the Court through the aperture of Article 9(4)(d) of the Protocol Relating to the Community Court and Community rights—all vested rights relating to residence, establishment and freedom of movement in relation to persons, goods, services, capital—which cannot be brought by the bearers of the right. As the Court has reasoned, where the violation borders on Community rights, it is an issue of failure, on the part of a Member State, to fulfil an obligation under protocol; therefore, it is either a Member State or President of the Commission that has access to the Court. Since the Court has shown unwillingness to entertain actions on Community rights brought by the bearers of the rights, and has separated human right action from Community right cases, the rest of the chapter will be dwelling on human right *per se*, which the Court is still willing to entertain.

5.2 Human Rights (Concept)

It may be slightly inappropriate to engage, robustly, in the debate on the difference between human right and fundamental (human) right. However, it would be hugely helpful to show how writers and experts have attempted to clarify these concepts. But it seems that having a grain of knowledge about the subject of rights might quicken one's understanding of these two other concepts. This is true, especially where the definition of any of the two concepts is cast with jurisprudential resources. For instance, in an attempt to capture the meaning of human right, in such a comprehensible way, a lexicon[6] defined it as "the right each human has to personal freedom, justice etc". One who has not learned the subject of right might experience some difficulties comprehending, without aid, the strata inherent in such a definition. One may not know whether that personal freedom can extend to privilege as well as to immunity or whether it stops at the right to do whatever one wills with one's property. To provide that quick aid, therefore, a brief primer on rights is provided below.

Right has been defined[7] as (1) *Title to or an interest in any property (2) Any other interest or privilege recognized and protected by law (3) Freedom to exercise any power conferred by law*. The Black's Law Dictionary[8] represented the meaning of right in different shades: "Something that is due to a person by just claim; legal guarantee or moral principle; legally enforceable claim that another will do or will

[6] The Chambers Dictionary 2006, p. 725.

[7] Law and Martin (2009), p. 481.

[8] Garner (2004), p. 1347.

not do a given act; a recognized and protected interest the violation of which is a wrong; a power, privilege or immunity secured to a person by law."

It is evident that the last definition viewed the concept of right from the perspectives of power, privilege and immunity; Wesley Hohfeld also patterned his representation of the concept of right along those lines.[9] According to him, right might be (1) a claim (2) a privilege/liberty (3) a power and (4) an immunity. When he refers to claim right, he presupposes that everyone is under a duty to allow X to do a thing and that X would have a claim against any person with a view to enforcing that right (especially if that person breaches the duty). By privilege or liberty, Hohfeld presupposes that where X holds a right he is free to do or refrain from doing a thing and no one can claim against him either for exercising or refraining from exercising this liberty. In regard to power, he is of the view that the holder of the right (power) is free to do an act, whether or not he has a claim or a privilege, and that this act would have the effect of altering the legal rights and duties of other persons. In regard to immunity, the thinker stated that the holder of the right (immunity) is not subject to any person's power to change his legal position.[10]

But there are other definitions that could enrich one's perspectives on rights. For instance, in the eyes of Hart, rights are legally protected choices, while in MacCormick's views, they are protected interest.[11] Holmes[12] sums it up as "Nothing but permission to exercise certain natural powers and upon certain condition to obtain protection, restitution, or compensation by the aid of public force". Summarily, this expostulation on divergent views on rights serves as the bedrock for easier appreciation of the concepts of human right and fundamental human right.

What then are human rights? They are freedoms, immunities and benefits that, according to modern values (esp. at an international level), all human beings should be able to claim as a matter of right in the society in which they live.[13] They have also been[14] defined as "Rights and freedom to which every human being is entitled". As to whether all human rights are fundamental rights, the explanation given by some experts would help solve the puzzle: "It is sometimes suggested that human rights (or some of them) are so fundamental that they form part of natural law. . .."[15] Consequently, it can be deduced from this suggestion that some human rights are considered to be fundamental while others are not—at least at a given period and in a certain jurisdiction.

What then are fundamental rights? They are rights derived from natural or fundamental law; they are fundamental because of the seat of derivation. For a

[9] Doherty (2004), p. 378.
[10] Doherty (2004), p. 378.
[11] *Ibid.,* pp. 382 and 383.
[12] Curzon (1995), p. 235.
[13] Garner (2004), p. 758.
[14] Law and Martin (2009), p. 269.
[15] *Ibid.*

law to be considered fundamental, it must be the organic law that establishes the governing principles of a nation or state—especially a constitution.[16] As to what will constitute natural law, it is that "philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action".[17] To appreciate natural law, take the sanctity of human life for instance and how every human race would protect it irrespective of existence or non-existence of legal codes; every race believes that nature and its rules abhor killing. Inferentially, where a human right is recognised and protected in a fundamental law (like the constitution) or the right is such that natural law, from time immemorial, lends protection to it, then such a right is fundamental.

5.3 Human Right Under the ECOWAS Law

The Economic Community of West African States has never had its own legal instrument on human and people's right. The Revised Treaty provides for the "Recognition, promotion and protection of human and people's right in accordance with the provisions of the African Charter on Human and People's Rights".[18] Consequently, it is the provision on human rights as contained in the African Charter that the Court would apply. The Court is not restricted to the boundaries of the Charter; it would recognise any other protected rights found in international human right instruments or in consonance with international obligation. For instance, as reported,[19] the Court recently considered the amendment to Burkina Faso's electoral law which bars the candidacy of anyone who once supported former President Blaise Compaore's third term bid as a violation of fundamental human right in line with international obligations of Burkina Faso.

Evidently, most applications that the Community Court has taken were brought under the provisions of the African Charter on Human and Peoples' Rights. For this reason, it will be educative and pragmatic to do a quick annotation on some of the key provisions and the articles which the Community Court has deliberated or decided upon. The annotation, it is believed, will not only reveal the Court's take on the extent of application of these articles but will also provide sizable insight on grey areas in some provisions of the Charter.

[16] Garner (2004), p. 697.

[17] *Ibid.,* p. 1055.

[18] Article 4(g) Revised Treaty, but the Court can have regard to other international instruments on human right, eg., Universal Declaration on Human Rights 1948; see also Art 1(h) Protocol on Democracy and Good Governance.

[19] The News (2015), CDP v Burkina Faso.

5.4 Annotation on African Charter on Human and Peoples' Rights

5.4.1 Article 1[20]

This article enjoins the Member States of the African Union (previously Organisation of African Unity) to recognise the rights, duties and freedoms enshrined in the Charter. It also provides that they should undertake to adopt legislative or other measures to give effect to them. This call for an undertaking shows that the instrument was not designed to have supranational impact within the territories of the signatories to the Charter, hence the need for further legislative steps to be taken in order to give it effect within their jurisdictions. With a view to giving effect to the Charter, the Nigerian legislature passed the African Charter on Human and Peoples' Rights Act. It is also possible, in some jurisdictions, to apply the provision of the Charter without the help of any domestic legislation. For example, in New Patriotic Party v Commissioner of Police,[21] a Ghanaian court held that the provisions of the African Charter can be relied upon even though an act has not been passed to give it effect within the jurisdiction of Ghana.

5.4.2 Article 2[22]

It provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, natural and social origin, fortune, birth or any status. This article has, by its wording, covered any form of discrimination against the enjoyment of any right found in the Charter. In Karaou case, the Court held, relying on this and other provisions of the Charter, that the applicant was a victim of slavery and discrimination.[23]

5.4.3 Article 3

This article protects right to equality before the law. It also provides that every individual shall be entitled to equal protection of the law. In Karaou case, the Court

[20] African Charter on Human and Peoples' Rights.
[21] 1993, p. 82.
[22] *Ibid*.
[23] Koraou v Republic of Niger, p. 244.

clearly condemned the inaction of both administrative and judicial authorities of Niger in the face of discrimination and slavery.[24] It means therefore that where public authorities failed to offer protection to citizens whose rights were violated, the aggrieved persons may rely on this provision to enforce their rights at the Community Court.

5.4.4 Article 4

Article 4 provides for right to life. It reads: "Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his person. No one may be arbitrarily deprived of this right."[25] However, it is not very clear why the draftsmen elected to employ the sort of phrases used in the article. At first glance, one might mistake the article for a provision on right to life and respect for human dignity. But taking Articles 4 and 5 together reveals that the latter covers respect of dignity inherent in human beings while the former protects right to life. It seems the phrase "respect for his life" relates to respect for the sanctity of human life. Where a prospective applicant feels that he has been treated in an undignified and disrespectful form, he may marry the second limb of Article 4 with Article 5 to be on a safe side. In promotion and protection of right to life, the Community Court disapproved of plans of Nigerian authorities to execute a woman for an offence she committed when she was a minor.[26]

5.4.5 Article 5

Article 5 clearly provides that an individual shall have the right to the respect of the dignity inherent in human beings and to the recognition of his legal status. It went further to provide that all forms of exploitation and degradation of man, particularly slavery,[27] slave trade, torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited. Karaou[28] is a case in point of how the Community Court treats issues relating to slavery. Although the act of slavery was not perpetrated by government officials or agencies, yet the Court found for the applicant and attributed blame to the government for inaction in the face of barbaric culture that encourages slavery and degradation.

---

[24] *Ibid*.

[25] African Charter; see Maneh v The Republic of Gambia 2008, p. 184.

[26] *Maimuna Abdulmuminu v Federal Republic of Nigeria & 2 Ors 2014*.

[27] Karaou v Niger 2008, p. 244.

[28] Ibid.

5.4.6 Article 6

Article 6 reads: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested[29] or detained."[30] The provisions of this article move against arrest and detention that are not in consonance with the law. But where an arrest or detention is ordered by a court or similar authority based on oppressive and right—infringing legislation, would it be just for the Community Court to consider such an order lawful? The contemporary practice is to disapply acts that offend human right provisions; however, that does not seem to be the case in Amouzou,[31] where the Community Court did not see anything wrong in detaining the applicants under a national law for several months.

5.4.7 Article 7

Under Article 7, every individual shall have the right to have his cause heard. This includes right to appeal, right to presumption of innocence, right to defence, right to be tried within a reasonable time by an impartial court or tribunal.[32] The same article frowns at condemnation of any one for an act or omission which did not constitute a legally punishable offence at the time it was committed. And no penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment should be personal and can be imposed only on the offender.[33] The article systematically provides for fair hearing and trial safeguards. It would be observed from the provision stated above that it took care of retroactivity, in that it abhors punishment of a person for an act that was not an offence at the time of commission. Furthermore, one might wonder why the Charter frowns only upon conviction and punishment of a person based on an act that was not an offence at the time of commission. What, then, would happen if a person is maliciously tried, without condemnation or conviction, based on an act that was not an offence at the time of commission, especially where the trial was designed to embarrass, cow, humiliate and legalise infringement of right by ordered detention? While the letters of Article 7 may not have expressed it as a violation, the spirits of Articles 5, 6 and 7 imply it.

---

[29] Musa Saidykhan v The Republic of the GambIa *2010*, pp. 14–15.

[30] Cf. Amouzou Henri & ors v Cote d'Ivoire *2009,* p. 303.

[31] Ibid.

[32] African Charter 7 (i) (a)–(B).

[33] *Ibid.,* (2).

5.4.8 Article 12

The right to freedom of movement and residence is both a human right and a Community right.[34] The article under consideration provides that "Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law".[35] Note that the freedom of movement which the Charter envisages does not cover movement from one country to the other within the Community; where a litigant intends to establish a claim on freedom of movement within the Community, then reliance must be placed on other Community laws.[36] However, where the application is purely on Community rights—free movement—then the proper parties that can approach the Court are Member States and the Commission and not the bearer of the right.[37]

Also, Article 12 provides for the following related rights:[38]

(a) *Right to leave any country including his own, and to return to his country.*
(b) *Right to seek and obtain asylum in other countries in accordance with national laws and international conventions when persecuted.*
(c) *Right not to be expelled, as a non-national, from a territory of a state party in which you were legally admitted, unless by a decision taken in accordance with the law.*
(d) *Rights of non-nationals not to be expelled in mass.*

To show the importance attached to protection of right of non-expulsion, the draftsmen chose to represent it in this wording: "The mass expulsion of non-nationals shall be that which is aimed at national, racial, ethnic or religious groups." The second limb of the provision has explained the major feature of what constitutes mass expulsion; it means that any expulsion that is not designed against persons from a certain nation, race, ethnic or religion would not amount to mass expulsion, unless the Court would expand any of the items to accommodate any new class of victimised persons. For instance, if a country, for religious or cultural reasons, decides to expel every person with dreadlocks, it is not clear under which class the Court will place such victims.

5.4.9 Article 14

Article 14 guarantees right to property. Property, under this head, should not be limited to land and all things fixed on it. It should extend to *personalty* and

[34] Unique *Rights recognized, created by or protected in Community instruments.*
[35] African Charter; Falana v Benin 2010, p. 114.
[36] Falana v The Republic of Benin 2012, p. 17.
[37] Ibid.
[38] Article 12(2)–(5.) African Charter.

intellectual property, but it is doubtful, from the tenor of the provision, whether the draftsmen intended to include intellectual property. However, the word property is used without qualification; then it must be interpreted in the most liberal way possible. Africans are beginning to acquire different intellectual property rights, so the laws and courts must protect them. Nonetheless, the right to property is not absolute; the Charter provides when an encroachment would be legal in these words: "...it may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".[39] The provision touching on encroachment suggests that the draftsmen had realty in mind.

5.4.10 Article 15

Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.[40] However; the Court has stated in one case that equal pay for equal service would only apply where the sources of finance for remuneration is the same. For instance, where a dancer is retained based on a contract and fund created by a foreign organisation, while the fund used in paying other dancers in the same troupe is created by the government of the state where the troupe is established, the latter cannot seek for equal pay with the former whose contract and source of fund for remuneration are different.

5.4.11 Article 16

Every individual shall have the right to enjoy the best attainable state of physical and mental health.[41] The Member States are obliged to take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.[42] It is easier to bring an application under Article 16(1), especially if by any decision, act or omission a person is denied or deprived of the opportunity to use health facilities which could have helped the person to enjoy the best attainable state of physical and mental health. But where one cannot enjoy the best attainable physical or mental state of health because of general maladministration in the concerned country, lack of fund, dearth of trained personnel to offer the proper service, then such application may not be granted. Even if it is granted and enforced, it may open the floodgate to other prospective applicants. Such

[39] *Ibid.,* Article 14; see also Chukwudolue v Senegal 2007, p. 157.

[40] *Ibid.,* Article 15; see Essien v Gambia 2007, p. 113.

[41] Article 16 (1) African Charter.

[42] *Ibid.,* (2).

problems often stem from bad governance and ineffective or unimplemented policies. That is why the same Article 16[43] renders that Member States should take necessary measures to protect the health of their people and to ensure they receive medical attention. The degree of fulfilment of these duties should be dependent on funds, infrastructure, laws and available trained personnel. But it should be reiterated that where a government, an organisation or an individual takes an action or makes an omission or a decision which infringes on the right of an individual to enjoy the best attainable state of physical and mental health, or would have enjoyed the right but for the acts, omission, or decision of the above-listed persons or entities, then such an individual might bring an application under Article 16(1).[44]

5.4.12 Article 17

This head contains two unrelated rights. The first one[45] is that every individual shall have the right to education. The word "education" is not qualified; however, it may mean, at least, good education. But what exactly is good education? Although it looks subjective, yet a common parameter may be created by every country. Does it also include free education? It may include free education where there are state policies on free education and availability of adequate fund to support the policy. The second right provided under this head is the right of every individual to freely take part in the cultural life of his community.[46]

5.4.13 Articles 18–24

The framers of the Charter used Article 18 to entrench the family as the natural unit and basis of society.[47] Articles 19–24 capture rights which the citizens can enjoy and enforce as people. According to the Charter, "All people shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."[48] Furthermore, the Charter provides[49] that "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political

[43] *Ibid.*
[44] African Charter.
[45] *Ibid.,* Article 17 (1).
[46] *Ibid.,* (2).
[47] Article 18 (1) African Charter.
[48] Article 19 African Charter
[49] Article 20(1)–(3) African Charter.

status and shall pursue their economic and social development according to the policy they have freely chosen". "Colonized or oppressed people shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. All people shall have the right to the assistance of the state parties in their liberation struggle against foreign domination, be it political, economic or cultural"

It is interesting to note that the Charter vividly provides for the right to self-determination. What then is self-determination? "It is the right of cohesive national groups (people) to choose for themselves a form of political organization and their relation to other groups."[50] For purpose of variety, the definition of self-determination given by some legal lexicographers might help. It is "the right of a people living within a non self – governing territory to choose for themselves the political and legal status of that territory". They may choose independence and the formation of a separate state, integration into another state, or association with an independent state with autonomy in internal affairs.[51]

Article 21 reads: "All people shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it."[52] "In case of spoliation, the disposed people shall have the right to the lawful recovery of its property as well as to an adequate compensation".[53] The Charter also provides that "The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law"[54].

Article 22 of the Charter provides for the right of the people to economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. The Charter did not define common heritage of mankind. It seems that the phrase as used in the instrument means "areas of Antarctica, the sea bed, and outer space which should not be monopolized for the benefit of one state or group of states alone, but should be treated as if they are to be used to the benefit of all mankind".[55] Another example of common heritage of mankind is the moon.[56] It practically means that where a place has been dubbed "common heritage of mankind", it ought not to be appropriated by one or more countries but should be treated as *res communis*.

[50] Brownlie (2003), p. 553.
[51] Law and Martin (2009), p. 500.
[52] Article 2(1) African Charter.
[53] *Ibid.,* (2).
[54] *Ibid.,* (3).
[55] Law and Martin (2009), p. 108.
[56] See the Moon Treaty of 1979.

5.5 Human Right Jurisdiction of the Community Court

The Protocol on the Community Court of Justice,[57] which was made in 1991, did not, at least expressly, vest in the Court the power to entertain action for violation of individuals' rights. Actually, the Protocol attempted to create room for individual actions in an indirect form. It 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".[58] Experience has shown that it is not a common practice for a state to sue another member state for violation of its citizens' rights except in very extreme situation. These kinds of issues are properly dealt with at diplomatic forum.

Another challenge which the law did not address is the violation of the citizens' rights by their countries or governments. In such a situation, reasoning from the old law,[59] the option left for the individual would have been to bring application before his national court. But that procedural route is more surreal than real because ECOWAS law has neither been a source of law nor applied on supranational ground within the jurisdictions of the Member States. It meant therefore that the old provision did not carter for such class of violations.

Moreover, in Afolabi v Federal Republic of Nigeria,[60] the applicant brought a suit against the defendant for causing him economic loss when it closed its borders with Benin Republic. The applicant relied on Article 9(1) and requested the Court to enlarge the parameter of the article to accommodate a situation where an individual sues or has sued his State. In response, the Federal Republic of Nigeria sought for an order striking out the suit for want of jurisdiction.[61] The Community Court did not borrow a leaf from the European Court of Justice[62] (as it then was) to expand Article 9 to accommodate the applicant's situation; rather, it applied Article 9(3) in its ordinary meaning and declined jurisdiction to entertain action brought by an individual for violation of his right. That decision worked great hardship on the forerunner and other prospective applicants intending to bring actions against Member States and their agencies. But the hardship was not allowed to last forever, for in 2005 the Community solved that jurisdictional problem by introducing the Supplementary Protocol of 2005, which amended the 1991 Protocol.

Article 9 of the amended Protocol now accommodates action for violations of human right. The inclusion was couched in these words: "The court has jurisdiction to determine cases of violation of human rights that occur in any member state."[63]

---

[57] Amended in 2005.

[58] Art 9 Protocol on the Community Court.

[59] *Ibid*.

[60] 2004, p. 1.

[61] *Supra* p. 5.

[62] See Defrenne v Sabena 1976, pp. 475–476.

[63] Art 9(4) Protocol as amended by Supplementary Protocol A/SP.*1/1/05*.

The new instrument did not stop at creating jurisdictional powers to hear cases of human right violations; it also implanted a new Article 10, which took care of right of access to Court. Currently, individuals have right of access to Court where

(1) *There is a proceeding for the determination of an act or inaction of a Community official which violates the rights of the individuals.*
(2) *They brings an application for relief for violation of their human rights.*

There could be a third situation where an individual may bring an action other than an action for violation of human right. To ease the task of explanation, the provision of Article 9(6) is reproduced hereunder: "The court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the court shall settle disputes arising from the agreement."[64] Inferentially, where it is reduced in any agreement between parties that any dispute arising from the execution of the agreement shall be heard in the Community forum, it automatically lends (jurisdictional) powers to the Court to hear the matter. It must be noted that the word "parties" as employed in Article 9(6)[65] relates to individuals and corporations.[66]

However, the jurisdiction of the Court to entertain human right issues is not as unlimited as touted by some citizens in the Community. It is true that the Court has powers to hear human right cases under Article 9(4)(d) of the Protocol Relating to the Community Court of Justice as amended in 2005, whether based on the provisions of the African Charter or other international instruments on human right. But the Court will slough off jurisdiction where an applicant woes it to apply right to freedom of movement as provided in the African Charter in a "cross border" violation or where the violation took place on entry to the territory of another Member State. Application of that provision, as the Court confirmed,[67] is limited to violation that occurred within the territory of a State. Again, the jurisdiction of the Court to entertain human right cases cannot be used as a procedural channel to bring cases purely on Community rights, whether free movement of persons, goods, services, capital and right of establishment. It is either the ECOWAS Commission or the Member States that can access the Court in such cases.[68] These two limitations narrow, at least effectively if not technically, the human right jurisdiction of the Court.

[64] Protocol as amended.
[65] *Ibid.*
[66] Linas International Nig Ltd v Ambassadors of Mali & ors 2009, p. 271 at 280, para 24.
[67] Falana v Republic of Benin 2012, p. 17.
[68] Pinheiro v Republic of Ghana 2012, p. 9.

5.6 Community Court and Human Right Actions

The Community Court has heard reasonable number of cases touching on human rights at the instance of individuals. It is clear that those applications were heard as "human right violation cases". It seems that individuals have not been bringing applications solely on violation of Community rights, which ought to be protected by the Community institutions. In most of the applications on violation of right to freedom of movement, the applicants would anchor the applications on Community rights and the provisions of the African Charter on Human and People's Rights. It is understandable why the lawyers employ this procedural strategy: to guide against jurisdictional objections. But as the Court has clarified, where the application is brought because of violation of Community rights *per se*, it is considered as action for failure to fulfil Treaty obligation and must be brought by Member States.[69] Nonetheless, some of the cases heard under the human right jurisdiction are considered below.

5.6.1 Right to Respect of Human Dignity: (Right Not To Be Enslaved)

In Koraou v Republic of Niger,[70] the Nigerien Government was held liable for institutional failure that allowed the thriving of slavery practices. The facts were that Hadidjatou Mani Koraou was sold as a slave in 1996 to El Hadj Souleymane Naroua. She was 12 years old when she was sold at the price of CFA F 240,000 (two hundred and forty thousand CFA francs). The illicit trade was conducted under the "Wahiya" practices, which entail selling young girls as concubines and domestic servants. In 2005, the captor issued her with a certificate of emancipation; on the authority of her certified freedom, the applicant attempted to leave her captor after bearing four children for him. She was resisted by her slave master under the pretext that she was still his wife. When the Konni Civil and Traditional Court was approached by the applicant, it held that there was no marriage; therefore, the applicant should be permitted to go and lead a new life.

Surprisingly, the Konni High Court, at the request of the slave master, quashed the decision of the Konni Civil and Traditional Court. When the applicant invoked the jurisdiction of the Supreme Court, the right-infringing decision of the High Court was quashed. Unfortunately, the Supreme Court, in its judgment, did not determine the applicant's slave status. When the applicant found real love in the life of Ladon Rabo, criminal charges of bigamy were preferred against the lovers, including the girl's brother. They were sentenced to 6 months' imprisonment, and

[69] Pinheiro v Republic of Ghana, p. 9.

[70] *Supra* p. 217 at 244, para 2.

a fine of CFA F 50,000 (fifty thousand CFA francs) was imposed on each of them. On 9 July 2000, based on the appeal filed by Koraou, the Criminal Chamber of Court of Appeal Niamey ordered their release.

When the Community Court heard the case, it held that the "Wahiya" practice did put the applicant in an unfavourable condition and excluded her from the sure and certain benefits of equal dignity recognised for all citizens. It further stated that the applicant was entitled to an all-inclusive relief in reparation for the harm resulting from such practice of slavery. Consequently, she was granted damages to the tune of CFA F 10,000,000 (ten million CFA francs).[71] In defence, the Nigerien authorities raised the issue of exhaustion of local remedy. According to them, Article 56 of the African Charter bordering on exhaustion of local remedy should be imported into the ECOWAS jurisprudence. In response, the Court, after considering Article 10(d) of the Supplementary Protocol[72] held that the rule of exhaustion of local remedies is not applicable before the Court.[73] By this landmark decision in Karaou, the Court puts a seal of protection on right to dignity and right not to be enslaved within the Community.

5.6.2 Right to Free Movement of Person

Prior to the amendment of Article 9 of the Protocol Relating to the Community Court,[74] one Mr. Afolabi brought an action[75] for violation of his right to free movement of persons and goods. Unfortunately, his action failed for want of jurisdiction. The facts were that Mr. Afolabi, a Nigerian businessman, could not proceed beyond the Seme border because Nigeria had closed its border with Benin Republic. The business meeting in relation to which Mr. Afolabi had embarked on the journey was scheduled to take place in Benin Republic. In his application, he prayed the Court to declare that the unilateral closure was unlawful and a breach of his right. The Court extensively considered the matter and concluded that an individual cannot bring an action against a Member State.[76]

After Article 9 had been amended to accommodate individual applications, a notable lawyer and one Waidi Mustapha brought an action—combining both the Community and human rights on free movement of persons—before the Community Court of Justice.[77] They sought, among other reliefs, a declaration that the defendants have no power to close the borders and erect checkpoints and toll gates

[71] Koraou 2008, pp. 242–244.
[72] *2005*.
[73] Koraou 2008, p. 229, para 49.
[74] *1991*.
[75] Afolabi v Nigeria 2004, p. 1.
[76] *Ibid*., p. 16, para 61.
[77] 2010, p. 114.

in the Member States. Fifteen Member States were joined as parties to the suit. One of the grounds of objection was non-exhaustion of local remedy; another was lack of jurisdiction because, according to one of the Member States, the requests made by the applicants deal with the internal organisational framework of each Member State. In response to the preliminary objection, the Court ruled that the requirement of exhaustion of local remedy does not apply.

When the matter was finally heard on merit by the Court, after it shrank the number of defendants to three, it held[78] that there is no proof, deducing from facts and evidence, of restraint on the movement of the applicants during their journey from Nigeria via Benin to Togo. It also expressed concerns about the timeliness of the action since it was brought more than 3 years after the cause of action has arisen—against the rules on permitted period within which to bring actions to the Court. Nonetheless, it is worthy of note that the Court confirmed the extent of application of right to free movement as provided in the African Charter. It held that such right does not go beyond the country where the applicants are and that the provision is not akin to freedom of movement as contained in the Community texts. Entirely, the application failed on merit.

5.6.3 Right to Liberty

In Manneh v Gambia,[79] a Gambian journalist was, on 11 July 2006, arrested without a warrant by two officials of the National Intelligence Agency of the Gambia. The government agency was alleged to have kept him away from his friends, family and lawyer. His detention was prolonged, and no opportunity was given to him to state his case in a court of justice. It was the Media Foundation for West Africa, a non-governmental organisation based in Accra, which actually retained the services of a law office in Nigeria to file the suit on behalf of the detained applicant. The issue turned on whether the arrest and detention were justified under the African Charter on Human and Peoples' Rights. Having considered the case of the applicant, since the defendant did not file any defence at that stage of the case, the Court held that the arrest and detention constitute violation of his right. It went further to grant the plaintiff the sum of $ 100,000 (one hundred thousand dollars) as damages.[80]

Alhaji Tidjani[81] is another matter that has one of its roots in violation of right to liberty. The plaintiff was a Nigerien resident in Benin Republic, where he was arrested and taken to Nigeria. The Nigerian security service alleged that he was in possession of stolen vehicles. On his part, he claimed that he was arraigned before

[78] Falana v Republic of Benin 2012, p. 14.
[79] 200, p. 181.
[80] Maneh 2008, p. 198.
[81] Tidjani v Nigeria & ors 2007, p. 77.

courts in Lagos and Ogun states on different charges. One of the courts in Lagos discharged him for lack of jurisdiction. While the other trials were pending, he brought an application before the Community Court seeking declaratory reliefs, namely a declaration that the Nigerian court has no jurisdiction to try him; a declaration that his arrest, detention and trial violated his rights; etc. The Community Court, having considered the cases of all parties present, did not agree with the plaintiff. To the Court, the arrest, detention and trial were done in line with laid-down criminal laws and rules of procedure; consequently, it sloughed off jurisdiction.[82]

It seems, to the Court, that where an arrest and detention were done purportedly under a laid-down law, it will not amount to violation of right to liberty even if the arrest was executed outside the territory of the Member State. In Djot Bayi Talbia v Nigeria & Ors,[83] MT Capbretton, a foreign vessel flying the flag of St Vincent and Grenadines, was arrested on the 17th of July 2003. The arrest was made by the Nigerian naval officers, but at the time of the arrest the vessel was 16 nautical miles off the territorial waters of Nigeria. One of the issues raised at the Community Court was whether the detention of the plaintiffs is arbitrary and does constitute a violation of their human rights. The Court held that the arrest and detention were not unlawful since they were necessary for the purpose of investigation.[84] However, the Court found for the applicants on the ground that continued detention and prosecution cannot be justifiable. In that vein, the Court was of the view that the continued detention was a violation of their rights to liberty,[85] especially after a court in Nigeria has discharged some of them.

Furthermore, in Musa Saidykhan v Republic of Gambia,[86] the Court found for a Gambian journalist who was arrested, detained and tortured by the Gambian security service. The Court, consequently, ordered the Government of Gambia to pay damages to Mr. Saidykhan. Unfortunately, the Republic of Gambia has not complied with that order made by the Community Court of Justice.

5.6.4 Right to Equal Pay for Equal Work

The Community Court seised the opportunity presented by Professor Essien v The Republic of Gambia & Anor[87] to hear a claim for violation of right to equal pay. The Commonwealth Secretariat recruited Professor Essien as a consultant to teach, for 2 years, at the Faculty of Medicine, University of the Gambia. His remuneration

[82] Tidjani *supra* p. 92, para 45.
[83] 2009, p. 245.
[84] Djot Bayi *supra* p. 263, para 35.
[85] *Ibid.,* p. 264, para 35.
[86] *Supra*.
[87] 2007, P 113.

was paid, in dollars, from the Commonwealth Fund for Technical Co-operation. At the expiration of the contract, the Gambian Government persuaded him to continue. When he wrote the school, later, asking for his arrears, they informed him that the request to the Commonwealth Secretariat as regards renewal of the contract had not been successful. They, therefore, offered to pay his arrears in their local currency: dalasis. To aggravate the situation, they also informed him that the rate of the payment shall be that which is applicable to other lecturers in the University of the Gambia. On the basis of these facts, the plaintiff brought an application to the Community Court for violation of his right to equal pay for equal work. Having listened to the parties, the Court admitted that right to equal pay for equal work exists under the ECOWAS law, but such right cannot be violated where the refusal to offer equal pay for equal work was occasioned by change in the source of remuneration.[88] The Court's reasoning was that the change in the source of fund for the payment of Professor Essien's salary would imply change in his salary structure and rate.

Again, it seems that the Community Court would not hold that rights touching on equal pay or fair remuneration had been violated if the victim is independent and does not have a salary scheme arrangement with the perpetrator. In CNDD[89] v Republic of Cote d'Ivoire, an organisation brought an application to the Community Court alleging that the excessive taxation policy put in place by Cote d'Ivoire has eroded the purchasing power of the coffee and cocoa producers in that country. The applicants further asserted that according to the report of Director of Operations of the World Bank for Cote d'Ivoire, the cocoa and coffee producers hardly receive forty per cent (40 %) of the fixed price on the international market as compared with countries like Nigeria and Ghana that receive up to ninety per cent (90 %) and seventy per cent (70 %), respectively. Therefore, the policy, as claimed by the applicants, violates the producers' right to fair remuneration and principle of equality of all citizens before the law. The Court held that there is no employment relationship between the parties such as to establish a salary obligation on the defendants towards the applicant, that the latter derives its revenues from the sale of its produce to exporters and that such revenue cannot be considered as remuneration. The Court consequently declined to admit that the defendant has violated the applicants' right to fair remuneration.

5.6.5 Right to Property

In Mrs. Alice Chukwudolue & Others v The Republic of Senegal,[90] survivors of late Dr. Chukwudolue brought an action against Senegal for violation of right to

[88] Professor Essien 2007, p. 128, para 37.

[89] National Co-ordinating Group of Departmental Representatives of the Cocoa-coffee Sector v Republic of Cote d'Ivoire 2009, p. 311 at 326, paras 48–50.

[90] 2007, p. 151.

property. In their pleading, they claimed that their late father deposited on the second day of May 1973 the sum of $ 2,000,400,000 (two billion four hundred thousand dollars) with the Government of Senegal. In addition, he left with them a bag containing 60 kg of precious metal, stones, diamond and rubies. In support of their case, they tendered a certificate of deposit bearing the *imprimatur* of the Republic of Senegal. They also asserted that refusal to hand over the deposit to them has affected their economic and human rights. The Court did not hear the matter on its merit because of jurisdictional issues. The Senegal authorities drew the Court's attention to jurisdictional clause in the certificate of deposit, which read: "Any dispute or claim is to be referred to the World Court at Hague, or International Court of Arbitration and no diplomatic immunity." On the basis of this choice of forum embossed on the certificate, the Court declared that it lacked the jurisdiction to entertain the matter.[91]

In Ukor v Laleye,[92] the applicant alleged that the Republic of Benin seize his truck, together with the goods packed in it. The action was brought against the freight forwarder for failing to fulfil his duties, which led to the order of seizure by a court in Republic of Benin. The applicant was aggrieved by the Government of Republic of Benin for impounding and holding the truck used in conveying the seized goods, thereby violating his right to property. In giving its ruling on the preliminary objection filed by the second defendant, the Court stated that it lacked jurisdiction to hear the matter since the seizure was effected by an order of a competent court.[93]

5.6.6 Right To Be Presumed Innocent

In Djot Bayi Talbia & Others v Nigeria & Others,[94] the Court considered whether the parading of the applicants before the world press as "vandals and thieves of Nigerian crude oil" constituted a violation of their rights with regard to their dignity of persons as entrenched in Article 5 of the African Charter on Human and Peoples' Rights. In answering the question, the Court held that the parade does not offend Article 5 of the Charter. In its opinion, the parading of the applicants before the press, when no judge or court has found them guilty, certainly constitutes a violation of the principle of presumption of innocence as protected under the African Charter.[95]

But in Amouzou Henri & Others,[96] certain media outlet owned by state was alleged to have violated the right of presumption of innocence of the applicants, in

[91] Chukwudolue 2007, p. 165, paras 65–66.
[92] (2004–2009) CCJELR, p. 131 at 150, para 32.
[93] Ukor v Laleye *2005*, p. 147, para 28.
[94] *Supra*.
[95] Djot Bayi Talbia 2009, p. 265, para 40.
[96] *Supra*.

its publication, when it alluded that the applicants are "presumed guilty". The publication was informed by a preliminary report issued by a judicial body. However, the Court failed to uphold this point and decoupled the state from the actions of its agency. It stated further that the published news wherein the applicants were portrayed as being "presumed guilty" by the press was done in the strict exercise of the right or the freedom of information.[97] It further opined that "Even if such has infringed upon their honour and reputation there is no way the state of Cote d'Ivoire could be held responsible for this".

This last point appears to contradict, at least in principle, the previous stand of the Court in regard to state liability for the actions or inaction of its emanation.[98] In Karaou case, the Government neither held or kept her in slavery nor authorised it, yet the Court held that "Hadijatou Mani Koraou was a victim of slavery and that the Republic of Niger is to be blamed for the inactions of its administrative and judicial authorities". If the Niger Government could be culpable because its independent bodies, for instance the courts, did not offer protection to the enslaved girl, the Republic of Cote d'Ivoire should be made responsible for the right-infringing behaviour of its agency. It is not very clear why the Court chose to make a volte-face in Amouzou Henri.

5.6.7 Right to Education

In SERAP v Federal Republic of Nigeria,[99] the plaintiff, a non-governmental organisation, brought an action against the Federal Republic of Nigeria and its emanation seeking, among other things, a declaration that the acts of the defendants amounted to violation of the right to quality education. The defendants, in response to the application, filed a motion for preliminary objection, on the grounds of justiciability, lack of jurisdiction and *locus standi*. It was their contestation that the plaintiff had no *locus standi* to bring the matter before the Community Court since it failed to show that it has suffered any damage, loss or personal injury in respect of the acts alleged in the suit. In giving its ruling, the Court associated itself with the plaintiff to the extent that in human right violation cause, a plaintiff must not be personally affected or have any special interest worthy of protection before it can be heard.

As regards jurisdiction, the Court held that under Article 9(4) of the Supplementary Protocol, it clearly has jurisdiction to adjudicate on applications concerning the violation of human rights that occur in Member States of ECOWAS. It further held that the thrust of the plaintiff's suit is the denial of the right to

[97] *Ibid.*, p. 301, para 78.

[98] Karaou 2008, p. 244, para 2.

[99] Registered Trustees of the Socio-Economic Rights & Accountability Project V Federal Republic of Nigeria & anor.

education for the people of Federal Republic of Nigeria, and such right has been protected under the African Charter on Human and Peoples' Rights. It therefore considered the matter to be justiciable. By the end of 2010, the Court gave its judgment having heard the case on its merit. It held that Nigeria's Universal Basic Education Commission has the responsibility to ensure that the funds disbursed for basic education are properly used for that purpose. It also stated that Nigeria should be accountable for ensuring the right to education.[100] However, it seems, from the tenor of the judgment, that right to education must not necessarily mean free education unless there is a policy and matching fund to achieve it. In such situation, then, the state and the institution assigned with the public duty may be held responsible for not implementing the free education policy.

5.6.8 Right to General Satisfactory Environment

The Community Court in SERAP v Federal Republic of Nigeria[101] in 2012, having considered the application on merit, held that the Federal Republic of Nigeria had breached Articles 1 and 24 of the African Charter by omitting to act in order to prevent damage to the environment in Niger Delta and for failing to make the offenders accountable for environmental degradation flowing from oil exploration and exploitation. Even though the Republic of Nigeria pleaded series of measures it has put in place to curtail environmental degradation, yet the Court found for the applicant because the measures alleged to have been made did not translate to actual safety or protection of the communities in that area.

5.7 Other Principles

There are certain principles of law that may not necessarily be in use in all the Member States but may have been imported or created by the Court in some of its landmark cases. These principles are considered below briefly.

5.7.1 State Responsibility (By Reason of Inaction)

It is probably part of the *corpus juris* of most common law countries to apply the principles of vicarious liability. Responsibility by reason of inaction should never be confused with vicarious liability. In line with the principle of vicarious liability,

[100] *Ibid.*

[101] 2012, p. 27.

an employer is liable whenever his employee commits a tort in the course of his employment or in circumstances sufficiently closely connected to his employment,[102] and it may be extended even where statutory duty is imposed on an employee but not the employer.[103] In most vicarious liability cases, there would be a link between the *tortfeasor* and the employer. Often, the wrong must have a connection with performance of assigned duty. But the scenario is different in the "responsibility by reason of inaction principle"; it is more akin to state responsibility in international law.

In Koraou[104] v Niger, the Government neither enslaved Hadidjatou Koraou nor asked its agencies and bodies not to ensure the protection of the rights of its citizens. But the Community Court alluded to the failure of the Konni High Court to denounce the imposed slavery status of Koraou and concluded that it amounted to acceptance of such practice.[105] Because there was no administrative or judicial protection offered to the victim of slavery, the Court held that Republic of Niger was responsible "in terms of both national and international law, for every form of human rights violation against the applicant, on the basis of slavery, as a result of the tolerance, passiveness, inaction, and abstention of these same authorities of Niger vis-à-vis the practice of slavery". The net effect of this principle is that a Member State may be held culpable not just for violation of its citizen's right but also for doing nothing in the face of gross violation or for failing to provide adequate institutions that can tackle human rights violation.

5.7.2 Exhaustion of Local Remedy

The Economic Community of West African States does not have its own legal instrument on human right. It actually imports the African Charter on Human and Peoples' Rights through the vent of Article 4(g) of the Revised Treaty of 1993. Surprisingly, Article 56 of the said Charter provides for exhaustion of local remedy before an application can be brought.[106] In Koraou case,[107] the defendant implored the Court to apply the rule of exhaustion of local remedy in the case before it. The Court clearly opined that the requirement of exhaustion of local remedies does not form part of the conditions of admissibility of human rights cases under the ECOWAS law.[108] The corollary is that an aggrieved person is not required first to exhaust all channels of dispute settlement available in his or her country of origin

[102] Murphy (2007), p. 604.
[103] *Ibid.,* p. 614.
[104] Koraou *case*.
[105] Koraou 2008, p. 239, para 83.
[106] African Charter on Human and Peoples' Rights.
[107] Koraou supra p. 228.
[108] *Ibid.* p, 226, para 36.

before he or she can invoke the human right jurisdiction of the Community Court. In Starcrest Investment Limited v The President of ECOWAS Commission & Others,[109] the Community Court also stated in its ruling that the question of exhaustion of local remedies does not arise in matters involving persons enjoying diplomatic immunity from the national courts. It appears, therefore, from these decisions that the Community Court has adapted the use of the Charter pragmatically to suit the judicial needs of the citizens of the Community; otherwise, most of the cases heard by the Court wouldn't have scaled the bars of preliminary objection.

5.7.3 Just and Equitable Reparation

Reading carefully the decision in Djot Bayi Talbia case,[110] one sees that the Court was aware that "reparation" was not spelt out in both Articles 9 and 10 of the Protocol Relating to the Community Court of Justice,[111] but it held that "any individual who is a victim of violation of his rights is entitled to just and equitable reparation".[112] In the same case, the Community Court informed that Article 19 (1) of the Protocol Relating to the Court authorised the application of Article 38 (1) of the Statute of the International Court of Justice; therefore, it might import reparation principles through that opening. So the Court used the opportunity created by Djot Bayi case to import and apply the principle of just and equitable reparation. It is hoped that in subsequent cases where no other relief would be appropriate other than just and equitable reparation, the Court should proceed to import the principles or rely on Djot Talbia as the basis for grant of such relief.

5.7.4 Res Judicata

Where the same matter brought by a litigant to the Court had been adjudicated in a national forum or court, and judgment had been given, the Community Court may not entertain the matter on the principle of *res judicata*.[113] By virtue of the decision in Sa Adatu case,[114] the Community Court has reserved a place, in its applicable body of laws, for *res judicata*.

[109] 2010, p. 112, para 34.
[110] Djot Bayi Talbia *supra* p. 267.
[111] 1991 as amended by Supplementary Protocol (A/SP.1/01/05).
[112] Djot Bayi, Talbia *supra* p. 267, para 45.
[113] Sa Adatu Umar v Fed Republic of Nigeria 2012.
[114] *Ibid.*

5.8 Conclusion

It is unequivocally true that there is a difference between human right and Community right even though a Community right may pass for human right in certain circumstance. And the Community Court of Justice would not let up on keeping that line of difference clear, as shown both in Falana and Pinheiro. Except where a Member State or the Commission is making the application, jurisdiction of the Court does not accommodate matters brought solely under Community text, even though it has been expanded to take individual applications on human right. Nevertheless, the individuals whose rights were violated have used the opening to bring their applications, often based on the provisions of the African Charter on Human and Peoples' Rights. And in the course of hearing these cases, the Court has adopted or developed some helpful legal principles that have enriched ECOWAS jurisprudence. In spite of this limitation of not allowing individuals to bring cases to the Court where the issue springs solely from Community text, the Court has given so many landmark judgments in promotion and protection of human rights—but not Community rights.

However, are these judgments binding? If they are, how are they executed within the Member States? Generally, every judgment reeled out by the Community Court of Justice is binding in as much as it has financial implications for nationals of the Member States or the Member States.[115] Where any judgment is binding, it can be executed by taking out a writ of execution[116] from the Community Court; then the Registrar of the Court submits it to the Member State for execution in consonance with the civil procedure rules of that Member State. It is the duty of that Member State to verify,[117] through its appointed authority, whether the writ emanates from the Court; where it is satisfied, then it shall proceed with the execution of the judgment. The Member States have the discretion of choosing the competent national authority that will be responsible for receiving and processing the execution. The national authority will also be responsible for notifying the Community Court of the progress or otherwise of the execution. In addition, it is expected of all the Member States, inclusive of Community institutions, to take all necessary measures to ensure that all decisions are executed.[118]

However, there are obvious challenges to the execution of the judgment of the Community Court of Justice. First, the Member States exhibit lacklustre attitude to the decisions of the Community Court of Justice. They have not demonstrated, convincingly, the intention to nurture the culture of executing decisions given by the Community Court of Justice. For example, the Community Court has given 17 judgments against Nigeria; 11 out of the 17 require execution. Nigeria appears to have executed Peter David v. Ambassador Raph Uwechue (ECW/CCJ/APP/04/09)

[115] Article 24(1) Protocol relating to the Community Court of Justice as amended.

[116] Ibid., (2).

[117] Ibid., (3).

[118] Article 22(3) Protocol Relating to the Community Court.

and the Registered Trustees of Socio-Economic and Accountability Rights Project (SERAP) v. Federal Republic of Nigeria & Anor (ECW/CCJ/APP/12/07). To comply with the decision in SERAP, the Government said it has built more schools in the rural areas and distributed buses to schools. Some of the decisions are either undergoing administrative procedure for enforcement or awaiting some kind of governmental approval. The execution of the rest is stalled because of non-issuance of writ of execution.[119] The Republic of Ghana has two outstanding judgments against it that have not been executed, Senegal one, Mali one and the ECOWAS Commission two, to mention but a few. These examples reflect neither unfettered respect for the decisions nor intention to nurture the culture of execution within the Community.

Second, the act of limiting bindingness only to decisions that have financial implications does not appear helpful. There could be decisions which may not require payment of damages, compensation or restitution. It means that decisions within this class cannot be described as binding. It is not clear whether the limitation was designed or erroneous; what is clear is that a defendant against whom a decision that has no financial implication is given may elect not to comply with it because ECOWAS law did not expressly state that such decision is binding. This error or design made by the draftsmen does not encourage culture of execution of the Court's decisions within the Community.

Third, the Court's decision does not evoke that sense of awe commonly associated with judgments of courts in the Member States; hence, Member States (judgment debtors and defendants) are reluctant to comply. There are two causal reasons for the absence of awe: one, the decisions are not popular within the territories of the Member States and thereby do not provoke public culture and debate. Consequently, the opposition parties in any given Member State cannot wield them as political swords against the ruling government that has failed to comply with the judgment. Two, the judgments do not constitute part of the judicial laws of the Member States and therefore cannot be enforced, when there is no compliance, using existing institutional mechanisms and procedure, to realise the fruit of judgment.

Fourth, there could be constitutional and legislative hindrances that affect the enforcement of the decisions of the Community Court in the Member States since ECOWAS law and the Court's decisions do not have supranational effect. Where, for instance, a Member State or defendant fails to comply with a decision of the Court, can it be enforced in consonance with the judgment enforcement rules of the Member State? Generally, there could be laws in a Member State that may immune public property[120] from attachments associated with post-judgment orders and writs. But where the defendant or judgment debtor is not a public enterprise, any judgment of a national court can be enforced because it is a part of the judicial laws of the country-and where it is appropriate the property of the defendant may be

[119] Final Report on Enforcement of Decisions of Community Court of Justice 2014, pp. 5–9.

[120] Mme Aziblevi Yovo and 31 others v. Togo Telecom Society and Republic of Togo 2012.

attached. Community Court's decisions are not within this class; they are seen as foreign judgments. But classifying a decision as foreign judgment does not necessarily mean that it would be recognised and registered automatically in order to enforce it using the institutional mechanism and procedure existing in that State. The question is whether Community Court's decisions come within the class of enforceable judgment under the recognition and enforcement of foreign judgment laws of the Member State.

It is possible, for instance, for such laws to contain reciprocity requirement which the Community cannot satisfy or other features which disqualify the decisions given by the Community Court. These kinds of restrictive features are solved through legislative or statutory intervention that could create some legal bypass for the decisions of the Community Court. For example, the United Kingdom had to introduce legislation[121] and subsidiary legislation on enforcement in order to create such legal bypass for European Union law and the decisions of the Court of Justice of the European Union. Article 22(3) of the Protocol Relating to the Court provides that States should take measure to execute the decisions of the Court; it is expected that making or amending existing legislation (including constitution) in order to create such bypass is one of the measures anticipated by the draftsmen. However, there is no record that any Member State has taken that legislative initiative. And the absence of these legislative measures is affecting the execution of the Court's judgments within the jurisdictions of the Member States.

Fifth, the Member States are required under the law[122] to determine or appoint national authorities that will be responsible for receiving and processing the execution. However, the findings of the Committee constituted by the Community Court of Justice show that only three countries—Nigeria, Togo and Guinea—have complied with the requirement.[123] It may be inferred that the failure to determine the national authorities in all the Member States may have slowed down the growth of culture of execution within the Community.

References

Laws

African Charter on Human and People's Right 1981
African Charter on Human and People's Right (Ratification and Enforcement) Act Cap 49 LFN 2004
European Community Act 1972 (UK)
Moon Treaty of 1979

[121] European Community Court Acts 1972.

[122] Article 24(4) Protocol Relating to the Community Court as amended.

[123] Final Report 2014.

Protocol A/P1/7/91 Relating to the Community Court of Justice
Revised Treaty of the Economic Community of West African States 1993
Supplementary Protocol A/SP.1/1/05 Amending Protocol A/P1/7/91 Relating to the Community Court of Justice
Universal Declaration on Human Right 1948

Cases

Afolabi Olajide v Federal Republic of Nigeria (2004–2009) CCJELR, p. 1
Amouzou Henri & Ors v Republic of Cote d' Ivoire (2004–2009) CCJELR, p. 303
Alice Chukwudolue and Ors v The Republic of Senegal (2004–2009) CCJELR, pp. 151, 165
CDP v Burkina Faso ECW/CCJ/JUG/16/15 http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2015/Aff_CDP_c_l_Etat_du_Burkina.pdf
Defrene v Sabena, 43/75 8/4/1976 eu-lex.europa.eu/Lex Uri Serv/Lex Uri Servido ? uri=CELEX 61975 CJ0043:EN: PDF. Accessed 13 October 2013
Djot Bayi & 14 Ors v Federal Republic of Nigeria & 4 Ors (2004–2009) CCJELR, pp. 245,263 265
Ebrimah Manneh v The Republic of Gambia (2004–2009) CCJELR, p. 184
Falana v The President of Benin & 14 Ors [2010] CCJLR [PT.3], p. 114
Femi Falana & anor. v The Republic of Benin & 2 others ECW/CCJ/JUD/02/12, 24/1/2012. www.courtecowas.org/2012. Accessed 21 March 2014
Hammani Tidjani v Federal Republic of Nigeria & 4 Ors (2004–2009) CCJELR p 77
Linas International v Ambassador of Mali & 2 Ors (2004–2009) CCJELR, p. 280
Maimuna Abdulmuminu v Federal Republic of Nigeria & 2 Ors: ECW/CCJ/APP/15/13
Mme Aziblevi Yovo and 31 others v. Togo Telecom Society and Republic of Togo ECW/CCJ/JUG/04/12. http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/Mme_Aziablevi_Yovo_et_31_autres_v_Societe_Togo_Telecom_et_Etat_Togolais.pdf. Accessed 14 July 2015
Musa Saidykhan v Republic of Gambia (Unreported) Suit No ECW/CCJ/JUD/08/10 16/12/2010
National Coordination of Departmental Delegates of the Cocoa Coffee Sector (CNDD) v Republic of Cote d' Ivoire (2004–2009) CCJELR, p. 326
National Patriotic Party v Commissioner of Police [1993] N.L.P.R 73
Prof. Essien v Republic of Gambia & Anor. (2004–2009) CCJELR, p. 128
Registered Trustees of the Socio- Economic Rights & Accountability Project v Federal Republic of Nigeria & Anor (Unreported) Suit No ECW/CCJ/APP/0808. www.righttoeducation.org/node/719. Accessed 2 May 2013
Sa Adatu Umar v Federal Republic of Nigeria ECW/CCJ/JUD/17/12. www.courtecowas.org/2012.pdf. Accessed 5 May 2013
Serap v Federal Republic of Nigeria Suit No ECW/CCJ/JUD/18/12. www.courtecowas.org/2012.pdf. Accessed 6 May 2013
Starcrest Investment Limited v The President of ECOWAS Commission & Ors [2010] CCLR [PT 3], p. 112
Ukor v Laleye & Anor. (2004–2009) CCJELR, p. 147

Publications

Brownlie I (2003) Principles of public international law, 6th edn. Oxford University Press, Oxford
Curzon L (1995) Jurisprudence. Cavendish Publishing Ltd, London
Doherty M (2004) Jurisprudence: the philosophy of law, 3rd edn. Old Bailey Press, London
Final Report on the Enforcement of Community Court Justice as at 16th October 2014 (ECOWAS)

Garner B (ed) (2004) Black Law Dictionary, 8th edn. Thomson West, Minnesota
Law J, Martin E (eds) (2009) Oxford Dictionary of Law, 7th edn. Oxford University Press, Oxford
Murphy J (ed) (2007) Street on torts, 12th edn. Oxford University Press, Oxford
The News (2015) Burkina Faso: ECOWAS Court lifts ban on Compaore's supporters via http://thenewsnigeria.com.ng/2015/07/14/burkina-faso-ecowas-court-lifts-ban-on-compaores-supporters/

Chapter 6
ECOWAS Law and National Laws

Abstract This chapter explores the concept of supranationality and how it interplays with national laws within an economic integration setting, using the European Union experience as a case study. It then situates supranationality, direct applicability and direct effect within the ECOWAS legal regime. Finally, the chapter posits that these principles do not apply within the Community because of constitutional strictures. It contends that if the Member States intend to make ECOWAS law supranational within their jurisdictions, they must take legislative and judicial steps to receive ECOWAS law as part of their body of laws.

6.1 Introduction

Although ECOWAS law might have been modelled on European Union law, yet both do not enjoy the same legal force within their respective communities. While it is appropriate to describe European Union law as part of *corpus juris* or body of laws of England, for example, it would amount to a misnomer to describe ECOWAS law as part of Nigerian or Senegalese legal system. The difference between ECOWAS law and European law leans on the effect of supranationality within these disparate integration arrangements. Because the former is not supranational, it cannot traverse the jurisdictions of the Member States; since the latter is, it permeates the membrane of sovereignty on to the body of laws of all the countries that constitute the European Union.

What then is being supranational, and how can one understand supranationalism? When used in an economic integration context, it depicts "a particular type of international organisation empowered to exercise, directly, some of the functions otherwise reserved for a state".[1] The distinct elements that delineate such organisation from other international organisations have been the pooling of sovereignty in favour of the quasi-state organisation and the ensuing limitation to the sovereignty of every member of the organisation.[2] The European Union cast a perfect

[1] Heifer and Slaughter (1997), p. 287.

[2] Ibid.

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_6

image of pooling and limiting sovereignty in an organisation–members relationship. The laws and institutions of the organisation, in such hierarchical formation, take pre-eminence over the existing laws and institutions of its Member States.

Leal-Arcas,[3] in explaining supranationalism from EU perspective, mirrors Weiler's segmentation of supranationalism along normative and decisional lines. Normative supranationalism relates to the link and the hierarchy existing between EU policies and legal measures on the one hand and the laws and policies of the countries that make up the Union on the other hand. Leal-Arcas appears to understand Weiler as saying that in normative supranationalism, the policies and measures should be interrelated with those of the Member States, while decisional supranationalism borders on the institutional structure and decision-making processes through which the Union, first, initiates, debates and formulates measures and policies and, second, how it then promulgates and executes them.[4] Leal Arcas opines that the two-part segmentation of supranationalism encapsulates the two ways or approaches of studying the concept: normative supranationalism could relate to judicial approach, while decisional supranationalism could cover political approach.[5]

Leal-Arcas has also explained, relying on Professor Ipsen's views, the theory of special-purpose associations (zweckverbände) of functional integration.[6] The proponents of this theory do not concede that law is the centre of the concept nor that economic and legal order should be subsumed under law. However, they highlight on the identification of technical (administrative) task which can and ought to be assigned to the supranational bureaucracy. It appears that the theory aims at showing that European Community (and its supranational governance) is based on commitment to specific functions for the purpose of realising technical goals—which to them is apolitical. Also, the proponents view the European integration as neither a constitutionalist-federalist arrangement nor as a mere organisation in international law; rather, they deconstruct European Community law as one in between federal systems and international organisation.[7] Furthermore, Leal-Arcas also sampled the theory of Wouter Will, which inclines towards partial integration. Will is of the view that single market should act as counterpoint between desire for government intervention and desire for integration (thereby creating a balance) and not counterpoint between technical and political task as propounded by Professor Ipsen. The desire for integration feeds the restraint on interfering with activities of people within Europe, while desire for government is targeted at national regulation rather than Community regulation[8]

Asante, an erudite statesman, in his Mission Report on ECOWAS expostulates on different integration approaches; conceding the work is not wound solely around

[3] Leal-Arcas (2007), p. 97.
[4] Leal-Arcas (2007), p. 98.
[5] Ibid.
[6] Ibid., p. 109.
[7] Ibid., 110.
[8] Ibid., 111.

supranationalism; it still enriches, by consequent inference, one's understanding of the concept. First, the statesman considers market integration or custom union approach as one which aims at creating a larger market. He suggests that this approach, popularised by European Economic Community, recognises the importance of joint action among developing countries, which must be executed within acceptable formulas like free trade areas, common markets and custom union. These formulas would thrive on abolition of discrimination and creation of centralised decision-making structures.[9] Inferentially, the creation of such centralised decision-making structures would inevitably create tension between national legal order and the centralised decision-making institutions. And to realise the set objectives, there must be some transference of restrictive power from the national legal order (sovereignty) to the centralised unit which would certainly set up a supranational governance system. Second, the statesman, in his intellectual reconnaissance, explores functional integration approach, which entails selective co-operation, among nations, at functional levels with a view to carrying out joint programmes and projects. He clarifies that the different states involved in this integration arrangement, to a large extent, retain the decision-making power; therefore, there is little impingement on sovereignty. Deductively, such integration approach would not leave the centralised unit with supranational powers because power still concentrates at the national levels.

It is trite that the ECOWAS integration approach is akin to the market integration or the custom union system adopted by the European Union. Resultantly, the success of integration, using this route, would depend on the concentration of power at the central institutions which are the decision-making units. It is logical to conclude, reasoning from the nature of the market integration approach, that where the constituents (Member States) have not sliced out some parts of their powers (sovereignty) in favour of the central structures—thereby creating supranational governance system—it will be tough for the decisions (judicial or political) of the central structures to sink into the jurisdictions of the former. In that case, the market integration approach may not have helped in achieving the set goals of the Community.

Before examining, the norms of the central structures or decision-making bodies (ECOWAS institutions) and how they rub off on the national legal systems or the interplay between the norms made at the central and the measures of the constituents, it will be appropriate to consider the European Union—another governance structure modeled on the market integration approach—and how its norms have impacted on the legal systems of the constituents. This consideration is important because it will help de-mystify the elusive supranationality in West Africa and proffer solutions on how ECOWAS can improve on the impact that the Community texts can have on national legal order.

[9] Asante (1991), p. 7.

6.2 European Union Experience

The original treaties[10] of the European Community did not state expressly that individuals can place reliance on the provisions of the treaties, for their benefits, in their national courts. However, as contended by Heifer and Slaughter,[11] the European tribunals have been the partial architect of their success. And among these success stories is the judicial insistence that individuals should be allowed to rely on such provisions that have vested rights in them before their municipal courts. To appreciate this judicial adventure, and how it has reshaped both Community and national jurisprudence in Europe, it will be pedagogically apt to explain, first, the principles of direct applicability—which is designed to dislodge the root of sovereignty—before considering direct effect and other proximate principles which the successful European Courts have developed over the years.

6.2.1 Direct Applicability

Under the European Union law, when a text, made by the decision-making institutions of Union, is said to be directly applicable, it means that it has become part of the law of the Member States. Prior to the amendment of the Treaty of Rome, regulation was directly applicable within the Member States.[12] The introduction of the TFEU and TEU did not change that legal position. Furthermore, a regulation, in some circumstance may require the Member States[13] to take further legislative steps; that actually will not detract from its enforceability. However, direct applicability differs greatly from direct effect; while direct applicability nails the Community instrument or act to the body of laws of the Member States, direct effect determines whether an individual can take benefit personally from the provisions of the text or act, in question, before a local or municipal court. Obviously, where a regulation, which is directly applicable, does not satisfy the direct effect requirements—which include "being sufficiently clear and precise"[14]—the court will not let the individual take benefit personally from the provisions. In summary, direct applicability, as a principle, makes a text of the Union part of the body of laws of Member States.

[10] European Coal and Steel Community Treaty 1951; European Atomic Energy Community Treaty 1957; and European Community Treaty 1957.

[11] Heifer and Slaughter (1997), p. 277.

[12] See old Art. 249 EC (Treaty on the Functioning of European Union (TFEU) and Treaty on European Union (TEU) are the current treaties).

[13] Harris and Horspool (2008), see also Italy v Commission 1972, p. 116.

[14] Azienda Agricola Monte Arcosu V Regione Autonoma della Sardegna 2001, p I-132.

6.2.2 *Direct Effect*

Direct effect means that individuals can rely on legal provisions found in the acts of the Union, which may have created rights and obligation before their national courts, provided that the said provisions meet the specified conditions. What then are these conditions? They are:

(1) that the provision must be clear and precise,
(2) that it must be unconditional,
(3) that its operation would not require a legislative implementing measure on the part of the state.[15]

A *locus classicus* on this issue is Van Gend en Loos v Nederlandse Administrative der Belastingen.[16] It was the Court's opinion, in that case, that even where an article in a treaty had not been legislated or domesticated by any measure in the Member State, an individual could directly rely on its provision[17] in his national court. It is important to appreciate the obvious difficulty which the Van Gend decision might have expunged. In international law, a sovereign state may enter into bilateral relations with another state. The provisions of such treaty may not be appropriated for individual use before a national court until some form of domestication or legislative action had taken place. Such legislative actions usually, 'bring home' the treaty. When the Court in Van Gend reached the decision that individuals could appropriate the provisions of the treaty for their benefit before municipal courts, it actually attacked international law norms on the doctrine of sovereignty and created a new legal order within the European Union.

Furthermore, it is not only some parts of the treaties of the Union that are directly effective. A host of other acts also have been considered directly effective. For instance, regulations have been considered to be directly effective,[18] but the direct effect of a regulation would depend on whether it satisfies the stipulated conditions outlined above. Also, a provision in international agreement entered into by the Union may have direct effect.[19] Reference to international agreement relates to bilateral or multilateral agreements which the European Union enters into with other entities or intergovernmental organisations. But such agreements must meet the conditions set out for direct effect before courts would apply them. Another act which has direct effect is decision. Decision, as a legislative act, actually binds those to whom it is addressed. And where it meets the conditions set out for direct effect, the court will apply it to the benefit of an individual or to whom it was addressed.[20]

---

[15] *Ibid.,* p. 98.
[16] *Supra.*
[17] Harris and Horspool (2008), p. 97.
[18] Azienda Agncola *supra.*
[19] Hauptzollamt Mainz v Kupferberg 1982, pp. 3665, 3666.
[20] Grad v Finanzamt Traunstein 1970, p. 837.

Directives, on their part, are acts of the institutions of the European Union which the Member State ought to transpose in their national laws. Considering the legislative nature of a directive, how then can an individual rely on the provisions of an unimplemented directive in a court? That riddle was solved in Van Duyn v Home Office,[21] where the European Court held that if a directive has not been transposed or incorporated in a national law, an individual may rely on any of its provisions or clauses. The rationale seems to be that a state, having breached her express or implied promise, should not rely on the fault to deny citizens of their rights. In addition, it must be noted that direct effect of directives are vertical, and not horizontal, in nature. That means an affected citizen may rely on a provision of a directive, before a national court, to seek relief against the state or government. The citizen cannot rely on the same provision in an unimplemented directive to seek relief against another citizen.[22] However, for one to rely upon such unimplemented directive against the state, one must wait until the time limit given for its implementation has lapsed.[23]

6.2.3 Indirect Effect

It has been stated that an individual may not be permitted to rely on the provision of an unimplemented directive to seek relief against an individual. However, this stand had introduced some form of hardship in various situations. To cure this anomaly, municipal courts are obliged to interpret their national laws in such a manner that would achieve the same purpose which the unimplemented directive would have achieved had it been transposed.[24] This doctrine has been termed "Indirect Effect". It can also apply in a situation where an individual cannot rely on an unimplemented directive because the instrument did not qualify for direct effect. Indirect effect is applied not only to national legislation which was made to implement or transpose a directive but also to any piece of legislation found in the statute books of the state that can be interpreted to achieve the purpose of the directives which the state has not implemented.[25] In plain language, what this doctrine does is to ask courts in Member States to interpret existing national laws, so far as it is possible, in such a manner capable of achieving the purpose of the directive, which the state has not implemented. This is because the Court of Justice of the European Union considers national courts as part of the State.

However, this doctrine has the following limitations:

---

[21] 1974, p. 1349.

[22] Marshall v Southamptom & South.West Hampshire Area Health Authority (Teaching) 1986, p. 750.

[23] Pubblico Minister v Ratti 1979, p. 1645.

[24] Colson and Kamann v Land Nordrhein—Westfalen 1984.

[25] Marleasing SA v La Commercial International de Alimentacion SA 1990, p I-4161.

(1) Since it requires interpreting national law in the light and purpose of the unimplemented directives, it means that there must be a national law on the same subject. Where there is no national law existing and touching on the same subject, the doctrine wouldn't be applied.
(2) It shouldn't be applied where it would determine or increase criminal liability of the persons involved.[26]
(3) It is also meant to be subject to general principles of law.[27]

6.2.4 Supremacy of the European Union Law

It would certainly serve an introductory purpose to begin this segment with the definition of the word "supremacy". It means "the state of being supreme; supreme position or power". The word supreme itself means "highest; greatest; most excellent, highest point; highest authority".[28] The corollary would be: to say that European Union law has supremacy over national laws means that European Union law is the highest authority within that geographical and political landscape. This supremacy resonates in most of the landmark cases which the European Court of Justice (as it then was) has heard over the years. A brief outline of some of these cases would help deepen one's knowledge in this regard. For example, in Costa v Enel,[29] the European Court of Justice held that by entering into the European Community Treaty the members of the Community have limited their sovereign rights; it further stated that national laws would not override Community laws. In recent times, the Court of Justice of the European Union has espoused the supremacy of Community law over national laws in the case of Queen v Secretary of State for Transport ex parte Factortame Limited and Others.[30] The judgment in effect required national courts to disapply an act made by the English Parliament. Furthermore, in spite of the initial hesitancy of the German judiciary in regard to the status of its constitutional provisions on human right, the Community Court still held that European law is supreme over German constitutional provisions.[31] In all these cases, the Member States affected by the decisions respected or implemented them within their territories. In Factortame[32] case, the House of Lord (now Supreme Court) responded to the pronouncement of supremacy by granting an injunction against the application of domestic legislation—a ruling so foreign to English legal history. Therefore, it is no more in doubt that the laws of the Union are

[26] Silvio Berlusconi and others 2005, Pi-3656.
[27] Kolpinghuis 1987, p. 3986.
[28] Brookes (2006), p. 1536.
[29] 1964, p. 593.
[30] 1990, PI-2474.
[31] Internationale Handelsgesellschaft MbH v Einfuh-und Vorratsstelle Fur Getreide Und Futtermittel 1970, pp. 1133–1134.
[32] *Supra*.

not only part of the national legal order of the Member States but also supreme over all their legislation.

The European institutions, especially the Court, may not have been solely responsible for the ease with which European laws sank into the pool of laws of Member States or the superiority status these acts enjoy within the internal jurisdiction of each Member State. Although Heifer and Slaughter were right to state that the European tribunals through a combination of perspicacity, foresight and tenacity devised successful strategies to make their judgments as effective as national court's ruling,[33] yet there was more to it. The Member States had to prise open their sovereignty through legislative and judicial means, without which it would have been difficult for the European Union laws and the Court's decisions to find their way into the legal systems of the Member States. How then did they open the floodgate to Community law? Some notable examples of acts of legislative and judicial acceptance will be interrogated below.

6.2.5 Member States' Reception of European Union Law

Unarguably, European Union law is a product of treaties. Generally, in international law, treaties may not automatically become part of the domestic law of the state party that is signatory to it. The ease or difficulty in making treaties part of a country's legal system may depend on the doctrine that applies when receiving international agreements and treaties. A state that ascribes to the doctrine of monism might permit the application of international law within its territory partly or wholly, while proponents of dualism uphold the major difference between international and municipal laws; therefore, international law should regulate the relations between or among states, while municipal law should be applied within a state.[34] In that vein, before international law should be applied to the relations of citizens, the parliament or the legislature ought to receive or domesticate the treaty.

Keeping these doctrines in mind, it would be pertinent to explain how the Member States of the Union responded to the primacy of the *nouveau* Community law. The United Kingdom ascribes to dualist views; therefore, no provision in a treaty or the treaty, itself, would become part of its domestic or municipal law until a floodgate has been opened through a parliamentary act. Notwithstanding the 'supremacy thesis' of the Court of Justice of the European Union, an Act[35] was passed to admit the European Union laws and decisions of the Court of Justice of the European Union into the United Kingdom. The rationale behind the use of a separate legislation to admit European Union law has been attributed to the absence of a written constitution.[36] If the United Kingdom had a single instrument termed

[33] Heifer and Slaughter (1997), p. 276.

[34] Brownlie (2003), p. 32.

[35] European Communities Acts 1972, see also European Communities (Amendment) Acts.

[36] Hartley (2007), pp. 256, 257.

"constitution", it might have amended an article or section to admit the provisions of the Community law. The vent through which France admits international treaties has been Article 55 of the French Constitution. The law provides for superiority of international treaties over national law. The inference to be made from this provision is that France applies the monism doctrine. By this receptive mode, ordinarily France is not expected to pass an act, like the United Kingdom, or amend its Constitution. As properly pointed out by a Community law expert,[37] one might think that it would have been easier for France to admit the supremacy of European law over national law—bearing in mind that it is a proponent of the doctrine of monism. Surprisingly, the Administrative Court[38] showed strong apathy towards the Community laws.[39] It was only in the case of Nicolo[40] that it indirectly showed reverence to the European law. Subsequently, France amended its Constitution to accommodate,[41] without further controversy, the European Union law.

In Ireland, the Constitution was amended (evidenced in the third Amendment to the Constitution) to create a constitutional path through which the European acts ply within her territory. Germany has its own peculiarity, especially in regard to issues touching on human right. However, Article 24(1) of the German Basic Law reads: "The federation may by a law transfer sovereign power to international organisation", and Article 25 provides: "The general rules of international law shall be an integral part of federal law". It can be seen that Article 24 was the basis of admission of Community law in Germany.[42] In international Handels gesellschaft mBH[43] against the backdrop of the decision of the German Constitutional Court that European Union laws shall be subject to fundamental human rights provisions found in the German Constitution, the European Court held that the validity and effects of Community measures need not be weighed in the balance of national rules. Finally, in Wunche Handels gesellschaft,[44] after acknowledging the development of human right protection in the European Union, the Court held that it wouldn't be necessary any longer to weigh the "Community law protection of human right" in the balance of "German human right principles". From this European experience, it can be seen that the judiciary and the legislatures of these countries played constitutional and legal roles in receiving the "supremacy thesis" of the European Union institutions.

[37] Hartley (2007), p. 248.

[38] Conseil d'Etat, this is the court that has jurisdiction to hear cases that arise from governmental administrative actions.

[39] Semoules case 1970.

[40] 1989.

[41] Article 188-1,-2 French Constitution 1958.

[42] See also Article 23 of the Basic law, specifically providing for transfer of power to European Union.

[43] 1970, p. 1134.

[44] 1986.

6.2.6 *ECOWAS Law and Supranationality*

Semantically, supranationality means (1) overriding national sovereignty or (2) in or belonging to more than one nation.[45] However, when the word 'supranational' is used in regard to an economic grouping pursuing an integration agenda, it may mean "a particular type of international organisation empowered to exercise directly some of the functions otherwise reserved for a state".[46] Supranationality is often used interchangeably with supremacy. But, from the above semantic rendition, a thing can be supranational without been supreme—if it is just a part of the whole. Nonetheless, a thing can be supranational and at the same time supreme within the colony of subjects or objects that it is. Where supranationality relates to the former, and it is linked to an economic grouping like ECOWAS, it will literally imply that ECOWAS texts can crack the beams of sovereignty and apply supremely within the jurisdictions of the Member States.

However, the term in use within the ECOWAS legal order has been "supranationality"[47] rather than supremacy, while the terms "supremacy" and "primacy" are randomly employed in Europe. Where the term "supremacy" is used, it clarifies the subject and sets a tone of definiteness as to what the community or grouping intends to achieve. But when ECOWAS, as an economic community, states that it is supranational, does it mean supranational from the perspective of "supremacy or primacy" in relation to national legal order or that its institutional acts and decisions make up parts of the body of laws of its members? The difficulty in answering this question is that ECOWAS texts have neither achieved the supremacy status in relation to national laws nor taken a place among the laws of the Member States.

But searching through the cases for judicial explanation of what the Community intends by supranationality, one discovers an indirect and faint clue given in Ugokwe v Federal Republic of Nigeria & Anor,[48] to wit: "...the distinctive feature of the community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law. And if the obligation to implement the decision of the Community Court of Justice lies with the national courts of Member States, the kind of relationship existing between the Community Court and these national courts of Member States are not of vertical nature... but demands an integrated community legal order." It is accurate that the remark was made in relation to the "doctrine of monism", yet it creates a tiny lead as to what the Court thinks about the subject of supranationality in ECOWAS.

Nonetheless, what kind of "monism" does the Court contemplate when it said "judicial monism"? Is it the type promoted by Hersch Lauterpacht or the kind patronised by Kelsen?[49] In the eyes of Lauterpacht, monism intends the supremacy

[45] Brookes (2006), p. 1536.

[46] Heifer and Slaughter (1997), p. 287.

[47] See ECOWAS, Review of the ECOWAS Treaty, para 57–58. 1992 cited in Falana (2010), p. 9.

[48] 2005, p. 51.

[49] See Brownlie (2003), pp. 32–33.

of international law within the municipal environment, while Kelsen views monism differently and has never supported the concept of primacy over national laws. Without blowing the remark out of proportion, what the Court appears to be saying is that Community Court decisions, on any issue touching on Community law, should be accepted within the Member States. It may be likely that the Court has pitched its tent next to Kelsen's as to what it meant by monism.

However, when the remarks made by the Court in Ugokwe case is married with the statement made in the final report[50]—which shows intention to have supranational regime—by Committee of Eminent Persons, would the result flowing from the marriage justify or support supranationality of ECOWAS law within the Member State? There is a feeling that supranationality should be extended to the major ECOWAS instruments and judicial decisions. This feeling might have taken some kind of "form" in the *out-of-court* discussions,[51] the attitudes of the Court[52] and the modification of the acts of the institutions. But when the Court had privilege to commentate on the point in Ugokwe case, it limited the acceptability of ECOWAS laws as part of national law to "judicial decisions" of the Community Court. It is interesting to note that the Court never closed the issue by saying that this "Community legal order sets forth *only* judicial monism".[53] But its failure to use the recent decision in Pinheiro[54] to pontificate on the effect of Community text on national legal order leaves no one with any hope. In summary, there is nothing in either Pinheiro and Ugokwe or the texts of the Community that can justify the supranationality of ECOWAS law within the Member States—although they may show institutional intention to be supranational. Even if there were elements of supranationality festered on the texts, they would have little or no impact for lack of constitutional or judicial acceptance by the Member States.

6.2.7 *ECOWAS Law and Direct Applicability*

It is reiterated that when an instrument or legislative act of a community is said to be directly applicable, it means that it can apply directly in the legal systems of the member states without the need to incorporate it in national legislation.[55] However, are there texts of ECOWAS which have force of law within the legal systems of the Member State? Apparently, the idea of direct applicability exists within the ECOWAS legal regime. At least, Article 9(4) of Treaty[56] provides that decision

[50] ECOWAS, Review of the ECOWAS Treaty, para 57–58. 1992 cited in Falana (2010), p. 9.

[51] International Conference of the Community Court of Justice held in Accra, Ghana, 16–18 October 2012.

[52] Ugokwe v FRN *Supra*.

[53] *Ibid*.

[54] Pinheiro v Republic of Ghana 2012.

[55] Harris and Horspool (2008), p. 71.

[56] Revised Treaty of 1993.

of the Authority shall be binding on the Member States and institutions of the Community. This progressive language led some experts[57] to conclude that "acts and decisions are applicable directly to Member States". Respectfully, that may not be absolutely correct. It is conceded that the Community wants some of its texts to apply within the Member States without the need for parliamentary or legislative action, but there are impediments capable of limiting their application within the Member States. Realistically, such texts cannot be directly applicable in all jurisdictions because of the restrictive effect of sovereignty. This legal restrictions play out in the kind of language used in the constitutions of some of the Member States. Where, for instance, a country (dualist) includes in its constitution that a treaty shall not be part of its municipal law until the legislature enacts an act for that purpose, can such constitutional barrier be broken by another treaty in which that state is a signatory irrespective of whether that other treaty is termed "act or supplementary act"?[58] From legal history, such barriers to applicability of treaties within the territory of a state may be broken by judicial decisions or parliamentary acts of the relevant state. Since the barrier was introduced from within, then it must be removed from within too.

Borrowing a leaf from Europe, the United Kingdom is a country that subscribes to the dualist doctrine. In spite of the "supremacy thesis" of the Court of Justice of the European Union and the specific provision in the Treaty, which states that regulation shall be directly applicable, the United Kingdom still appreciated the barrier created by parliamentary sovereignty. In order to dislodge it, the Parliament opened a door to the European Union jurisprudence through the enactment of the European Community Act of 1972. Furthermore, France is a monist state with a Constitution that admits treaty into its body of laws, yet the confirmation of the acceptability of European Union law, as part of the French legal system, was done through judicial decisions[59] and further constitutional amendment. Germany, too, had constitutional provisions through which the European Union law could be admitted, yet it waited until the mid-eighties before it confirmed, through a judicial decision, that the European Union has grown its human right regime to the equivalent of human right provisions found in German Constitution—therefore, they should apply in Germany.

Thus, it is pertinent that the Member States of ECOWAS take some legislative and judicial steps in order to make supplementary acts or decisions directly applicable within their jurisdictions. It is impracticable to break the walls of sovereignty from the Community level by merely providing in a text that decisions shall be binding on Member States and the institutions. Since the relationship between the Community and its members is contractual, consequently there must be a corresponding action from the Member States before the texts of the

[57] Falana (2010), p. 11.

[58] See Section 12 Nigerian Constitution 1999.

[59] Vabre and Weigel 1975, p. 336, Nicolo's *case* supra see generally Harris and Horspool (2008), p. 112.

Community can be directly applicable. In essence, the Member States must receive those Community laws first.

6.2.8 *ECOWAS Law and Direct Effect*

While it is commonplace to find the term '"supranationality" in an ECOWAS narratives, Community law terms like "direct applicability" and "direct effect" are rarely used. Direct effect means that where certain conditions are fulfilled and a community instrument has created rights, an individual may rely on such rights before a national court. Painting a scenario might enhance the explanation. If the Authority makes a decision against a tourism promotion company operating in state X to the effect that the company should cease to present the "living style and condition" of an ancient coastal community to foreign tourists as "object of tourism", can any person from that community, based only on such ECOWAS decision, bring an action in the national court, against that company, for failing to respect the decision? If an individual can, then it means that the decision is directly effective. But where the court seises jurisdiction, in such a case, because the applicant combined both a constitutional provision and the provisions of the decision of the Authority, then it can't be said, in a hurry, that such a decision is directly effective. For an act of a community to be directly effective, that act, alone, should be capable of sustaining the application or matter in the national court of the litigant seeking its application.

There is no evidence that any ECOWAS citizen has approached any national court solely on the provisions of an ECOWAS text. The reason for the dearth of cases on issues arising from Community law within the Member States is obvious: ECOWAS law does not constitute part of their legal systems because the Community texts are neither incorporated in their legislation nor supranational in character. In Pinheiro,[60] the Community Court surprisingly held that national courts are Community courts and have competence to apply Community law that forms part of the internal order. With respect, ECOWAS texts do not form part of the national laws of the Member States. The common law countries have constitutional barriers[61] that limit the application of international agreements and treaties within their countries, while the civil law countries can only apply treaties where certain reciprocity conditions—that other parties to the treaty are also applying them—have been fulfilled. For a common law country to apply ECOWAS texts as part of its internal legal order, there must be a constitutional reception. And for the civil law countries to apply them, the reciprocity conditions must be fulfilled or construed, by a constitutional court, to have been fulfilled.

[60] Pinheiro v Republic Ghana 2012.

[61] See, for instance, section 12 Constitution of Republic of Nigeria 1999 and Article 75(2) Constitution of the Republic of Ghana 1992.

That isolated case[62] in Ghana, a common law country, where a court was willing to apply a regional document or text on human right even though it has not been incorporated or domesticated should not be wielded as precedent. The reason is that human right, *per se*, has acquired a unique status, akin to customary international law, within the international legal order, so much so that courts in civilised countries are obliged[63] to disapply national legislation that is in contradistinction to international or regional human right regime. Expectedly, courts in countries with growing culture of democracy and human right protection, like Ghana, will certainly catch the trend. And, perhaps, the same or equivalent right may also be found in the Constitution of Ghana. Therefore, the court, based on these fortifying grounds, will find some kind of justification for forming the opinion that the African Charter on Human and Peoples' Rights can be relied on in the absence of domestication or incorporation. That same court may not attempt to form such opinion, without attracting judicial criticism, if the issues were to arise from sheer Community rights.

In summary, there is no report on the application of ECOWAS text in a national court of any of the Member States. And by extension, there is no justification to state that ECOWAS texts are directly effective in the jurisdictions of the Member States. Direct effect ordinarily stems from supranationality. Since the texts are not supranational, it will be absurd to say that they are directly effective within the jurisdictions of the countries that make up ECOWAS. For this simple reason, it is not common for one to find other major Community law terms in ECOWAS narratives, except by experts[64] who suggest the existence of some of the principles, since the Community is still at the stage of determining how to make its law, first, supranational.

6.2.9 ECOWAS Law and Constitutional Barriers

A constitution would either provide for admittance or reception of treaties as part of the laws of the receiving country or otherwise. In some rare situation, a constitution may appear quiet on whether the country in question is either a monist or a dualist state; a perfect example of such constitution with opaque outlook on reception is the Belgian Constitution.[65] The countries that make up ECOWAS are no different. Their constitutions are patterned after the European countries that colonised them. Constitutions of the French-speaking countries[66] in West Africa are modelled on the French Constitution; they are all monist in their common approach to reception

[62] New Patriotic Party v Inspector General of Police 1993, p. 82.

[63] See sections 1–19 Human Right Act 1998.

[64] Nwuche (2009), p. 12.

[65] Articles 168–169.

[66] See Articles 98 the Constitutions of Senegal 2001, Article 140 Constitution of Togo 2002 Article 147 Constitution of the Republic of Benin 1990.

of international agreements or treaties into their territories. The common feature in these constitutions is that international agreements are applicable and superior to local laws provided that the other parties to the agreements reciprocate. For example, (the translated version of) Article 98 of the Constitution of Senegal provides: "Treaties or agreements duly ratified shall, upon their publication, have an authority superior to that of the laws, subject, for each treaty and agreement, to its application by the other party." Two primary requirements can be deduced from this constitutional provision. One, for the international agreement to be applied, it must have been duly ratified by the legislature. Two, the other party to the agreement must be applying the agreement (reciprocity). Where these conditions or requirements are met, the international agreement will not only apply in the French-speaking countries of West Africa but will also be superior to their national laws.

Invariably, it means that ECOWAS instruments will not be applied within the Francophone countries unless the two conditions or requirements are satisfied. The first condition, on ratification, appears a lot easier to fulfil; the second condition, on reciprocity, has been the kernel of the challenge. The Anglophone countries that make up the Community, together with the Lusophone states of Cape Verde and Guinea-Bissau, do not apply ECOWAS instruments within their jurisdictions; therefore, the Francophone countries do not have collective constitutional basis to apply them too. One other issue is whether this condition will be deemed fulfilled if at least one Member State is found to have been applying ECOWAS law within its territory. It appears that the word "party" as used in the constitutions of the Francophone countries covers "other parties" and not just one of the parties to the agreement. However, the constitutional or apex courts in these countries will inevitably be invoked to interpret this provision when an issue arises as to whether the condition has been fulfilled by virtue of the application of a Community text by a Member State. In the vent that such issue arises, the courts may hold—if they intend to promote the ideals of ECOWAS—that it is fulfilled provided that only the citizens of that other country that applies the instruments shall be accorded the benefits of the applied instruments on reciprocal grounds.

With regard to the Anglophone countries[67] in West Africa, their constitutions are fashioned after the constitutions of other common law countries. Within this legal family, international treaties or agreements do not constitute internal legal order until specified legislative steps are taken by the legislatures or parliaments. Often these steps include passing an act in order to bring home the international agreement or treaty. For example, section 12 of the Nigerian Constitution provides: "No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly." The other countries within this legal family in West Africa have similar

[67] Section 12 Constitution of Federal Republic of Nigeria 1999; Article 75 Constitution of the Republic of Ghana 1992.

restrictive provisions in their constitutions.[68] Consequently, it means that all treaties or international agreements shall not constitute the laws of these countries save to the extent their parliaments or legislatures have enacted laws to accommodate them within their jurisdictions. It also means that ECOWAS instruments, by virtue of their status as international agreements or treaties, shall not be applied in these countries until legislative steps are taken. And there has been no report that any of these Anglophile countries has passed an act or resolution for the purpose of creating a legislative space for all of the laws of ECOWAS.

The Lusophone countries of Cape Verde and Guinea-Bissau have a different constitutional structure. They relate to or treat international agreements or treaties from the monist perspective. Resultantly, international agreements are part of their national laws. For the purpose of explanation, examination of the provisions of the Cape Verdean Constitution will suffice. Generally, international agreements and treaties that are duly ratified and published will constitute internal legal order of Cape Verde provided they are in force internationally.[69] Specifically, any legislative act emanating from a supranational organ of which Cape Verde is member enters directly into its internal legal order.[70] However, there is a caveat—the constitutive instruments of that supranational organ must provide for its laws to apply directly within the jurisdictions of its members.[71] Deductively, two basic requirements must be satisfied: first, the organ must be supranational; second, the constitutive instruments must provide that the legal acts shall constitute the legal order of the member states. Applying these to the case in hand, is ECOWAS a supranational body yet? It seems fair to take it as an organ repurposed to achieve supranational governance by virtue of the 1993 revision of its principal Treaty. The Preamble captures the intention to pool sovereignty together, albeit gradually; what is not clear is at what point one will say that the Member States have transferred part of their sovereign powers to the Community institutions. Objectively, it is more of a legal intention or political pursuit than an achievement. However, the organ has been posturing as one with supranational structures and has been remodelling its acts in that direction. Because of its stance on supranationality, the objective of creating internal or common market, the recent rearrangement of its acts and faint expression of intention to have supranational laws in Ugokwe and Pinheiro, ECOWAS will be considered as an organ in pursuit of supranationality. The major defect is that the Member States have not received ECOWAS laws as supranational instruments within their territories.

The other point is whether the constitutive laws of ECOWAS provide that the legal acts should apply directly within the Member States. It seems that "decision" and supplementary act"—deriving their powers from the Revised Treaty, which is a

[68] Article 75(2) of the 1992 Constitution of Ghana; article 40(4)ii Constitution of Sierra Leone; section 57 Constitution of Liberia; section 79(1) c Constitution of Gambia 1997.

[69] Article 11(2) Cape Verde Constitution 1992.

[70] Ibid., (3).

[71] Ibid.

constitutive law—appear to be crafted in that form among all other instruments. Consequently, Cape Verde may decide to apply these two sets of acts within its country. However, it is likely that the sense of judicial apathy exhibited by other members of the Community towards ECOWAS texts may have discouraged Cape Verde from applying these two sets of acts, even though there appears to be constitutional basis for their application.

In conclusion, neither the Anglophile nor Francophile countries have constitutional basis to apply ECOWAS law within their territories. Their constitutions harbour restrictive features that limit the entry of Community legal order within their jurisdictions. Contrastingly, Cape Verde appears to have friendlier constitutional provisions in regard to receiving acts of a supranational body or organ. But the country needs to find legal courage and political grounds to pioneer the application of ECOWAS instruments within its jurisdiction. Nonetheless, application of the Community texts, either by incorporation or on supranational basis, may not necessarily amount to supremacy of the texts, especially in Anglophile countries. This issue of supremacy will be considered briefly.

6.2.9.1 Constitutional Supremacy

What informs the treatment of supranationality and supremacy differently, in this work, is the indistinct nature of the kind of supranationality the Community is pursuing; for, as stated earlier, it is possible to have a supranational organ whose laws are merely a part of the body of laws of its members—without more. This is because the model with which to achieve an economic integration or free trade area is a matter of choice open to the members. In case the supranationality which the Community is pursuing is different from that achieved by the European Union, in that it is designed merely to be part and not be superior to national laws, then there is need to explain how the Community law will fare in the face of the supremacy clauses in the constitutions of the Member States.

As the Community pursues its integration agenda, there has not been any *locus classicus* on the supremacy of ECOWAS law over the laws—inclusive of the constitutions—of the Member States. However, Pinheiro[72] appears to have offered the Community Court an opportunity to brighten the path of that aspect of Community jurisprudence, but the Court recoiled shyly from such highly anticipated enunciation. All that the Court said that appears telling is that national courts have competence to apply Community texts that make up part of their internal legal order within their jurisdictions. It neither explained whether what it meant was that the national courts should apply them where they have acquired that legal status of national law—probably through incorporation—or that Community law constitutes the internal legal order of the Member States. Since the Community Court shrank

[72] Pinheiro v Ghana 2012.

from clarifying issues of supremacy, then help can be sought from the constitutions and laws of the Member States.

The jurisprudence of common law countries supports constitutional supremacy in the face of other applicable legal norms; this, often, finds expression in the kind of clauses that herald their constitutions. For instance, section 1(1) of the Nigerian Constitution[73] provides that the Constitution is the supreme law of the land; consequently, any other law that is not consistent with the Constitution shall, to the extent of that inconsistency, be void.[74] The corollary is that the Constitution of Nigeria is supreme over all laws, including ECOWAS instruments, within the sovereign territory of that country. The Supreme Court of Nigeria has not had the privilege of determining the status of ECOWAS instruments vis-à-vis the Constitution but had to decide in Abacha v Fawehinmi[75] on the status of the African Charter on Human and Peoples' Rights as domesticated under the laws of Nigeria. The Court formed the opinion that the Charter is inferior to the Constitution of Nigeria. It means, therefore, that even if ECOWAS texts are adjudged supranational, by national and Community courts, or incorporated in Nigerian legislation, they would not be superior to the Constitution of Nigeria unless section 1 of the Constitution is amended to clad them with that garb of primacy.

Under the laws of Ghana, the Constitution is supreme over any other applicable law within the Ghanaian jurisdiction. This is clearly expressed in Article 1(2) of the Constitution, which reads: "This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void." Inferentially, this law takes away the possibility of reckoning any international agreement as supreme over the Constitution. Therefore, incorporation or domestication of all or some of the Community texts by the Ghanaian Parliament would not detract from their inferiority to the Constitution. Like the Nigerian Supreme Court, the Supreme Court of Ghana has not been invoked to interpret whether ECOWAS law constitutes part of the laws of Ghana, let alone decide on issues of supremacy. But it did fall on a court in that jurisdiction to determine whether the African Charter on Human and Peoples' Rights applies in Ghana in the absence of incorporation or domestication. The court was of the view that the human right regime of the region may apply even though the Parliament has not incorporated it in a piece of legislation. If this judicial magnanimity is extended to the dossier of texts of the Community, it would not still make them superior to the Constitutions of the warm people of Ghana.

With regard to the Francophone countries of West Africa, where international agreements or treaties have been duly ratified and the reciprocity requirement has been satisfied, the international agreements or treaties not only apply but also are superior to all other laws in these countries. But where an international agreement,

[73] Constitution of Nigeria 1999.

[74] Ibid., (3); see also Attorney General of Bendel State v Attorney General of the Federation 1982, p. 1.

[75] 2000, p. 228.

prior to ratification, is considered incompatible with the constitution, its ratification would depend on whether the constitutional court has ordered the amendment of the constitution to accommodate the incompatibility.[76] Consequently, where a constitutional court has not ordered the amendment of the constitution to accommodate that inconsistency, such agreement would not be ratified. The net effects, therefore, are (1) that the superiority of an international agreement within the jurisdiction of a civil law country is controlled by the constitution and (2) that any international agreement that is not in tandem with the constitution, save there is amendment or revision, will not be ratified. The constitutions of these civil law countries, therefore, are supreme until they open the floodgate to other inconsistent international or regional legal order. Relating these views to ECOWAS texts, none of the Community acts shall be ratified, assuming the reciprocity requirement is satisfied, by these countries if any is inconsistent with their constitutions. And where any of the Community acts is ratified and applicable within their jurisdictions, it becomes superior to all other pieces of legislation.

The Lusophone countries of Cape Verde and Guinea-Bissau are monist in regard to reception of international law. Using Cape Verde as an example, rules and principles of general and common international law or conventional international law that are duly ratified will normally prevail over local legislation.[77] However, it is doubtful whether such laws will prevail where they are inconsistent with the Cape Verdean Constitution, because Article 1(3) renders that the laws and acts of the state will only be valid if they are in conformity with the Constitution. Therefore, any other law that is not in sync with the Constitution will not be valid within Cape Verdean jurisdiction. However, where it is in conformity with the Constitution, such international law prevails over other legislation. But there are procedures that can clean up the irregularity or inconsistency label on an international agreement. An international agreement that is inconsistent with the Constitution will be applicable if the Supreme Court certifies it and the order is approved by a two-third majority of the legislature.

However, does this superiority over all legislation cover acts of a supranational organ? This is not very clear because the Constitution did not include acts of supranational body in Article 11(4); rather, it limited superior laws to principles and rules of common and general international law and conventional international law. Furthermore, it provides that legal acts emanating from supranational body shall enter directly into force in the internal legal order. To enter directly into force in the internal legal order does not imply supremacy over all legislation, unless the Supreme Court will subsume legal acts of supranational organ under the umbrella of "common and general international and conventional international law". Applying this to ECOWAS texts, it means, since they only qualify as legal acts of supranational organ, that they will simply make up the laws of Cape Verde and

[76] For example, see Article 146 Constitution Republic of Benin 1990 and Article 97 Constitution of Senegal 2001.

[77] Article 11(4) Constitution of Cape Verde 1992.

will not be superior to either the Constitution or other pieces of legislation unless the Supreme Court construes Article 11(4) to accommodate legal acts of a supranational body.

6.3 Conclusion

Out of its volition, the Community took the windy path of "market integration model" to its destination of economic integration. Consequently, the Member States must decide to release some part of their sovereignty and make progress or keep all and stand still, for it will be a cumbersome, but not an impossible, journey to arrive at economic integration through the market integration route without some kind of transference of power to centralised institutions. This is because if the walls of sovereignty of all Member States will be pulled down to create an extended internal or common market, those Member States must agree first to the pulling down of those walls. It is the lack of that collective agreement that had hindered the application of ECOWAS texts within the jurisdictions of the Member States, even though the centralised institutions are remodelling their structures to serve supranational purpose. Because of this lack of agreement to receive ECOWAS texts within their jurisdictions, Community citizens are deprived of the benefits of the vested Community rights, since they cannot approach their national courts either to protect or enforce any of these interests.

There are a lot of constitutional hedges, especially in the laws of Anglophile and Francophone countries, that obstruct the inflow of Community laws; those hedges are there to achieve some legal, political and supremacy goals. Unless they are dislodged, Community laws will neither form part of nor be superior to internal legislation. But there are existing formulas for removing barriers to Community laws within the jurisdictions of members. For instance, the common law countries could amend or revise their constitutions in order to create space for ECOWAS instruments within their jurisdictions, while the Francophone countries could either follow suit or rely on judicial pronouncement of their constitutional or apex courts to admit ECOWAS laws. Perhaps, where the Francophone countries could lay hand on proof of application by other parties to the agreement, they can begin to apply ECOWAS law on reciprocity ground. These examples are the safe ways to dislodge the constitutional hedges and demystify the subject of supranationality in ECOWAS.

References

Laws

Belgian Constitution 2007
Constitution of Benin Republic 1990
Constitution of the Republic of Ghana 1992
Constitution of the Federal Republic of Nigeria 1999
Constitution of Senegal 2001
Constitution of Togo 1992
European Atomic Energy Community Treaty 1957
European Community Act (UK) 1972
European Coal and Steel Community Treaty 1951
European Community Treaty 1957
French Constitution 1958
Revised Treaty of the Economic Community of West African States 1993
Treaty on European Union 1992
Treaty on the Functioning of European Union 2007

Cases

Abacha v Fawehinmi (2000) 6 NWLR (Pt 660) 228
Attorney General of Bendel State v Attorney General of the Federation (1982) 3 N.C.L.R 1
Azienda Agricola Monte Arcosu SrL v Regione Autonoma della Sardegna, C-403/98 11/1/2001 curia.europa.eu/juris/list=jsf? Language=en&num=C-403/98. Accessed 16 October 2013
Commission v Italy, C-39/72 7/2/1973eulex.europa.eu/LexUriServ/LexUriServido?Uri=CELEX 61972CJ0039:EN: PDF. Accessed 19 November 2013
Costa v Enel C-6/64 15/7/1964 eu-lex.europa.eu/LexUriServ/LexUriServido? Uri=CELEX 61964CJ0006:EN:PDF. Accessed 16 October 2013
Grad v Finanzamt, C-9/70 6/10/1970 eu-lex.europa.eu/LexUriServ/LexUriServido? Uri=CELEX61970CJ0009:EN:PDF. Accessed 16 October 2013
Hauptzollamt Mainz/Kupferberg & cie C-104/81 26/10/1982 eu-lex.europa.eu/LexUri Serv/ LexUri Servido? Uri=CELEX61981CJ010:EN:PDF. Accessed 16 October 2013
International Handelsgesellschaft Mbh v Einfur-und Vorratsstelle Fur Getreide Und Futtermittel C-11/70 17/12/1970 eu-lex.europa.eu/LexUri Serv/LexUri Servido? Uri=CELEX61970 CJ0011: EN:PDF. Accessed 16 November 2013
Kolpinghuis Njimegen BV C-80/86 8/10/1987 eu-lex.europa.eu/LexUri Serv/LexUri Servido? Uri=CELEX61986CJ0080: EN:PDF. Accessed 16 October 2013
Marleasing SA v La Commercial International de Alimentacion SA C-106/89 13/11/1990 eu-lex. europa.eu/LexUri Serv/LexUri Servido? Uri=CELEX61989CJ0106: EN:PDF. Accessed 17 October 2013
Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching) C-152/84 26/2/86 eu-lex.europa.eu/LexUri Serv/LexUri Servido? Uri=CELEX61989CJ0106: EN:PDF. Accessed 16 October 2013
Nicolo case 20/10/1989 (eng.translation) in the web site of the University of Texas School of Law www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1440 (Professor B.S Markesinis). Accessed 19 November 2013
New Patriotic Party v Commissioner of Police [1993] N.L.P.R 73

Pubblico Ministero v Ratti C-148/78 5/4/1979 eu-lex.europa.eu/LexUri Serv/LexUri Servido? Uri=CELEX61978CJ0148: EN: PDF. Accessed 16 October 2013
Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others C-213/89 20/10/2013 eu-lex.europa.eu/LexUri Serv/LexUri Servido? Uri=CELEX61989CJ0213: EN:PDF. Accessed 20 October 2013
Silvio Berlusconi & Others, C-403/98 3/5/2005 docid59275&page index=O&DOCLANG=EN&mode=1st&dir=occ=first&part=1&cid=187690. Accessed 20 October 2013
Ugokwe v Federal Republic of Nigeria (2004–2009) CCJLR, p. 51
Vabret and Weigel [1975] 2 CULR 336
Van Duyn v Home Office C-41/74 4/12/1974 eu-lex.europa.eu/LexUri Serv/LexUri Servido? Uri=CELEX61974CJ0041: EN:PDF. Accessed 16 October 2013
Van Gend & Loos v Nederlandse Administrative Der Belastingen C-26/62 5/2/1963 eu-lex.europa.eu/LexUri Serv/LexUri Servido? Uri=CELEX61978CJ0148: EN:PDF. Accessed 17 October 2013

Publications

Asante S (1991) ECA-MRAG mission report on ECOWAS. http://www.repository.uneca.org/handle/Bib-66051. Accessed 10 Jan 2015
Brookes I (ed) (2006) Chambers Dictionary, 10th edn. Chambers Harrap Publishers Ltd, Edinburgh
Brownlie I (2003) Principles of public international law, 6th edn. Oxford University Press, Oxford
ECOWAS, Review of the ECOWAS Treaty: Final Report of the Committee of Eminent Person
Falana F (2010) ECOWAS court: law and practice, 1st edn. Legal Text Publishing Company Limited, Lagos
Harris S, Horspool M (2008) EU law (subject guide). University of London Press, London
Hartley T (2007) Foundations of European Community Law, 6th edn. Oxford University Press, Oxford
Heifer L, Slaughter A (1997) Toward a theory of effective supranational adjudication. Yale Law J 107:273. Available via scholarship.law.duke.edu. Accessed 15 June 2015
Leal-Arcas R (2007) Theories of supranationalism in the EU. J Law Soc 8:1. Available via http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995748. Accessed 15 June 2015
Nwuche E (2009) Enforcing ECOWAS Law in West African National Courts. Paper presented at ANCL Conference, Cape Town 2009 available via http://www.ancl-radc.org.za/sites/default/files/Enforcing%20Ecowas%20Law%20in%20West%20African%20National%20Courts.pdf

Chapter 7
Reference for Interpretation

Abstract This chapter briefly considers the Reference for Interpretation Procedure, which enables national courts in West Africa to refer issues bordering on interpretation of ECOWAS texts to Community Court merely for construction purposes. It sheds lights on when a national court is not bound to make such reference to the Community Court. Also, the chapter outlines the conditions for the application of the procedure, its importance, as well as the duty to refer.

7.1 Introduction

In Ugokwe case,[1] the Court did state that the Community legal order created "...judicial monism of first and last resort...." This statement presupposes that the decision (law) of the Community Court is supranational and ultimate, so long as the issue relates to the Community law. This dictum does not mean that an issue touching on Community law may not be raised in any national or municipal court. In fact, ECOWAS jurisprudence envisages that such issues may be raised at national courts but expects reference to be made to the Community Court for interpretation. Article 10(f) of the Protocol Relating to the Community Court[2] states:

> 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.

In Pinheiro,[3] the Community Court confirmed this point when it held that a national court has competence to apply Community laws, which form part of internal legal order. Truly, the Community texts are designed to be implemented at the national level and applied to issues raised at the municipal forums. However,

[1] 2005, p. 51.

[2] 1991 as amended.

[3] 2012, p. 10.

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_7

before an issue would arise as to how an instrument of ECOWAS would be interpreted in a national court, some persons must have placed reliance on any of them. But the challenge is in locating the appropriate legal basis upon which to raise the issue before a national court for a reference procedure to be invoked. It is obvious that the usefulness of this procedure would, certainly, be enhanced by direct effect and applicability of ECOWAS texts within the Member States and, alternatively, by incorporation of the procedure in national legislation. In the meantime, none of these legislative events have taken place in all the jurisdictions of the Member States. Consequently, the municipal courts have not been exploring this procedural option to protect the Community rights of the citizens.

However, perfect demonstration of how the procedure works can be gleaned from European case law. The procedure, known in Europe as preliminary ruling jurisdiction, principally functions as a judicial approach of securing a uniform interpretation of Union law among the Member States.[4] The national courts have the discretion to decide whether to make reference to the Court of Justice of the European Union (CJEU); however, such discretion will be limited where an issue on Union law is raised before a court against whose decision there is no remedy under national law. In such situation, the duty to refer becomes compulsory.[5] Even though a court may be under obligation to refer, it may not actually do so if it is not necessary because the question on Community law may not determine the outcome of the case before the court, where the CJEU has ruled on the same or similar question or if the case is acte clair (the right application is so clear or obvious).[6] The failure to make a reference, on the part of a national court of last resort, may ground action for state liability, and any national law that diminishes such liability would contravene European Union law.[7]

Categorically, ECOWAS rules on the subject may not have been explored and tested. So it is not clear how that part of the jurisprudence would develop: whether the Community would carve out its precise principles or fashion theirs after the European Union law or produce a medley of both. Nevertheless, the legal provision and rules on reference procedure, as they appear on the books, are examined, though briefly, below.

7.2 Conditions for Application of the Procedure

However, if a national court finds basis for making a reference, such a court must observe the following conditions and points.

[4] *Da Costa en Schaake NV* v *Nederlandse Belastingadministratie* 1963, p. 31.

[5] Article 247 TFEU 2008.

[6] Case 283/81 *CILFIT* [1982], p. 3415.

[7] *Traghetti del Mediterraneo* v *Repubblica Italiana* 2006, p. I-5177.

1. Issues must arise as to the interpretation of a provision of the Treaty or the other protocols or regulations. So where an issue arises as to interpretation of other international instrument, the court is not obliged to make a reference unless it can show that the instrument forms part of the laws listed in paragraph f.[8] Does it really mean that a court may not refer a provision of an instrument of the Community that is not mentioned in paragraph f[9] for interpretation?

   One smart way to circumvent this hurdle is to consider what treaty is under the ECOWAS law. Under the Rules of the Court, treaty has been defined as the Revised Treaty of the Economic Community of West African States and includes protocol and conventions and annexure. The word "annexure" has been defined[10] as "something added", "especially added to a public document". Consequently, it means that issues which will arise from the application of any convention and annexure can be referred to the Community Court for interpretation. Also, it would amount to an absurd interpretation should a court exclude instruments like supplementary acts and decisions which are acts of the institutions of ECOWAS.
2. The power to refer has been vested in the national court. However, the provision on reference did not contain a description of the court which can make reference to the Community Court. For instance, where a medical body in Nigeria or Senegal has been vested with powers to determine issues touching on right to practice in that country and assuming during the course of the hearing, an issue touching on interpretation of a relevant protocol arises, would that body refer such question for interpretation? There is nothing hindering ECOWAS from developing its own principles. All the same, looking at the practice of the European Court, in regard to this issue, would not be out of place. The approach adopted by the Court of Justice of the European Union is that a body or tribunal which does not meet the requirement of a court within its territorial jurisdiction may qualify as a court in the European Union. For them, a body is a court for the purpose of reference if it is permanent, independent, established by law, has compulsory jurisdiction and procedures that are inter parties and applies rules of law.[11]

   In Broekmeulen,[12] a body that takes appeal from a Registration Committee which registers medical practitioners in the Netherlands was considered to be a court since it employs adversarial procedure, it allows legal representation and it was a body of last resort in respect of right to practice. It does not necessarily mean that every appellate body should be considered a court. In Corbiau case,[13] a Director of Taxation in Luxembourg had appellate jurisdiction, but it was

[8] Article 10. Protocol on Court 1991.

[9] *Ibid*.

[10] Brooks (2006), p. 55.

[11] Harris and Horspool (2008), p. 120.

[12] 1981.

[13] 1993, p. 1304.

established that he was not independent. Consequently, the Court of Justice refused to treat his office as a court.

3. While it is the court that has the power to refer, yet the parties have the right to request. It is obvious—at least from the tenor of the provision—that their rights end there. All that a party could do is to make a request; it is the court that decides on the merit of the request. Under the European Union law, it may be possible to bring an action against a Member State for state liability if a court of final appeal fails to make a reference and such failure results in breach of Community law. It is hoped that failure to refer, upon request, may be considered actionable, by the Community Court of ECOWAS, if the failure results in violation of Community right.

7.3 Acte Clair and Acte Eclaire

Note that it may not be necessary for a national court to make a reference where a Community law or its application is so clear and obvious that no interpretation would be needed. This principle is referred to as *acte clair*. Where an issue has been dealt with by the court and a clear ruling has been given, then one should not make a reference. This principle is referred to as *acte eclaire*. Under the European Union law, where these two principles have taken root, a national court is at liberty to apply a previous decision of the Court of Justice if the question interpreted in the previous case is similar to the question before it. The court, in spite of this liberty, can proceed to send a reference even though it may have been answered in other cases.

7.4 Importance of Reference for Interpretation

In Ugokwe,[14] the Community Court did state that "the kind of relationship existing between the Community Court and these national courts of member states are not of vertical nature. . . but demands an integrated community legal order". In pursuance of this judicial goal, it is suggested that continuous interaction between the Community Court and national courts by way of reference and interpretation would definitely foster respect and integration.

It would certainly make ECOWAS law popular within the Member States. Without a doubt, such judicial interaction would help in developing ECOWAS jurisprudence. From the European Union experience, reference procedure has been the vehicle through which the national courts convey, indirectly, their message of acceptance to the Court of Justice of the European Union. Most of the popular

[14] *Supra*.

cases[15] that were heard by the Court of Justice came through reference procedure. It has been suggested[16] that "the function of the reference procedure is to ensure the unity of interpretation of the function community law". That remark was made in respect of European Union law; however, considering that ECOWAS law is still a Community legal order, the same function can be attributed to Article 10(f).[17]

It must be noted that where a question is referred to the Community Court for interpretation, it does not vest in the Court the power to hear the substantive matter directly or indirectly or to sit on appeal over the issues. What the Community Court should do is, simply, to interpret the unclear provision and remit the same to the national court. It is the national court that would apply the result of the interpretation to the case pending before it. The existence of reference procedure, in Community law, does not vest in the national courts powers to render Community laws invalid. That function has always been reposed in the Community Court.[18]

7.5 Duty to Refer: Discretionary or Obligatory?

It is plain, on the face of the law, that the word used in the Article[19] is "may". For ease of comprehension, it is reproduced, again, below:

> 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.

How should the Court interpret "may"? Generally, "may" does not, when used in a measure or legislation, impose obligation on the person charged with the duty. But, in order to achieve a legislative intent, a court would not be wrong to take "may" as "must" or "shall".[20] In such situation, "may" becomes synonymous with "shall". The reasons for raising this interpretational issue are two. First, the Community Court in Ugokwe[21] stated that the Community legal order of ECOWAS sets forth a judicial monism of first and last resort in Community law.

This vital statement, it must be conceded, was not made expressly in connection to "duty to refer"; however, it gives any reader clues as to the Court's attitude to its duties, position, power and decisions in regard to issues of Community law. That statement was neither the *ratio* in Ugokwe case, nor clearly explained for all to appreciate the Court's distinct position in regard to supranationality of ECOWAS

[15] Defrenne v Sabena, 1976; Costa v Enel 1964; Van Gend en Loos 1963.

[16] Harris and Horspool (2008), p. 119.

[17] Supplementary Protocol.

[18] Foto-Frost & Hautzollamt Lubeck-ost 1987, p. 4235.

[19] Article 10(f) Supplementary Protocol.

[20] Garner (2004), p. 1000.

[21] *Supra*.

law in the Member States. But given the context in which it was made, it appears that the Court was asserting the applicability of its decision within the Member States without any judicial pronouncement from a national court. The statement also presupposes that the decision of the Community Court, provided the issue relates to Community law, is not only supreme but also cannot be affected by any decision of a national court. Furthermore, it would be great to know whether a national court, under the ECOWAS law, is compelled to refer any issue that borders on Community law to the Community Court of Justice for interpretation.

Looking elsewhere, it would be discovered that reference procedure has both mandatory and discretionary requirements. Under the European law, for example, "where such a question is raised before a court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon".[22] This particular provision totally gives discretion to the national court to decide if it would make a reference to the Court of Justice of the European Union or not. Now consider the second provision: "where any such question is raised in a case pending before a court or tribunal of a member state, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice".[23] This limb takes away discretionary powers from the national court when there is no judicial remedy under the national law. This kind of duty to refer is compulsory.

It is important to draw this analogy because failure to make the compulsory reference can be considered as breach or infringement of Community law. Consequently, it can ground an action against a Member State for state liability.[24] Assuming that the word "may" as used in Article 10(f) of the Protocol Relating to the Community Court is considered, by the Court, to be synonymous with "shall", then failure to refer by the national court would have given either another Member State or the President of the Commission power to bring an action against the Member State for failure to fulfil an obligation under Articles 9(d) and 10(a) of the Protocol[25] Relating to the Community Court where the omission has infringed on the Community rights of the subjects.

Notwithstanding the assumption raised above, there are two fundamental criticisms against interpreting "may" as though it were "shall". First, if the draftsmen intended to model this procedure on the European Union version, they would have done so, dividing the procedure into parts, using "may" and "shall" when appropriate to convey their intentions. Second, the Member States have not been making reference to the Community Court and no enforcement action has been brought against any of them. This second criticism does not appear unarguably perfect: the national courts may not have been making reference because ECOWAS laws have

[22] Article 265 Treaty on the Functioning of the European Union.

[23] *Ibid*.

[24] Kobler v Republik Osterreich 2003, pp. 10305–10307.

[25] *2005*.

not been accepted as part of the internal laws of the parties at the time. It should be noted that the reason for promoting the concept of compulsory reference is that it affords Community citizens an opportunity to have their rights protected. It is expected that the Community Court would soon be given an opportunity to make pronouncement on reference procedure. However, considering the provision of that article, the attitude of the Court and the prevailing practice in the European Union, it does not appear that the Community Court would attach a sense of compulsion to that provision, especially where the national court involved could attain justice without the interpretation of an article in an ECOWAS instrument or where the court, at the national level, has the privilege of an appellate help. But the kernel of the issue would be where an apex court, or court of final appeal, has before it an issue touching on Community law, which could affect its decision, but omits or refuses to refer the issue to the Community Court. In such situation, the Community Court may create its own principles. However, it should bear in mind that in other jurisdiction (the European Union), such reference is mandatory in order to protect the Community rights of citizens.

7.6 Conclusion

ECOWAS legal regime provides for a procedure which enables a national court to make reference to the Community Court for interpretation where an issue arises, in a matter before it, as to the proper construction of the Revised Treaty and protocols. It is expected that the other Community texts would be included in the class of acts that should be referred to the Community Court for interpretation. Although the national courts are expected to apply Community texts, as the Court highlighted in Pinheiro case, yet the challenge has always been the existence of legal basis upon which to apply these acts and refer issues arising from them to the Community Court. However, where the legal basis exists, in the legislation or case law or constitution of a Member State, capable of grounding a referral to the Community Court, the national court should take cognisance of the condition and points discussed above: the issue must arise, in a matter before it, as to the interpretation of the Revised Treaty and the protocols and that it is the duty of the court to refer, while the parties have the right of request. However, national courts may not be required to refer if the Community law provision on the issue is so clear and obvious that it requires no interpretation and where the Community Court has previously ruled on the issue. The merits of this procedure are that it strengthens the relationship between the Community Court and the national courts and creates a platform for uniform interpretation of the provisions of Community texts.

References

Law

Supplementary Protocol A/SP.1/1/05 amending Protocol A/P1/7/91 Relating to the Community Court of Justice

Cases

Broekmeulen v Huisarts Registratie Commisie, C-246/80 6/10/81eu-lex.europa.eu/Lex Uri Serv/Lex Uri Servido? Uri=CELEX61980CJ0246:EN:PDF. Accessed 20 October 2013
Case 283/81 CILFIT [1982] ECR 3415
Case 28-30/62 *Da Costa en Schaake NV* v *Nederlandse Belastingadministratie* [1963] ECR 31
Case C-173/03 *Traghetti del Mediterraneo* v *Repubblica Italiana* [2006] ECR I-5177
Costa v Enel, C-6/64 15/7/1964 eu-lex.europa.eu/Lex Uri Serv/Lex Uri Servido? Uri=CELEX61964CJ0006:EN:PDF. Accessed 16 October 2013
Defrene v Sabena C-43/75 8/4/1976 eu-lex.europa.eu/Lex Uri Serv/Lex Uri Servido? Uri=CELEX61962C00025:EN:PDF. Accessed 17 October 2013
Foto-Frost v Hauptzollamt Lubeck- Ost, C-314/85 22/10/1987 eu-lex.europa.eu/Lex Uri Serv/Lex Uri Servido? Uri=CELEX61985CJ031:EN:PDF. Accessed 17 October 2013
Gerhard Kobler v Republic Osterreich curia.europa.eu/jurist.jsf?language=en&num=C-224/01. Accessed 17 October 2013
Pierre Corbiau v Administration des Contributions du Grand Duche de Luxembourg C-24/92 30/3/1993 eu-lex.europa.eu/Lex Uri Serv/Lex Uri Servido? Uri=CELEX61992CJ0024:EN:PDF. Accessed 19 October 2013
Ugokwe v Federal Republic of Nigeria (2004–2009) CCJELR, p. 51
Van Gend & Loos v Nederlandse Administratie Der Belastingen C-26/62 5/2/1963 eu-lex.europa.eu/Lex Uri Serv/Lex Uri Servido? Uri=CELEX61962CJ0026:EN:PDF. Accessed 17 October 2013

Publications

Brookes I (ed) (2006) Chambers Dictionary, 10th edn. Chamber Harrap Publishers, Edinburgh
Garner B (ed) (2004) Black Law Dictionary, 8th edn. Thomson West, Minnesota
Harris S, Horspool M (2008) EU law (Subject Guide). University of London Press, London

Chapter 8
Actions for Damages and on Legality

Abstract Subtly, this chapter explains the unique Community procedure termed action for damages which could be used to bring actions that would otherwise be entertained under contract or tort in a municipal setting. It also explains actions relating to legality of Community texts, which cover cases under (municipal) administrative law. It distinguishes legality of action from legality of Community text and official acts from acts of officials. Furthermore, this chapter simply clarifies issues relating to reviewable text, right of access and relief. These principles are treated, in this chapter, from Community law perspectives and not from the viewpoints of national norms on contract, tort and administrative law.

8.1 Action for Damages (Background)

Article 9(1)(g)[1] provides that "The court has competence to adjudicate on any dispute relating to the following: the action for damages against a community institution or an official of the community for any action or omission in the exercise of official functions". And Article 9(2) of the same Protocol[2] provides also that "The court shall have the power to determine any non-contractual liability of the community and may order the community to pay damages or make reparation for official acts or omissions of any community institution or community officials in the performance of official duties or functions". Actions that could be brought under these heads include cases that could come under contract, tort and administrative law in a municipal court.

Where a prospective plaintiff wants to bring an action under Article 9(1)(g), it must be *against a Community institution or an official of the Community and for action or omission in the exercise of official functions*. What then is meant by "exercise of official functions" for the purpose of this provision? One would easily appreciate the answer if one first understands what an action for damages is in

[1] Protocol on Community Court as amended by Supplementary Protocol A/SP.1/1/05 (it covers contractual liabilities).

[2] *Ibid*. (it covers non-contractual liability like tort).

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_8

Community law. Under the European Union law, for example, action for damages enables individuals or Member States that have suffered damage to obtain compensation from the institution of the European Union that caused it.[3] They are generally contractual or non-contractual in nature. Therefore, exercise of official functions will relate to performance of assigned duties by the officials or institutions of the Community in the pursuit of ECOWAS integration objectives. By extension, if any person suffers damage because of action, in the exercise of official function, of an official of ECOWAS, such a person may claim compensation through any of these procedures.

In such action before the Community Court (ECOWAS), individuals and corporate bodies are considered as legal persons capable of accessing the Court.[4] It seems clearer, taking Articles 9(1)(g), together with 10(c), that the action or omission for which the plaintiff brings the case must have violated the rights of the plaintiff. The plaintiff in Oluwatosin Adewale v Council of Ministers ECOWAS & Others[5] did not rely chiefly on these two provisions; rather, she anchored her cause of action on human right and administrative law. In spite of this procedural approach, the Court, somehow, found space to elucidate that in such actions brought under Article 10(c), the individual should be the bearer of the right allegedly violated by the act or inaction of the Community or its officials. It seems that once the plaintiff is a bearer of the right that has been violated by the act or omission, the prospective litigant can bring an action. And to qualify as an individual holder of the right, the holder must be a person whose interest is directly and immediately affected by the act or inaction that is being contested.[6]

8.1.1 In the Performance of Official Duties and Function

Where a Community official violates the right of a citizen of the Community by any act or omission made outside the course of his or her duty, it cannot be attributed to the Community; therefore, the Community would be responsible where the officer acted in his official capacity. In Savage v Leduc,[7] the Court of Justice of the European Union considered official capacity to mean act performed by officials within the framework of the task entrusted to the Community. Therefore, if a clerk or personnel of the Community Court elects to drop off a litigant after a court proceeding and, while doing so, ram the car into a pole, the Community cannot be held liable for any injury which the litigant may sustain. This is because the act of

[3] Study generally Harris and Horspool (2008) and Hartley (2007).

[4] Article 10 (c) Protocol on the Community Court as amended by Supplementary Protocol 2005.

[5] *2012*, pp. 12–13.

[6] Oluwatosin Adewale 2012, p 13, para 45.

[7] 1968, p. 401.

assisting the litigant, in that context, is not part of the task assigned to the institution.

A prospective litigant intending to bring an action under Article 9(2)[8] should bear in mind the principles discussed above in regard to Article 9(1)(g); however, the litigant should appreciate the peculiar features of this article. For instance, what would qualify as "official acts" for the purpose of determining non-contractual liabilities of the Community? Does it mean legislative acts or other forms of acts, like hauling a set of furniture from one location to the other? Again, is official act the same as ordinary acts of officials (of the institution) performed in the course of their official duties, or does it qualify as a special category of acts performed by the institutions?

8.1.2 Official Act

Generally, it is the duty of a court to give interpretation to words or terms contained in treaties. However, it may appear slightly absurd to construe ordinary acts of the officials as being totally different from official acts. The reason for this appearance may be supported by a fact: the officials of the institution perform official acts of the institution of ECOWAS, while personnel and officers of the institution perform the ordinary acts in the course of their duties. In order to find clarity, help may be gotten from the explanation made by a Community law expert[9] on a similar point. According to him, formal (or official) acts are those performed by the official organ of the institution, for example, decisions of the Commission or Council or the resolutions of the Parliament.

Following the above reasoning, it can be said that official acts as contained in Article 9(2) of the Protocol would include the above examples unless such construction would, given a peculiar circumstance, lead to injustice. The essence of this phrase, inferring from Hartley's explanation, hinges on "action performed collectively as an organ". It means that where the ECOWAS Parliament, as an institution, finds a legal basis to monitor and evaluate constitutional amendment done in a Member State, it would qualify as official act. According to Hartley, it can also extend to act performed collectively by a number of officials over a period of time.[10] However, should the Court decide to limit the meaning of official acts to these situations, as done by Hartley, then other acts which ordinarily would have been caught by Article 9(2) would be left out. Under the European law (on - non-contractual liability), the phrase "official act" was not employed to demarcate the kind of acts for which the Community would be liable; rather, the law stated that the Community shall "make good any damage caused by its institutions or by its

[8] Protocol on the Community Court as amended by Supplementary Protocol A/SP.1/1/05.

[9] Hartley (2007), p. 431.

[10] *Ibid.*

servants in the performance of their duties". With this kind of drafting, the Court of Justice would have the ample opportunity to insert diverse acts (and omission) as part of the elements of the tort.

In the interest of justice, the Community Court of Justice (ECOWAS) should not limit the ambits of "official acts" to the instances listed by Hartley, even if it appears sound, but should extend them to any act(s) done in an official capacity in the exercise of official function. However, where the Court becomes unusually academic by limiting official acts to the examples drawn by Hartley, then the other option for litigants to get relief in non-contractual liability cases would be to rely on Article 9(1) g; after all, there is nothing specifically that states that it (Art. 9(1)(g)) should only be used in contractual liability cases. Another safer route which a litigant can ply would be to combine Article 9(1)(g) and (2) to avoid procedural hitches.

8.1.3 Actions and Omissions

Under these heads, actions consequently would include acts intended to have legal effect (like decision or regulation) and other acts which may not have legal effect (e.g., a report), inclusive of physical acts. Omission would certainly include failure to act where there is an imposition of duty to act or, probably, where it could be inferred, from a law, that the institution or officials concerned have the duty to act. But it is not clear how the Court would treat the issue of omission where the official who omitted to act has discretionary powers to choose either to act or not to act. It seems an action would not lie or succeed where such discretion was judiciously exercised.

8.1.4 Who Should Be Sued?

The law, in this area, has two varied provisions. In regard to Article 9(1)(g), it is expressly provided that action for damage can be brought against a *Community institution or an official of the Community*. Of course, in practice, the best approach would be to join the Community official with the institution where he or she works. But where the official is not known to the applicant, then the institution that employed the official should be sued. In regard to the provision of Article 9(2), the word used is "community", so the Community should be sued. For ease of understanding, the provision is reproduced again: "The Court shall have the power to determine any non-contractual liability of the community and may order the community to pay damages or make reparation for officials' acts or omissions of any community institution or community officials in the performance of official duties or function."

Moreover, it is clear from the wording of the law that in action for damages, liability is attributed to the Community. Consequently, which of the institutions will represent the Community, is it the Commission or the institution whose action necessitated the action? If the Commission should represent the Community, it may not be in a good position to appreciate the facts where the wrong was done by an official of the ECOWAS Parliament, for instance. In Oluwatosin Adewale case,[11] the plaintiff sued the Council of Ministers, President of the Commission, the Court which performed the act that she alleged to have violated her right and another official of the Court. If she had brought the action against a single institution, would it have been wrong under the ECOWAS Court's procedure? A cursory analysis of the European Union's attitude to such form of action might help in answering this question.

The European version of the law reads: "In the case of non-contractual liability, the community shall, in accordance with the general principles common to the laws of the member states, make good any damage caused by its institutions or by its servants in the performance of their duties."[12] Clearly, it is the Community that ought to be liable for errors of the institutions and their officials. This provision is similar to Article 9(2) of the Protocol Relating to Community Court (ECOWAS). But in Werhahn v Council and Commission,[13] in settling the issue of who should represent the Community, the Court stated as follows: "It is in the interests of a good administration of justice that where community liability is involved by reason of the act of one of its institutions, it should be represented before the court by the institution or institutions against which the matter giving rise to liability is alleged." The effect of this decision is that the institution involved in the act or omission that led to the infliction of injury should represent the Community.[14] Consequently, it would not be out of place should the institution that caused the dispute represent the Community (ECOWAS) in Court.

Supportively, by examining Article 10 of the Protocol, it appears that the draftsmen might not have intended, despite its personality, that the Community should access the Court except through its institutions. However, note that an action may be brought against[15] "The Community"—with or without indicating the relevant institution that acted or made the omission. In David v Uwechue,[16] the Court said that any action for reparation of damages caused to a third party by an act of the Community or its institution or officials must necessarily be brought against the Community, but the Court did not enunciate on the proper institution that should represent the Community; therefore, it is suggested that it will make for good

[11] *2012*.

[12] Article 340 of the Treaty on the Functioning of the European Union.

[13] 1973, p. 1247, para 7.

[14] Facts are in their domain. This principle stems from good rationalisation.

[15] This safe procedural approach would certainly protect the process from being struck out.

[16] 2010, p. 161.

administration of justice should the institution whose act or omission has given rise to the liability represent the Community before the Court.

8.2 Action on Legality (Background)

Community law ordinarily creates powers and duties, and it is the citizens that would exercise such powers and fulfil the connected duties. It is imperative, therefore, to gauge the exercise of public powers or the performance of duties in order to sustain the balance between protection of rights of citizens and the pursuit of integration objectives. The existence of administrative law structure within the Community norms[17] appears to strengthen the power-duty calibration exercise. For clarification, administrative law in a municipal setting, is a branch of public law governing the exercises of powers and duties by public authorities.[18] It includes functions of public authorities and officers, functions of tribunals, judicial review of the exercise of those functions, civil liability and legal protection of those purporting to exercise them and aspects of the means whereby extrajudicial redress may be obtainable at the instance of persons aggrieved.[19] Administrative law is heavy and would always bear huge baggage: *ultra vires*, abuse of power, discretion, unreasonableness, rules of natural justice, etc.[20] It seems that the administrative structure existing under the Community legal order would cover similar protective procedures as would in municipal administrative law.

A careful scrutiny of Articles 9 and 10 of the Protocol on the Community Court as amended by Supplementary Protocol of 2005 shows two prominent provisions that border on legality of Community texts. Article 9(1)(c) provides that "The court has competence to adjudicate on any dispute relating to the following: the legality of regulations, directives, decision and other subsidiary legal instruments adopted by ECOWAS", while Article 10(b) of the same Protocol reads: "Access to the court is open to the following: member states, the Council of Ministers and the President of the Commission in proceeding for the determination of the legality of an action in relation to any Community text." These provisions will be explained, in detail, below.

[17] Articles 9 and 10 of the Protocol on the Court 1991 as amended.

[18] Law and Martin (2009), p. 16.

[19] Hailsham (2009), p. 1.

[20] See generally Leyland and Wood (1999).

8.2.1 Applicants and Capacity

In any proceeding for the determination of the legality of an action in relation to any Community text, the following persons have legal capacity: the Member States, the Council of Ministers and the President of the Commission. These three parties have the right to access the Court when issues arise as to legality of action in relation to any Community text.[21] Notice that in providing for capacity, the law states: "in proceeding for the determination of the legality of an action in relation to any community text". It did not literally state "in proceedings for the determination of the legality of Community text". If the Court has powers under Article 9(c) of the Protocol to adjudicate on disputes relating to the legality of Community instruments, which of the parties then has the capacity to access the Court?

It is not very clear whether the drafting style employed in Article 10(b) was deliberate or otherwise, but reading beyond the letters, it is envisaged that the Member States, President of the Commission and Council of Ministers are the proper parties/persons with right of access in regard to proceedings for the determination of the legality of Community instruments. Another way to appreciate it is to look at other capacities vested in them in the same article. If they have the capacity to access the Court in proceedings for the determination of the legality of an action in relation to any Community text, then they should have the capacity to access the Court when the issue turns on legality of a Community instrument itself. Even if there was no provision as to which of the parties should access the Court, yet it would be reasonable to infer that the Council of Ministers should have the capacity to access the Court in proceedings for determination of the legality of instrument because it is one of the institutions that makes some of the instruments. If those instruments should be questioned, then the Council of Ministers should be there to state its case or raise its defence. After all, as the Court of Justice of the European Union held in Werhahn case,[22] the right institution to be in Court for the whole Community should be the institution whose act has given rise to liability. So if an act or text made by the Council has occasioned injustice, then it should be given an opportunity to state its case. As regards the Member States, they are the stakeholders and, indirectly, through their Heads of State, make the laws or the instruments. The rationale is that since the instruments are made through their representatives (the Authority and Council of Ministers) and for them too, they ought to be allowed access to the Court when an issue arises as to the legality of their instruments. In summary, there exists sustainable argument in support of the right of both the Council of Ministers and the Member States to access the Community Court where the issue is on the legality of texts.

[21] Request for Advisory Opinion from the Executive Secretary of ECOWAS, Relating to Article 23(11) of the Rules of Procedure of the Community Parliament and the Provisions of Article 7 (2) and 14(2) f of the Protocol on the Community Parliament. 2005, pp. 57–58.

[22] *1973*, p. 1247.

Nevertheless, individuals and corporate bodies have right of access in proceedings for the determination of actions or inactions of a Community official that violates their rights. Query: Does this provision give them the power to challenge the legality of ECOWAS instruments made by the institutions, especially where the instrument violates their vested rights? It seems likely that individuals and corporate bodies may rely on Article 10(c) to challenge a Community text before the Court; however, this point will be treated extensively below.

8.2.2 Legality of Action

Legality of action would certainly cover questions like whether any of the institutions of the Community or official acted in line with the provision of an instrument of the Community or whether the actions of the institution or official, substantively or procedurally, conform to the law from which either of them derived power or authority. In Request for Advisory Opinion[23] from the Executive Secretary of ECOWAS, Relating to Article 23(11) of the Rules of Procedure of the Community Parliament and the Provisions of Article 7(2) and 14(2) f of the Protocol on the Community Parliament, the President of the Commission (then Executive Secretary) sought the opinion of the Community Court on the legality of the decision of the Speaker of the Parliament to remain in office and manage the daily affairs of the institution beyond the tenure of the first legislature.

Having interpreted Rule 23(11) of the Rules of Procedure of the Community Parliament which the Speaker relied on in justifying his overstay, and Articles 7 (2) and 14(2) of the Protocol of the Parliament, the Court stated that his action was in line with the law. In Oluwatosin Adewale,[24] the applicant sought a declaration to the effect that the reinstatement of the former personnel officer by the Community Court of Justice ECOWAS, after resignation, is a gross violation of the ECOWAS Treaty, Staff Regulations and the legal regime of ECOWAS. The applicant further alleged that the Acting Director of Finance and Administration lacked power and competence to appoint any person to an office in the Court except as provided by the ECOWAS regulation. In dismissing the application, bearing in mind that the applicant was not a staff of any of the Community institutions, the Court stated that she lacked the legal capacity or *locus standi* to challenge an act of an ECOWAS official that did not directly violate her rights or cause any harm to her.

Although Lijadu-Oyemade v Executive Secretary ECOWAS (No 2) was, as regards cause of action, a medley of employment and contract law, yet there was appraisal of issues that bordered on administrative law. The Court held that the failure and refusal to suspend all actions on the decision to apply the sanction by first defendant after the applicant had given notice to second and third defendants to

[23] *2005*, p. 61.

[24] *Supra,* p. 14, para 50.

invoke her right of appeal was unlawful and contrary to the ECOWAS Staff Regulation.[25] It further stated that refusal or failure to acknowledge the applicant's appeal and their failure to present a memorandum to the Administration and Finance Commission, which ought to be forwarded to Council of Ministers, were unlawful and contrary to the ECOWAS Staff Regulation.[26] From these judicial examples, it is safe to subsume non-compliance with ECOWAS texts under "legality of action" challenge.

8.2.3 Legality of Community Text

The Community Court has power to hear dispute relating to the legality[27] or otherwise of legal instruments adopted by ECOWAS; these instruments adopted by the institutions of the Community invariably have legal effect. It is clear that questions on legality of Community instruments borders on whether the institution that adopted the instrument has the power to do so; whether, where an institution has the power to adopt the instrument, it complied with substantive and procedural rules; whether the institution has fulfilled other condition precedent needed to clad that instrument with legality; and whether an instrument is in contradistinction to the Revised Treaty or any of the protocols.

8.2.4 Reviewable Instrument

Under this jurisdiction, the Community Court has powers to review (1) regulations, (2) directives, (3) decisions and (4) other subsidiary legal instruments adopted by ECOWAS. The use of the phrase "other subsidiary legal instrument" leaves open the classes of instruments which the Court can review. It seems that the better view is that the Court can review any text or instrument, provided it has legal effect, which any of the institutions may make based on the authority it derives from the Revised Treaty. Therefore, the Court can also review supplementary acts as well as resolutions made by the institutions.

[25] *Supra,* pp. 90–91, para 70 a.

[26] See (now) Articles 73 (h) of ECOWAS Staff Regulations 2005.

[27] Article 9 (1) (c) Protocol on the Community Court 1991 as amended by Supplementary Protocol A/SP.1/1/05.

8.2.5 Right of Access

8.2.5.1 Automatic Right of Access

In action for determination of the legality or otherwise of a Community instrument, the appropriate applicants with full right of access[28] are (1) the Member States, (2) the Council of Ministers and (3) the President of the Commission. These applicants need not prove how a particular instrument may or may not have affected their interests. They have right of access automatically.

8.2.5.2 Qualified Right of Access

The Protocol[29] provides that the Court has competence to adjudicate on any dispute relating to the legality of instruments adopted by ECOWAS. As regards access, it further provides[30] that Member State, the Council of Ministers and the President of the Commission shall have access to the Court in proceedings for the determination of the legality of an action in relation to any Community text. It cannot be said that a combined reading of the two provisions could encourage either an individual or a corporate body to bring an action to challenge any Community text.

However, it can be seen from Article 10(c) that individuals and corporate bodies can access the Court in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies. On the face of it, the law stated "in proceedings for the determination of an act or inaction of a community officials" and not "in proceedings for the determination of an act or inaction of a Community institution". The instruments which the Court can review are mainly made by the institutions, so how can this provision be a ground for an individual or corporate body to challenge the legality of an act or instrument adopted by a Community institution? Furthermore, assuming that an official is empowered to make an instrument, with a legal effect, can an individual ask the Court to declare it void? These questions touching on whether individuals and corporate bodies can challenge the legality of a Community text or whether Article 10(c) empowers them to do so would be answered through the cases. In Oserada v ECOWAS Council of Ministers & Others,[31] the applicant sought, *inter alia*, for a declaration to the effect that Regulation C/REG.5/06/06 made by the Council of Ministers, allocating the post of Secretary General of ECOWAS Parliament to Guinea, on the ground of exceptional case, is illegal.

---

[28] Article 10 (b) Protocol on the Community Court as amended by Supplementary Protocol 2005.
[29] Ibid., Article 9 (c).
[30] *Ibid.,* Article 10 (b).
[31] *2008*.

In challenging the law, the applicant relied on Article 10(c) of the Protocol Relating to the Community Court.[32] In its judicial analysis, the Court began by considering whether Regulation C/RG9.5/06/06 harms the applicant; if it does, according to the Court, then he would have interest at stake. (Notice that the Court did not expressly state that an individual cannot challenge the legality of a Community text.) Nonetheless, the Court further clarified the link between Article 10(c) and the procedure of contesting the legality of an act of the Community in these words:[33] "Indeed, the provision made under Article 10 (c) of the 2005 Supplementary Protocol on the Court, in respect of bringing cases before the court to contest the legality of an act of the community, does concern the existence of an act or inaction of a community officials which violates the rights of the person requesting the annulment of such act. . ." This clarification establishes that an individual or corporate body may bring an action to contest the legality of Community text provided the existence of the act does violate the right of the individual or corporate body.

This clarification is important for two reasons: first, because the drafting technique used in Article 10(c) blurs the meaning of "act". On reading the provision, one might erroneously construe the "act" to mean that of an official since it is fused together with 'inaction of a Community official" by the article "or". Confusingly, "or" can play, especially in legal documents, both disjunctive and conjunctive roles in a sentence. Consequently, there was need for interpretation. Second, there is nowhere in Article 10 that the draftsmen listed individuals and corporate entities as applicants that can access the Court in matters relating to legality of Community texts. Contrastingly, under European Union law, the clarity of the right of an individual to challenge a legislative act has been depicted in this form: "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them and against a regulatory act which is of direct concern to them and does not entail implementing measures."[34] So for an individual, under the ECOWAS law, to have access to Court to contest the legality of a Community text, the Court must find a way to broaden or interpret "act" in Article 10(c) to mean acts with legal effect, and that is what it appears to have done in Oserada. By such broad interpretation, "acts" as contained in Article 10(c) would now include any Community text, the application of which has affected the vested rights of individuals and corporate bodies.

8.2.5.3 Conditions for Access (Under Article 10(c))

It is possible for an individual (or corporate body) to challenge an act or inaction of the Community official which violates his or her right; however, there are conditions to be fulfilled for the applicant to have access to the Court. First, the act being

[32] *Ibid.,* p. 175, para 23.
[33] *Ibid.,* p. 176, para 29.
[34] Art 263 TFEU.

challenged must affect the legal status of the applicant; second, there should be in existence a sufficiently direct relationship of cause and effect; and third, the applicant must be directly and personally concerned by the act complained of.[35]

Importantly, "directly and personally concerned" as contained in the third condition simply means that the text contested must concern the applicant both directly and personally. Drawing on Plauman case, the Court explained that "those personally concerned are the persons who are affected by the act, by reason of a situation of fact which typifies them vis-a vis any other person, and marks them out individually in exactly the same manner as recipient is marked out".[36] It seems "sufficiently direct relationship of cause and effect" means that there is an adequate and clear link or connection or nexus between the act made by the institution and the violation of the right which the applicant bears personally. And "legal status" which the instrument should affect means the distinct legal rights of the individual or corporate entities challenging the instrument.

8.2.6 Reliefs

A Community court can grant various reliefs asked for provided such relief is supported in law. Emphasis has been placed on different forms of actions and the consequential remedies that follow, in this work, directly or indirectly. Generally, where a person has suffered damages as a result of an action of an official or an act of an institution, the Court may award monetary compensation. For the purpose of this segment, priority is given to "order of annulment"[37] and "the power to declare legislative acts ILLEGAL". Ordinarily, where an instrument of any of the institutions is challenged, on the grounds of legality, successfully, the Community Court has power to declare the act of the institution ILLEGAL. Where the application is pursued by the Member States, Council of Ministers or President of the Commission, it will be expected that, on successful establishment of applicant's case, the Court will not hesitate to declare the act void. Now would the same ease accompany the minds of the justices when the application is brought by an individual or corporate body?

If the Court had stated directly or indirectly that an individual may bring such action where the act harms his right, then it would be expected that the Court would easily declare the act void—at his instance. For example, where a regulation is made for the whole Community but affects an individual in a personal way, and he successfully establishes this fact, the Court should not avoid such declaration because of the benefit of the instrument to the whole Community. If an individual succeeds to establish that he has the right of standing and shows that he has suffered

[35] Oserada 2008, pp. 177–178, paras 34–35.

[36] Ibid., 178, para 35.

[37] Oluwatosin case *supra,* p. 13, para 45.

or is still suffering injury because of the act or instrument, then the Court should be at ease to declare the instrument void in the interest of justice.

In regard to parties challenging the action and inaction of the Community officials that violate their rights, the *dictum* of the Court in Oluwatosin Adewale case[38] has shown its attitude to annulment of acts of the Community. The *dictum* is reproduced below for emphasis: ". . .This means that if the person is not directly or immediately affected by the act he/she seeks for annulment, such person cannot be accepted to submit a case under Article 10 (c) of the Protocol on the Court of Justice, and therefore the complaint should be rejected."[39] Reasoning from this dictum, once an individual or corporate body scales the bar of right of standing and successfully establishes his or its case, the Court would certainly annul the act of the Community.

Importantly, the violation must relate to rights which an individual or corporate entity could bear. It must not be tied, solely, to human right—in the conventional sense. Where the right is an overlapping one, that is, it can qualify as a right in other disciplines of law as well as under human right law, then the application should be brought under that other shade of right for it to slip through Article 10(c). Where the applicant claims that his human right has been violated by an action or inaction of a Community official, then he should bring his action under Article 10(d) and seek the proper relief. The Court explained further in Oluwatosin case[40] that before an individual (or corporate body) can rely on Article 10(c),[41] he (it) should be the bearer of the right allegedly violated by the act or inaction of the Community or its official that is being challenged. To qualify as holder of such right,[42] the person's interest must be directly and immediately affected by the act or inaction that is contested. In sum, where it is has been successfully established that the right of an individual or corporate body has been affected by an act of any of the institutions of ECOWAS, the Court may annul such act.

8.3 Conclusion

The chapter distinctly explained action for damages, action relating to legality of Community texts and actions of officials. Action for damages and action relating to legality provide unique procedures for aggrieved Member States, corporate entities and individuals to seek relief in the event of violation of rights or illegality. While it is unambiguously expressed that the Member States, the Council of Ministers and the President of the Commission can access the Court in matters relating to the

[38] *Ibid.*

[39] *Ibid.*

[40] *Ibid.*

[41] Protocol on the Court 1991 as amended by Supplementary Protocol of the Court 2005.

[42] Oluwatosin supra, pp. 12–13, para 45.

legality of action in relation to any Community text, it is not clearly stated that individuals and corporate entities can access the Court in such matters. But the Court seised the opportunity presented in Oserada case to construe Article 10(c) of the Protocol on the Community Court (as amended) to include right of access in matters touching on legality of text in as much as the applicant bears a right which has been violated.

The access is hinged on satisfaction of certain conditions: that the act being challenged affects the legal status of the applicant; that there is a causal link, which must be sufficient, between the act and the violation of right; and that the applicant must be personally and directly concerned. Where these conditions are met, the Court would hear the matter and, where successful, grant the reliefs sought. One of the prime reliefs is annulment of the act which violates the right of the applicant. And it has been canvassed that where an individual or corporate entity establishes that a Community act violates his or its right, it will be in the interest of justice to annul the text.

References

Laws

ECOWAS Staff Regulation 2005
Protocol (A/P1/7/91) on the Community Court of Justice
Supplementary Protocol A/SP.1/1/05 Amending Protocol A/P1/7/91 Relating to the Community Court of Justice
Treaty for the Functioning of European Union 2007

Cases

Claude Moise Savage & Anor. V Jean Pierre Leduc & Others, C-5/68 11/7/68 eu-lex.europa.eu/LexUri Serv/Lex Uri Servido? Uri=CELEX:61968CJ0005:EN:PDF. Accessed 16 October 2013
Lijadu Oyemade v Executive Secretary ECOWAS (No 2) [2008] CCJLR [PT1], pp. 90–91
Odafe Oserada v ECOWAS Council of Ministers & 2 Others (2004–2009) CCJELR, pp. 175–176
Oluwatosin Adewale v Council of Ministers & Others ECW/CCJ/APP/11/10 16/5/2012. www.courtecowas.org/site2012/pdf. Accessed 1 June 2013
Peter David v Uwechue [2010] CCJLR [PT3], p. 61
Request for Advisory Opinion from the Executive Secretary of ECOWAS, Relating to Article 23 (11) of the Rules of Procedure of the Community Parliament and the Provisions of Article 7 (2) and 14(2) f of the Protocol on the Community Parliament. (2004–2009) CCJELR, pp. 57–58
Wuhelm Werhahn v Council of European Communities, and Commission, C-63-69/72 eu-lex.europa.eu/LexUri Serv/Lex Uri Servido? Uri=CELEX:61972CJ0063:EN:PDF. Accessed 20 October 2013

Publications

Harris S, Horspool M (2008) EU law (Subject Guide). University of London Press, London
Hartley T (2007) The foundations of European Community Law, 6th edn. Oxford University Press, Oxford
Hailsham (ed) (2009) Harlsbury's Laws of England (Administrative law – admiralty), vol 1(1), 4th edn. Butterworths, London
Laws J, Martin E (2009) Oxford Dictionary of Law, 7th edn. Oxford University Press, Oxford
Leyland P, Wood T (1999) Textbook on administrative law, 3rd edn. Black Stone Press Limited, London

Chapter 9
Selected-Forum and Community Staff Actions

Abstract ECOWAS law empowers the Community Court to entertain actions filed by parties that have chosen the Court as their forum for settlement of disputes arising from agreements. This jurisdiction of the Community Court to hear selected-forum cases covers commercial and non-commercial relations. ECOWAS law has also procedural space for members of staff of any of the institutions of the Community to bring actions that pertain to their employment contracts. Summarily, this chapter explores these two disparate procedures as provided under Article 9 of the Protocol Relating to the Community Court of Justice.

9.1 Introduction

There is a plethora of reasons why litigants involve in forum shopping; it could be that the Court is plaintiff-friendly or that the jurisdiction is reputed for awarding huge damages or that the plaintiff, where federal and state courts have concurrent jurisdictions, anticipates a more sympathetic decision from a local than a federal court. Other factors like expertise, quality of judgment, procedural issues or external influences may tilt the pitching of tent one way or the other. In any of these situations, it is likely that the plaintiff will file his action in a court that will treat his case favourably. The phrase forum shopping[1] covers the practice whereby a plaintiff, among the multiple courts that have jurisdiction over a case, chooses a particular court in order to get a favourable decision. It may also explain the situation where parties, bound together by agreement, mutually select a particular court over other courts with concurrent jurisdiction. This practice is common in commercial and transnational commercial cases. And where this choice of forum, especially if selected at the instance of the plaintiff, will only enure to the benefit of the plaintiff and exacerbate the hardship which the defendant will suffer, it is left to the defendant to file a motion of forum non-convenience in order to wriggle out of such unfavourable jurisdiction.

[1] USLEGAL.

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_9

ECOWAS law seems to have created this jurisdiction for the Community Court to take actions similar to forum-shopped cases. In most forum shopping, it is the plaintiff that files in a court that will be beneficial to him. However, it is possible for parties, in business transactions, to agree on a court, among other courts with concurrent jurisdiction, which will hear their matter. Often, this practice of mutually agreeing on forum, and of course applicable law, is covered in an agreement. The Community Court's jurisdiction in this respect is unique and different, in that the parties must have agreed, mutually, to subject themselves to the jurisdiction of the Court. The jurisdiction creates alternative forum option for commercial (and non-commercial) actors who use choice of law and choice of forum clauses to determine their settlement or resolution venues. In this kind of forum selection, unlike forum shopping, the forum selected might have no connection to the transaction from which the dispute arose. It is only a neutral venue selected out of choice by the parties. So the agreement becomes the creator of the jurisdiction. For instance, commercial courts in London are inundated with commercial cases that have no greater connection to London than the courts of the countries which the parties hail from. In MacShannon v Rockware Glass Ltd,[2] Lord Salmon observes that . . ."hundreds if not thousands of commercial contracts, having nothing to do with the United Kingdom, are made all over the world every year between foreigners, containing a clause that any difference or dispute between the parties shall be arbitrated in London". So it is the parties, out of choice, that choose these neutral venues for settlement or resolution of disputes, thereby vesting powers in the courts to adjudicate over the matters.

It seems the jurisdiction of the Community Court of ECOWAS, in this light, may be akin to what happens in London. It may not exclude parties from other parts of the world, so long as the choice of forum can be seen in an agreement between the parties. However, whether this jurisdiction could grow or not may be dependent on internal and external factors. Druzin[3] has shown that the network effect can determine how often such jurisdiction can be engaged. The more litigants engage it, the more the value increases. Thus, increased value would attract more litigants to consume the jurisdictional 'brand'.

On the other hand, ECOWAS law has specifically vested right of access in the members of staff of the institutions to seek redress in the Community Court in the event of breach of terms of contract of service as well as other employment rights. It is obvious that where a Community official or institution breaches a term in an agreement between a contractor and the Community, the Court will not entertain the matter under Article 9(1)(f), which is reserved for actions between the Community and its officials. In order not to throw ajar the floodgate to every busy body, the law insists on exhaustion of all internal appeal process before a staff can invoke the jurisdiction of the Court. It is evident that the Court has powers to award assorted reliefs whether interim or final.

[2] [1978] AC 795.

[3] Druzin (2009), p. 5.

9.2 Selected-Forum Actions

Article 9(6)[4] reads: "The court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the court shall settle disputes arising from the agreement." The jurisdiction of the Court in this area relates to power to hear cases brought by parties—whether corporate or individuals—provided that there exists an agreement which stipulates in one of its clauses that the Community Court shall be the proper forum for settlement in the event of dispute arising from their transaction. The law did not expatiate on the nature or limit of the subject matter. However, it is taken for granted that the subject matter must include commercial disputes between Community citizens, between Community citizens and non-Community citizens, as well as between parties who have no connection to the Community either by nationality or transactions, provided that there is a choice of forum clause in their agreement selecting the Community Court as the forum for settlement.

Nonetheless, from the tenor of the provision,[5] the subject matter may extend to non-commercial relation provided that there is a choice of forum clause that selects the Community Court as the venue for resolution of dispute. One area that comes to mind, swiftly, is political conflict; often the peace process, in a conflict situation, is documented in a peace agreement as seen in most cases in West Africa.[6] Where a peace agreement includes a clause for resolution of disputes arising from the peace agreement and selects the Community Court as the forum for resolution, then there should be no exogenous feature that would prevent the Community Court from assuming jurisdiction to entertain the case based on Article 9(6). Since militants and terrorist groups have some international capacities to enter into agreements that are recognised internationally, the appropriate forum which can entertain any dispute involving them should be an international court—of which Community Court is one—and not a national court. Therefore, the Community Court of Justice should be one of the appropriate forums to determine disputes arising from peace treaties or agreements concluded in West Africa.

9.2.1 Agreement

The article did not explain what it meant by agreement. The word agreement is open and large. Does it include oral agreements, submissions, etc.? Ordinarily, an agreement is a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances, a manifestation of

[4] Supplementary Protocol A/SP.1/1/05.

[5] Article 9 (6) Protocol Relating to the Community Court of Justice 1991 as amended.

[6] Chapter 4 dealt with conflict in West Africa extensively.

mutual assent by two or more persons.[7] Conventionally, commercial agreements or international contracts used in regulating private and public transactions would fit in, provided that there is a clause vesting jurisdiction in the Community Court. The case of Petrostar (Nigeria) Limited v Blackberry Nigeria[8] & Anor offered the Community Court an opportunity to hear a case on contractual liabilities brought by independent parties. The facts bordered on failure, on the part of the defendant, to pay a contractual sum to the plaintiff. In an agreement for liquidation of indebtedness, the parties agreed and stipulated in one of the clauses[9] that any dispute shall be settled by the Community Court of Justice (ECOWAS). On the strength of this clause, the Court seised jurisdiction and found for the plaintiff. This case establishes that the agreement under this head includes commercial agreements or contracts.

It may be possible for two or more persons to agree on referring any dispute arising from their transaction to the Community Court of Justice without reducing their intention into writing. Would the Court listen to such matter, or would it want to see a document evidencing the agreement? It seemed that the Court had, once, taken the latter view. In Linas International Nigeria Limited v Ambassador of Mali & Ors,[10] the Court, while explaining that it may not consider an application relating to contractual matters except as provided under Article 9(6) of the Protocol Relating to the Court, made the following statements: "However, in this case, there is no document proving that the parties have indicated in their alleged contract that this court would have jurisdiction to settle any agreement."

It means that the Court envisages the presentation of a document evidencing agreement to submit to the Court's jurisdiction. Now what sort of document should evidence this intention to submit to the Court jurisdiction? Reading the article,[11] clinically, it becomes clearer that it requires the existence of a transactional agreement either for business, enterprise or other issues of life, and the agreement should provide in one or more of its clauses that the Community Court shall be the proper forum to settle any dispute arising from the agreement. If one moves away from the letter to the spirit of the law, one sees also that the idea is simply to show willingness to submit to the jurisdiction of the Court. If that point is sound, then it would not erode the purpose should parties involved in a transaction that has been executed without a written contract approach the Court with a post-transaction submission. In this context, submission means a contract in which the parties agree to refer their dispute to a third party for resolution. Parties may go into business relationship without reducing their terms into writing, or where reduced, did not indicate that a particular forum or court should be approached in the event of dispute. If one arises, after a long transactional relation, and the parties elect,

[7] Garner (2004), p. 74.

[8] 2012, p. 1.

[9] Ibid., p. 2, para 3.

[10] 2009, p. 279, para 24.

[11] Article 9 (6) of the Supplementary Protocol A/SP.1/1/05.

through a submission, that they want the Community Court to settle the dispute, it wouldn't be rational for the Court to decline jurisdiction.

9.2.2 Choice of Law

Often, in commercial transactions, the agreements provide both for choice of forum and choice of law. Where parties have selected the applicable law, courts would normally apply it in settling the dispute arising from the transaction. The clause may also provide for the application of international rules on commerce, for example Hague Visby or Hamburg rules, in settling the dispute. In such situation, the Community Court will apply those legal norms. Otherwise, it will be absurd to give the Court jurisdiction to hear cases where parties select it as the forum to settle their disputes and in the same breath deny the parties the opportunity to choose their applicable law. The Court can also rationalise the reliance on any selected law by branding its power to import international and national laws through the vent of Article 38 of the Statute of International Courts of Justice.[12] Those international commercial rules may not belong to any particular country, but they apply in the legal systems of the civilised nations and thereby could be described or, at least, deemed as a set of general principles of law recognised in civilised nations.[13] In cases where the issues turn on principles of international law or stem from international agreement of any kind, including peace treaty or agreement that has international nature, the Community Court should readily rely on Article 38 of the International Court of Justice to apply international norms in settling the dispute. However, in situations where the Community Court is invoked to apply foreign law which it is not very conversant with, the foreign law will become an issue of evidence. Parties and experts should be allocated time to adduce evidence on the existence and relevance of the foreign law to the transaction or relation.

9.2.3 Parties

The parties that can invoke the jurisdiction of the Court in selected-forum cases go beyond the parties listed in Article 10 of the Protocol Relating to the Court.[14] It seems that any person, artificial or natural, that is not incapacitated by reason of infancy or insanity can approach the Court. All that the Court needs to do is to satisfy itself that there is an agreement between the parties that contains a choice of

[12] Article 19(1) Protocol relating to the Community Court of Justice 1991.

[13] Article 38(c) International Court of Justice; Article 19(1) Protocol relating to the Community Court of Justice 1991.

[14] 1991 as amended.

forum clause, which selects the Community Court as the appropriate forum for resolution of dispute. Consequently, the parties may be individuals, organisations, corporate bodies, states, intergovernmental organisations, militants and armed groups. They must not necessarily have connection with the Community unless the Court decides otherwise.

9.2.4 Reliefs

The reliefs the Court can order will depend on the nature of the dispute or the agreement which the Court may be invited to interpret in the face of a dispute. It is unarguably right that the Court can order all the reliefs it could make in other rafts of cases brought under Articles 9 and 10 of the Protocol, ranging from damages, restitution, declaration, compensation, etc. The Court, of course, in its wisdom would consider the matter before granting, appropriately, any of these reliefs.

9.2.5 Execution of Judgment

The crux of the challenges in regard to this unique jurisdiction is not the types of reliefs the Court can grant but rather how a granted relief can be appropriated by way of execution. Under the ECOWAS law, the procedure[15] for execution of judgment entails issuing a writ of execution, which the registrar of the Court will normally forward to the relevant Member States for execution in line with its applicable civil procedure rules. Probably, under the enforcement rules of all or some of the Member States, there could exist certain conditions, relating to recognition of judgment or reciprocity, which are meant to be satisfied. It is likely, especially, in the common law countries that decisions of the Community Court may not satisfy all or some of these conditions. And, regrettably, ECOWAS law does not constitute part of the laws of the Member States. Because of these constitutional factors, it will be difficult to enforce or execute the judgment unless the judgment debtor or defendant elects to comply voluntarily. The United Kingdom, a common law country, solved a similar challenge before joining the European Union in 1973 by relying on its European Community Acts of 1972[16] to make European Communities (Enforcement of Community Judgments) Order 1972. With the aid of this subsidiary instrument, judgments of the Court of Justice of the European Union can be enforced as though it were made by courts in the United Kingdom. This sort of legal bypass is what the common law countries need

[15] Article 24(2) Protocol relating to Community Court 1991 as amended.

[16] Section 2(4) European Community Act 1972.

to do in order to enforce decisions given in selected-forum cases within their jurisdictions.

Where the judgment or decisions is intended to be enforced or executed in a foreign or third country, it will depend if the courts or judiciary of that country will recognise the judgment of ECOWAS Court as one given by an international court as per its recognition rules. If there are no legal or constitutional grounds upon which such judgment will be recognised, then doubt is cast on its enforceability within that third country. In such situation, the plaintiff or applicant will depend heavily on good will and faith of the defendant to comply voluntarily.

9.3 Community Staff Actions

The ECOWAS law did provide that the Court has competence to adjudicate on any dispute relating to the Community and its officials.[17] Furthermore, Article 10(e) of the same instrument provides that access to court is open to the staff of any Community institution, after the staff has exhausted all appeal processes available to the officer under the ECOWAS Staff Rules and Regulations.

9.3.1 Parties to an Action

In David v Uwechue,[18] the Court stated, in its judgment, that "...if the action is a dispute on community public service it shall not be competent to adjudicate the case because those disputes should necessarily be between an official and the community or one of its institutions". The effect of this principle is that in an action that touches on Community employment contracts or law, the parties should be officials, institutions of ECOWAS, and the Community. The Court expects, on the authority of this case,[19] that prospective litigants who are officials of the Community should bring their grievances against an institution of the Community or the Community itself. It further stressed[20] that "within the frame work of the Community, the employer cannot be a natural person.[21] The employer should necessarily be the Community or one of its institutions". According to the Court, the action should be brought against the Community or one of its institutions, which should be the employer.

[17] Article 9 (1) (f) Protocol Relating to the Court as amended.

[18] Supra, p. 158, para 54.

[19] Ibid.

[20] Ibid.

[21] Ibid, para 52.

It seems, on the authority of Lijadu Oyemade v Executive Secretary ECOWAS,[22] that where a litigant intends to join principal officers who orchestrated the violation as parties to the suit, it will be advisable to include the institution that employed them. Conclusively, where an employee or former employee or officials feel aggrieved by the action or omission of the Community institutions or officials, it is expected that the action should be brought against the institution(s) or the Community or both. But where the matter is brought against top-ranking officials or employees of the institution, the cause may meet a wave of objection.

9.3.2 Exhaustion of Appeal Process

A staff of any Community institutions may access the Court after he or she has exhausted all appeal process available to the officer under the ECOWAS Staff Rules and Regulations. The Regulation contains internal reconciliatory mechanism for the settlement of grievances. Take for instance Article 73(b),[23] which provides that: "Any member of staff who wishes to appeal against sanctions imposed on him

(i) Must first write a letter to the President of the Commission requesting a review of his case.

(ii) The letter shall be sent by registered post within 30 (thirty) days of receiving notification of the decision, where the staff member's duty station is outside the headquarters.

(iii) (a) If the President maintains the decision or

(b) If the staff member received no response from the President of the Commission within 30 (thirty) days, he shall have another period of 30 (thirty) days within which to bring the matter to the notice of the Council of Ministers through the staff representatives."

The combined effect of Article 10(e) of the Supplementary Protocol[24] and Article 73(b) of the Staff Regulation[25] is that the Court would seise jurisdiction in a matter brought by an official if the latter had first written the President for a review, and failing which, he has taken his grievance, through staff representatives, to the Council of Minister—and he is still unsatisfied with the outcome. Where the applicant has not complied with this condition, the matter would be premature and the Court would, certainly, slough off jurisdiction. But the matter would never be premature if the actors who ought to send the appeal to the appropriate office or institution fails or that the chain of the appeal processes is dysfunctional or has been obstructed.[26]

---

[22] 2008.

[23] ECOWAS Staff Regulation 2005.

[24] 2005.

[25] 2005.

[26] Oyemade v Executive Secretary 2008 (No 2) supra, p. 84, para 55.

9.3.3 Protection of Employment Rights Pending Determination of Matter

Where an official is sanctioned or dismissed, he cannot seek for maintenance of the *status quo ante* pending the determination of the substantive suit. He should not be insisting on the subsistence of his employment contract but ought to ask for damages if the contract was wrongly terminated.[27] But where the contract has statutory flavour, the principles differ. In Oyemade v Executive Secretary ECOWAS (No 1),[28] the plaintiff, whose appointment was terminated, having initiated the action, filed an additional application for expedited action and, *inter alia,* sought an order for the parties to keep the *status quo ante* and, thus, safeguard the position in question and to restrain the defendants from any recruitment exercise while the case was being examined on its merits. After listening to both sides, the Court granted[29] the interlocutory application filed by the plaintiff. This case becomes an authority to state that where an appointment, which has statutory flavour, has been terminated, the Court may order, if requested by the plaintiff, the maintenance of *status quo ante*, pending the determination of the suit, especially where the process of internal appeal mechanism has been obstructed. The order essentially protected the employment right of the plaintiff. The maintenance of *status quo ante*, in this situation, includes[30] the payment of salary of the aggrieved official until the appeal is properly heard. In Oyemade v Executive Secretary of ECOWAS (No 3),[31] the defendant brought another application seeking the suspension of the order which compelled them to pay and continue to pay the plaintiff's salary pending the completion of the appeal process. The Court, having considered some principles on stay of execution, refused and dismissed the application.[32]

9.3.4 Reliefs

The Court has power to grant reliefs to a successful litigant provided the relief sought is adequate in the circumstances and it is such that it has powers to grant. Principally, it has powers to award damages and, probably, order reinstatement. These reliefs are considered below.

---

[27] Folami v Community Parliament 2010, p. 74, para 20.

[28] 2008, p. 33, para 15.

[29] *Ibid.,* p. 49, para 2.

[30] Oyemade v Executive Secretary ECOWAS (No 2) 2008, p. 92, para 71 (c).

[31] [2008], p. 115.

[32] Ibid.

9.3.4.1 Damages

Reading Article 9(1)(g) and (2) together, one would certainly see that the Court has power to award damages or order reparation where the plaintiff suffers injury as a result of institutional or official actions or omissions. Where an official contract is terminated wrongly, the official should seek for the award of damages unless the employment has statutory flavour.[33]

9.3.4.2 Reinstatement Order

This is "an order made by an employment tribunal directing an employer who has been found to have unfairly dismissed an employee to restore him to his former job".[34] The employee is expected to be treated as though he had not been dismissed; consequently, he is entitled to recover any benefit that he has lost because of the period of unemployment. But an employer cannot be compelled to comply with an order for reinstatement. Where the employer has failed to reinstate, the Court would award compensation to the aggrieved plaintiff.[35] This form of order is rarely used by a court. However, it would still be made where the situation requires it. The decision in Oyemade v Executive Secretary ECOWAS (2)[36] shows the Court's attitude to the relief of reinstatement. Although the order did not state that Mrs. Oyemade should start attending office at the ECOWAS Commission, yet it provided for payment of salaries and other emoluments. An order of reinstatement couldn't have been made at that stage because what the plaintiff was seeking was the preservation of her right to appeal to the Council of Ministers. And while the appeal is processed or heard, she should be treated as one whose employment had not been terminated. In that vein, the Court protected her employment rights by ordering the maintenance of *status quo ante*. By that decision, it can, reasonably, be said that where an aggrieved party has appealed to the Council of Minister and lost but excels at the Community Court, then the Court may, if the circumstances permit, grant an order of reinstatement.

9.4 Conclusion

The Community Court of Justice has the jurisdiction to take actions brought by parties that have selected the Court as forum for settlement of dispute arising from their agreements. This procedure is slightly different from the practice popularly

[33] Folami v Community Parliament *supra*, p. 20.
[34] Law and Martin (2009), p. 464.
[35] *Ibid*.
[36] *Supra*.

referred to as forum shopping, whereby a plaintiff shops, among different courts with concurrent jurisdiction over the matter, for a court that will treat his case favourably perhaps because of a peculiar feature about that jurisdiction. In selected-forum cases, the parties, relying on their choice of forum clauses, mutually agree and subject themselves to the Court's authority. The Court can, in cases of this kind, resolve commercial and non-commercial disputes in as much as there is an agreement indicating that the Court is the selected forum. While the Court may grant assorted reliefs, the judgment creditor or the plaintiff may experience certain constitutional limitations in attempting to execute the judgment within the jurisdiction of the Member States because of lack of supranational governance in the Community.

Also, the members of staff of the Community institutions have been given access to the Community Court in situations where their employment rights have been breached by the Community institutions or any of the officials of the institutions. In such cases, the parties that can bring actions are limited to persons under contract of service. And under this jurisdiction, a Member State does not constitute an institution of the Community. Moreover, the Court will consider a case unripe if the applicant did not exhaust all appellate procedures available before invoking its jurisdiction. Where a case is successfully established, the Court may grant different reliefs, including damages and order of reinstatement.

References

ECOWAS Staff Regulation 2005
European Community Act 1972 UK
European Communities (Enforcement of Community Judgments) Order 1972 UK
Protocol A/P1/7/91 Relating to Community Court of Justice as amended by Supplementary Protocol A/SP1/1/05

Cases

Executive Secretary & Others v Lijadu Oyemade (NO 3) [2008] CCJLR [PT.1], p. 92
Folami v Community Parliament [2010] CCJLR [PT3], p. 74
Lijadu Oyemade v Executive Secretary & Others (NO 1) [2008] CCJLR [PT.1], p. 33
Lijadu Oyemade v Executive Secretary & Others (NO 2) [2008] CCJLR [PT.1], p. 84
Linas International Nigeria Limited v Ambassador of Mali (2004–2009) CCJELR, p. 279
In MacShannon v Rockware Glass Ltd [1978] AC 975
Peter David v Uwechue [2010] CCJLR [PT3], p. 158
Petrostar Nigeria Limited v Blackberry Nigeria & Anor ECW/CCJ/JUD/05/71 18/3/2011. www.courtecowas.org/site2012/pdf. Accessed 2 May 2013

Publications

Druzin B (2009) Buying commercial law: choice of law, choice of forum, and network externalities. Tulane J Int Comp Law 18. http://bura.brunel.ac.uk/bitstream/2438/5917/2/Buying%20Commercial%20Law.pdf. Accessed 8 July 2015

Garner B (ed) (2004) Black Law Dictionary, 8th edn. Thomson West, Minnesota

Law J, Martin E (ed) (2009) Oxford Dictionary of Law, 6th edn. Oxford University Press, Oxford

USLEGAL (online dictionary). http://civilprocedure.uslegal.com/jurisdiction/forum-non-conveniens-and-forum-shopping/. Accessed 22 June 2015

Chapter 10
Free Movement of Persons and Right of Residence

Abstract ECOWAS is routing for a fusion of all the markets of Member States, by collapsing internal frontiers, to form one common market capable of leveraging free movement of persons, goods, services and capital within the Community. A key component capable of animating the consequent crisscross of movement is the right of persons to move freely around the *nouveau* expanded market. Because of its importance, this chapter explores what constitutes free movement of persons, the extent and limitations of this Community right as well as the modalities put in place to achieve it within ECOWAS. It examines, also, the right of residence, its effect and justifiable restrictions under the Community law.

10.1 Introduction

In a common or internal market arrangement, the principle of free movement of person is hinged on the existence of a jural right, of a community law nature, to enter, move and reside in any part of the created community[1] or free trade area without restriction and discrimination on the basis of nationality. By implication, it encapsulates[2], also, the ability to work and study within the territories of all the members of that community or economic grouping. The merits of entrenching a functional free movement of persons' regime, in a community, are not only numerous but also fulfilling. Certainly, free movement of persons galvanises economic growth[3] in more than one way. First, it enables people to move and shop within the community, which in turn keeps the market vibrant and generates revenue for the commercial and entrepreneurial actors. Second, it widens the pool of experts and talents from which companies can recruit in order to maximise available human capacity to achieve economic efficiency and optimal profit. Third, it can offer an economic community an opportunity to plug the gaps in some sectors where there is deficiency in specialist skills and to tackle job mismatch existing in

[1] Carera (2005), p. 702.

[2] European Commission (2013), p. 1.

[3] Ibid., p. 2.

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_10

some countries that make up the community.[4] Fourth, it can reassign, temporarily though, or share the public duty of providing employment for citizens in moments of biting economic crunch. Fifth, it also presents an opportunity for the citizens to explore educational, training and vocational options in reputable institutions in other Member States, especially where the institutions have proven history of expertise in those particular disciplines. Sixth, free movement of persons can break cultural and social barriers existing between tribes and races, thereby creating common ground upon which business synergy could be forged.

However, mobility and migration flows can create some destabilizing challenges for some or all the countries that constitute the community or economic grouping. One cannot completely rule out abuse in any integration pursuit. And abuse, as one European Justice Commissioner once said, can weaken free movement.[5] One of the abuses that should be gauged is the practice of "social welfare tourism[6]" whereby economic migrants from poorer countries troop to richer territories merely to take advantage of social benefits existing in those countries. The experience may be uniquely different in West Africa because of less-efficient social welfare policies; nonetheless, some countries, as to social benefit policy, are ranked higher in the pecking order. No matter how modest it may be, Nigeria and Ghana have some social benefit policies on health insurance scheme, poverty alleviation and basic education—enlarging the number of participants can bring down the whole benefit structure in the richer countries of West Africa. Another abuse that comes with migration flows is the escalation of transnational organised crimes;[7] the reduction in border control and improvement on interstate journeys help bandits to perpetrate their heinous crimes from shore to shore.

Furthermore, free movement can put a strain on education, housing, power and other infrastructure,[8] especially where there is no corresponding effort to improve on these systems and infrastructure to stem the effects of the inflow. Also, there could be the challenge of inadequate social inclusion mechanism; this will be visible in countries that are not ready for the migration flows. Where there is no preparation for social inclusion, the migrants will be totally detached and alienated from the entire nationals of the host country; this will affect their productivity, as well as the integration objectives of the community. In summary, these challenges—crimes, social welfare tourism, strain on infrastructure and social inclusion—highlighted above can also apply to the ECOWAS legal regime on free movement.

Nonetheless, ECOWAS legal regime on free movement, as it is, is a paradox: it vests right to free movement of persons in the Community citizens and, indirectly, puts it in abeyance by disabling them from enforcing it either in the Community

[4] Ibid.

[5] European Commission (2013), p. 1.

[6] Carera (2005), p. 709.

[7] Ibid., p. 700.

[8] European Commission (2013), p. 1.

Court or municipal courts. Citizens of the Community are empowered to bring applications to the Community Court in two classes of violations: when any person or persons violate their human rights[9] and when the Community or its officials violate any other rights[10] which natural and artificial persons can bear. This type of right which both natural and artificial person can bear does not include, for the purpose of the Court's jurisdiction, any of the Community rights vested in the Community citizens. In Pinheiro,[11] the applicant alleged that the Republic of Ghana violated his right of establishment, which is a Community right; the Court held that in a situation where a Member State has not implemented a protocol within an internal legal order, such act will amount to failure to fulfil Community obligation. Therefore, the appropriate party to access the Court will be the country of nationality of the bearer of the Community right and not the bearer. It means that the Court is not disposed to hear applications for violation of any Community right, inclusive of right to free movement of persons, at the instance of individuals. The alternative procedure for any citizen, whose right is violated, as the Court aptly pointed out in Pinheiro,[12] will be to take out a writ in a municipal court. Unfortunately, Community texts do not constitute the internal legal order of the Member States because they are neither supranational nor incorporated in their statutes; consequently, municipal courts will not locate constitutional basis upon which to entertain such cases.

While it is correct that African Charter on Human and Peoples' Rights, which is applicable in municipal courts,[13] has provision on free movement of persons, that provision only applies to a violation that occurred within a state and not to cross border violation cases. Therefore, the provision on free movement as contained in the African Charter cannot serve as an alternative legal basis to protect the right to move from one Member State to another. The Community Court of Justice confirmed the difference between these similar rights in the case of Falana v Benin Republic.[14] Therefore, it is proper to describe the regime on Community right as a paradox, because it has vested the citizens with rights and failed to equip them with power to either protect or enforce them at the Community and national forums.

But the Community Court could improve on this stalemate as well as strengthen the law on freedom of movement as the Court of Justice of the European Union did in Europe. For instance, the Court of Justice of the European Union[15] in interpreting Article 45 of the Treaty on the Functioning of the European Union (TFEU), which merely prohibits any form of discrimination in regard to free movement of person,

[9] Articles 9(4) and 10 (d) Protocol relating to Community Court of Justice 1991 as amended.

[10] Ibid., Articles 9(g) and 10(c).

[11] Pinheiro v Republic Ghana 2012, p. 9.

[12] Pinheiro 2012, p. 8.

[13] African Charter on Human and Peoples' Rights Act of Nigeria, New Patriotic Party v Commissioner of Police.

[14] Falana v Benin 2012, p. 17.

[15] Bossman (1995), P I-4921.

roped in any national provision which is not discriminatory but is capable of hindering access to employment in another country within the Union, as being in contravention of Article 45. And in Commission v Luxembourg,[16] the Court, with a view to protecting the entitlement of citizens to welfare or benefit packages in another country, held that conditions which stipulate the number of years one must have lived in a country before one is entitled to support will breach Article 45. In Zhu and Chen, the Court held that to deprive Chinese parents of a European citizen's right of residence would invariably mean depriving their child, who is a European citizen, right of residence as provided under the law. But the Court seems to have narrowed the principle somewhat in Shirley McArthur.[17] Therefore, it behooves on the Community Court of ECOWAS to either improve on its judicial behaviourism in order to construe some of the texts in a manner that will achieve the Community objectives or tread with great circumspection to avoid ruffling some political feathers, which will invariably affect the growth of the Community law and the protection of Community rights.

10.2 Community Citizen and the Freedom of Movement

A person who is not a citizen of the Community ordinarily would not be entitled to the benefit encapsulated in the freedom of movement regime. The Protocol[18] provides that any person who is a national by descent of a Member State and is not a national of any non-Member State of the Community qualifies as a Community citizen. Observably, this provision does not encourage dual citizenship; therefore, in the contemporary times it would be difficult to apply it, in the literal sense, without infringing on the rights of the citizens of the Member States. However, the following classes of persons will qualify as citizens of the Community: persons who are citizens of the Member State by birth,[19] an adopted child[20] who upon attaining the age of 21 expressly takes up the nationality of his adoptive parent who is a Community citizen, a naturalised person who had satisfied certain conditions, and a person who is adopted by a naturalised person.[21]

Nonetheless, there is a fundamental uncertainty surrounding the conditions that attach to the qualification of citizenship and the grounds of forfeiture.[22] Deplorably, the law provides that a person may lose his or her citizenship if the person permanently settles in a non-Member State or acquires, voluntarily, the nationality

[16] 2002 P I-5899.

[17] 2001, p I-3375.

[18] Article 1 Protocol A/P3/5/82. Relating to Definition.

[19] Ibid., 1(h).

[20] Ibid., 1 (i).

[21] Article 1 generally.

[22] Article 2.

of a non-Member State or loses nationality of the country of origin, etc. It will certainly work hardship on the rights of the citizens who may have taken citizenships of other countries either by marriage or long stay. Therefore, it is suggested that some of these provisions would benefit hugely from extensive review and amendment.

10.3 The Right to Move Freely

The Protocol provides that Community citizens have the right to enter, reside and establish in the territory of Member States. And the time frame[23] within which the right should not be exercised has elapsed. Therefore, all citizens are at liberty to exercise this right in all territories of all the Member States. In exercising this right, a citizen of the Community does not require any entry clearance—whether visa or entry permit—to enter any of the Member States.[24] However, the law expects the citizen to possess a valid travel document and an international health certificate;[25] a valid travel document, for this purpose, would include a national passport and an ECOWAS travel certificate.[26] Where a citizen does not possess an international health certificate, the exercise of the right of entry may be curtailed on the ground of public health. Health certificate, in this regard, includes a yellow card generally recognised as evidence of having taken certain vaccination. There are other conditions, apart from possession of valid travel document and an international health certificate; a citizen of the Community wishing to exercise his right of free movement must seek to enter any Member State through the official entry point. For the purpose of determining the official entry point, it is the rule or law of the relevant Member State that would provide for the designation. However, an indicator that an entry point is official could be the stationing of immigration and other security personnel at such point and the provision of immigration services for embarkation and disembarkation purposes. And where he or she enters through an official entry point and elects to stay in that country beyond ninety (90) days, he or she would be required to obtain permission for an extension of stay from the appropriate authority.[27] The application for such permission for extension of stay must be made to the authority or office in charge of immigration in that Member State unless a contrary provision is provided in the laws of that country.

[23] Maximum of 15 years from the date the Protocol entered into force; see Art. 2 Protocol Relating Free Movement.

[24] Articles 2 (3); 3 (1) (2) of A/P1/5/79 Relating to Free Movement.

[25] Ibid., Article 3.

[26] Decision A/DEC.2/7/85 Relating to the Establishment of ECOWAS Travel Certificate. It also includes laissez-passer or other valid travel documents establishing the identity of the holder with his photograph which has room for immigration endorsement; see Article 1 Protocol Relating to Free Movement.

[27] Ibid., Article 3 (2).

The first invitation, by a Community citizen, to the Community Court of Justice to protect the Community right of free movement of persons was made in the case of Olajide Afolabi.[28] The applicant, a Nigerian businessman, alleged that he had made arrangement with his customer in Benin Republic to enable him to purchase some goods. In keeping to the business appointment, Olajide embarked on a journey to Benin but was not allowed to go beyond the border (Seme) between two countries because Nigeria had closed the border; hence, he suffered some financial loses.[29] Indeed, the applicant made his application before the enlargement of the Court's jurisdiction, in 2005, to entertain action brought by individuals in the event of violation of their human rights; resultantly, he based his claim on the old Article 9 of the Protocol on the Community Court, which only permitted the Member States to bring applications on behalf of their citizens for the purpose of interpretation of the Treaty.[30] Having considered the application, the Community Court held that it lacked jurisdiction to entertain the action because the applicant has no right of access and cannot bring an action against the Member State that ought to sue on his behalf.[31]

After the enlargement of the jurisdiction of the Court in 2005, two applicants filed a suit[32] against the Republic of Nigeria and all the other Member States which constitute the economic grouping. The applicants alleged that maintaining check points at the border between Benin Republic and Togo and the eventful closing of the border on the day the applicants set out to monitor the election in Togo violated their right to free movement of persons under Protocol A/P1/5/79 relating to Free Movement of Persons, Residence and Establishment and the African Charter on Human and Peoples' Rights. Quite in character, the Member States raised series of objections to the suit, ranging from non-exhaustion of local remedy to jurisdiction and *locus standi*. After taking the preliminary objections, the Court ruled that the requirement for exhaustion of local remedy does not apply and that the applicants have sufficient interest; therefore, it would seise jurisdiction to hear the matter.[33] When the matter was heard on merit,[34] the Community Court dismissed the action for failure, on the part of the applicants, to demonstrate that their right to free movement was actually restrained since they were allowed to pass the border after explaining their mission to the security personnel at the border post.

However, the Court also expatiated on two vital issues in the matter: (1) whether the limitation period of 3 years within which an action should be brought to the Court applies to human right cases and (2) whether free movement under Article 12 of the African Charter has the same effect as the Community right of freedom of

[28] Afolabi v Federal Republic of Nigeria 2004, p. 1.

[29] Ibid., p. 2.

[30] Ibid., p. 4.

[31] Ibid., p. 16.

[32] Falana v Republic of Benin 2010, p. 114.

[33] Ibid., p. 133, para 33.

[34] Falana v Republic of Benin 2012.

movement of persons under the 1979 Protocol of ECOWAS? The Court clarified that time bar applies to human right cases unless the matter falls under "gross violation of human right".[35] As to the effect of the similar rights covered under the Charter and the Protocol on Free Movement of 1979, confirmed that free movement as contained in Article 12 of the African Charter relates to free movement within a state and not free movement within the Community, thereby distinguishing Article 12 of the Charter from Article 3 of the Protocol on Free Movement.

10.4 Right of and Condition for Refusal

The right to enter the territory of a Member State is not absolute. The Member States have been empowered to exercise right of refusal[36] in certain situations. Article 4 has entrenched the right of Member States to refuse to admit any citizen into their territory where such a person comes within the category of inadmissible immigrant under their laws.[37] The responsibility of determining who should be classified as inadmissible immigrant falls squarely on each Member State. The Protocol did not define what it meant by inadmissible immigrant; however, it must be a phrase which depicts a class of immigrants that a Member State would not want within its territory because of public health, public security, public policy or morality.

Under the laws of Ghana,[38] for instance, a person is a prohibited immigrant if he has deportation order in force against him, is unable to show means of support, refuses to submit to a medical examination after being required to do so by a health officer, has been sentenced in a foreign country for an extraditable crime within the Extradition Act of Ghana, has been certified by a health officer to be medically unfit to enter Ghana, procures or attempts to bring into Ghana a person for the purpose of prostitution or any other immoral purpose. Similar provisions have always been in Nigeria's immigration laws.[39] The right of refusal, under this head, must be exercised within the bounds of applicable law; where a person is refused entry on any ground other than a legal one, such refusal would violate Articles 2 and 3 of the Protocol.

[35] Falana v Benin Republic 2012, p. 13.

[36] Article 4 Protocol Relating to Free Movement.

[37] Ibid.

[38] Section 8 Ghana Immigration Act 2000.

[39] Section 17 (1) Nigeria Immigration Act of 1963; see also Eze (1988), p. 56.

10.5 Movement of (Persons in) Vehicle

Obviously, the freedom of movement of citizens of ECOWAS extends to the cars or vehicles conveying them to the designated Member States. This freedom prevails irrespective of the purpose of the vehicle in use—whether commercial or private vehicles. Where the vehicle is a private[40] one and has been registered in the territory of a Member State, it may enter the territory of another Member State provided that the citizen presents to the appropriate authority of the designated Member State the following documents: valid driving licence, matriculation certificate (ownership card) or log book, insurance policy recognised by Member States and international customs documents recognised within the Community.

The private vehicle should not exceed ninety (90) days within the territory of that Member State.[41] The article[42] did not state what should happen where the vehicle has cause to stay more than ninety (90) days within the territory. However, it is reasonable to suggest that the provision of extension[43] applicable to citizens should also apply to their cars. Where the vehicle is used for commercial purposes and has been registered in the territory of a Member State and it is conveying passengers, it would enter and may remain in that territory up to 15 days. Such vehicle would enjoy the freedom of movement provided that the driver or person managing it presents similar documents required of a private vehicle.[44] Where the vehicle has cause to exceed 15 days, it would be appropriate for the driver or manager of the vehicle to seek permission.

But what happens where a commercial vehicle, without passengers or goods, enters a territory, would the rule on private vehicle apply to it or would the law insist that it should not stay more than 15 days? If the spirit of the law is put into consideration, then the right interpretation would be that though it is a commercial vehicle in private use, yet it should be allowed to remain in that territory up to 90 days. To decide otherwise would certainly hype technicality over common reasoning and work hardship on the rights of drivers or owners of a commercial vehicle. That a vehicle is registered as a commercial vehicle does not deprive the owner of the right to use it, at some point, for private purpose when the need arises. Another grey point is: how would the law respond to a commercial vehicle that enters as such but the driver decides to take a holiday for more than 15 days in the territory of another Member State? It seems that this situation is different because it entered as a commercial vehicle with passengers; if the driver wants to extend the stay of the vehicle beyond the appropriate time, he may have to get permission from the authority.

[40] Article 5 (i) Protocol Relating to Free Movement.

[41] Ibid.

[42] Ibid.

[43] Article 3 (2) Protocol Relating to Free Movement op.

[44] Ibid., Article 5 (2).

Another restriction[45] which the law has imposed on commercial vehicle is that the vehicle should not engage in any commercial activity within the prescribed time. What, then, would qualify as commercial activity? The Protocol did not explain that; however, "commercial"[46] as an operative word relates to "commerce (interchange of merchandise on a large scale between nations or individual; trade or traffic) mercantile, having profit as the main aim. . ."; consequently, a vehicle registered for commercial purpose may engage in non-commercial activities within the territory of a Member State. A good example would be conveying fellow compatriots living in a Member State to any destination within that territory.

10.6 Interpretation of Protocol

In the event of disputes, among Member States, bordering on how to interpret or apply the Protocol dealing with abolition of visa and entry clearance, the law once provided that the disputes shall be amicably settled by direct agreement. Where direct agreement fails, the matter should be referred to the Tribunal of the Community.[47] The above provision has been amended somewhat; while the concept of amicable settlement still subsists, the portion dealing with referral to Community Tribunal has been deleted.[48] In its place, the law reads: "in the event of failure to settle such a dispute amicably, the chairman of the Authority of Heads of State and Government may upon receiving a complaint from a Member State of the Community of systematic or serious violations of the provisions of the Protocols on Free Movement of Persons, the Right of Residence and Establishment on the part of another Member State, request the President of the Commission to urgently dispatch to the Member States concerned a fact finding mission comprising officials from at least three Member States, acceptable to the parties concerned, and officials of the President of the Commission, to investigate the complaint".[49] The fact-finding mission should write a report of their investigations and submit it to the President of the Commission. The President should then forward the report to the chairman of the Authority of Heads of State and the Member States concerned, for the purpose of finding the appropriate solutions to the problems.[50]

This procedure relates only to Member States; it can never be extended to an individual when the application or interpretation has affected his Community right. The appropriate procedure in the event of violation of the Community right of a citizen would be to approach the courts. However, there are limitations, in the

[45] Ibid.

[46] Brookes (2006), p. 307.

[47] Article 7 Protocol Relating to Free Movement.

[48] Article 2 Supplementary Protocol A/SP/1/6/89.

[49] Ibid., (2).

[50] Ibid.

meantime. The Community Court would slough off jurisdiction if an individual attempts to access the Court by reason of violation of Community right, because it held in Pinheiro[51] that the appropriate party to access the Court should be the Member States and not the individuals whose rights were violated. Again, the option of invoking the jurisdiction of a municipal court to address the violation would hit the rock because ECOWAS laws are not supranational within the Member States.

10.7 Expulsion and Repatriation of Citizens (Guidelines)

A study of Article 3(1)–(9) of the Supplementary Protocol[52] would show that the words "expulsion" and "repatriation" were used by the draftsmen without any express intention to highlight the differences. It seems, to them, since the effect is the same, that it matters little to delineate one from the other. However, under administrative law of most sovereign states, an expulsion order may not be the same with repatriation or removal. If the draftsmen neither differentiated nor, clearly and intellectually, attached different conditions to each of them, it would certainly pose great difficulty, here, to attempt such technical adventure. It may amount to the imposition of technicality, even if it were right, on a provision intended to be ordinary.

But for the purpose of emphasis, expulsion may mean the termination by a state of an alien's legal entry and right to remain. This termination may be occasioned by the fact that the alien poses threat to the state or has become undesirable in the eyes of the state. Generally, the grounds of expulsion includes conviction of a crime compromising public security; vagabondage, vice, disease; spying and political intrigue; resistance to the law; and abuse of the national flag.[53] A good example of a country where the term repatriation is used in its immigration law is Ghana.[54] Under the heading "Removal of illegal immigrants", the relevant section reads: "Where the presence of a person in Ghana is unlawful, that person may be repatriated from Ghana by an order of the Director." It further provides that "Where a person is ordered to be removed from Ghana, that person may be arrested and detained for a period that is necessary for making arrangement for the removal."[55] So under the Immigration Act of Ghana, the words removal and repatriation were used interchangeably.

Another immigration term that merits explanation is deportation. It has been described as the act or an instance of removing a person to another country, the

[51] Pinheiro v Republic Ghana 2012, p. 9.

[52] Supplementary Protocol A/SP.2/7/85 on the Code of Conduct.

[53] Law and Martin (2009), p. 221 see also the Buffalo case 1903 cited in Oxford Dictionary, p. 221.

[54] Ghana Immigration Act 2000.

[55] Ibid., Section 21 (1) (2).

expulsion or transfer of an alien from a country,[56] the removal from a state of a person whose initial entry into that state was illegal[57] or a person who was lawfully in a country but has become unwanted due to breach of terms of permission of stay or because of court recommendation, etc.[58] In order to appreciate the usage of the word "deportation", section 35 of the Ghanaian Immigration Act is considered, which, *inter alia*, provides that a foreign national would be liable for deportation if a court makes such recommendation or a court finds that he is of unsound mind, he is a prohibited immigrant, he is in Ghana without a valid permit or any of the conditions on which the permit was granted has been broken.[59] A person can be liable to deportation if his presence is in the opinion of the Minister, not conducive to the public good.[60] The inference to be drawn here is that, in most cases, a court should find against the person on certain grounds or recommend that the person should be deported. However, the Minster may also, in his opinion, consider a person to be liable to deportation.

In all, with reference to Ghana, it is the Minister that makes the order of deportation[61] while the director makes the order of repatriation. This line of difference helps to clarify that removal and repatriation may occur were the immigrant entered illegally while deportation relates to a situation where the immigrant may have entered legally but by virtue of behaviour, conduct or breach of conditions has become unwanted. Generally, from this explanatory exercise, it is agreed that deportation has some similarities with expulsion as previously defined.

With reference to ECOWAS, it is not very clear whether the institutions intended to give repatriation or expulsion a different meaning; however, it may end up in the interpretative hands of the Community Court; nonetheless, the procedural guideline stipulates that illegal immigrants should enjoy and exercise their fundamental human rights.[62] The fundamental human rights of expelled immigrant, as well as employment rights, should be respected. It is further provided that any expulsion order shall be enforced in a humane manner without injury to the person, rights or property of the immigrant. Any person under an expulsion order shall be given a reasonable period of time to return to his country of origin, and any expulsion order which may lead to the violation of fundamental human rights is prohibited. Because of the fundamental human rights enjoyed by immigrants, host countries are instructed to ensure that repatriation takes place under legal and properly controlled procedures.[63]

[56] Garner (2004), p. 471.

[57] Law and Martin (2009), p. 164.

[58] Ibid.

[59] Section 35 Immigration Act 2000.

[60] Ibid.

[61] Section 36 Immigration Act 2000.

[62] Art 3 (1) Supplementary Protocol A/SP.2/7/85.

[63] Ibid., (2)–(5).

The same law also provides that "where it is absolutely necessary, expulsion shall be contemplated solely on strictly legal grounds, in any case, it shall be effected with due respect for the human dignity of the expelled immigrant".[64] The law may have provided how illegal immigrants may be expelled or repatriated; however, it does not encourage repatriation or removal of illegal immigrant. In fact, Member States are encouraged to take all possible steps to ensure or facilitate the obtaining of the correct documents by illegal immigrants if desired and possible.[65]

In conclusion, the essence of the law is that illegal immigrants from a Member State should not be expelled unless it is not possible or that the affected immigrants do not want to be assisted with regularisation of their documents. And where the circumstances justify expulsion, time must be given to the immigrants to return to their countries. In the event of actual expulsion, the expelling States must accord all the immigrants every respect and refrain from violating any of their fundamental human rights. If these provisions were applied to the expulsion of Ghanaians from Nigeria in the 1980s, then that expulsion process would certainly have contravened the laws of ECOWAS, for the spirit of the law strives against mass expulsion save where there is no remedy to the situation.

10.8 Immigrants and Their Property

One of the implications of the "right to enter and reside" is the right to acquire both moveable and immovable property. The host country should protect property legally acquired within its territory by immigrants; any right flowing from such acquisition must be respected.[66] Member States are not permitted to apply any measure that would be detrimental to the property, rights and benefits legally acquired in their territory by citizens and nationals of other Member States which would not be applicable to their own nationals under the same conditions.[67] Any Member State that has taken a measure which is detrimental to goods, movable property or fixed assets legally acquired by Community citizens who are nationals of another Member State shall be liable to payment of a fair and equitable compensation.[68]

[64] Ibid., (6).

[65] Article 5 (1) Supplementary Protocol A/SP.2/7/85.

[66] Article 7 (1) Supplementary Protocol A/SP.2/7/85.

[67] Ibid., (2).

[68] Ibid., (3).

10.9 Free Movement and Border Closure

Every citizen that fulfils the conditions required of a person intending to enter another Member State has the right to enter and reside. Nonetheless, a country has the right to close her borders in the event of an internal security challenge.[69] In such situation, the law allows the State to impose measures which may restrict the implementation of the provisions found in the Protocol on Free Movement of Persons. However, there is an obligation on such a State to inform the President of the Commission and other Member States within a reasonable period of time. Under this article,[70] a country may close its borders on the ground of "problem of internal security". It means that where the closure was informed by other reasons which may be trivial, it could be seen as restriction on free movement of persons and goods. In Falana,[71] a Member State closed its borders in order to prevent any security issues arising during an election. And the Court, in giving its judgment that the rights of the applicants were not violated, also confirmed the power of States to take steps to ensure public security.

10.10 Member States' Obligation to Immigrants

There are certain obligations and roles heaped upon the Member States in their relations with the immigrants. Where a Community citizen intends to enter another Member State, it is the responsibility of the country of origin to ensure that the citizen possesses valid travel documents recognised within the Community. Member States are also charged with the duty of establishing or strengthening appropriate administrative services in order to furnish immigrants with all the necessary information likely to permit legal entry into their territories.[72] It is also the role of Member States to introduce strict measures that could check illegal recruitment by employers within the territories.[73]

[69] Femi Falana & anor. v The Republic of Benin & others 2012, pp. 17–18.

[70] Article 8 (1) (2) Supplementary Protocol A/SP.2/7/85 see also Falana v The Republic of Benin.

[71] Femi Falana v The Republic of Benin & others 2012, pp. 17–18.

[72] Article 2 (1) (2) Supplementary Protocol A/SP.2/7/85.

[73] Ibid., (3).

10.11 ECOWAS Travel Certificate (Valid Travel Document)

Under the ECOWAS law,[74] a valid travel document means a passport or any other valid travel document establishing the identity of the holder with his photograph, issued by or on behalf of the Member State of which he is a citizen and on which endorsement by immigration and migration authorities may be made. A valid travel document shall also include a laissez-passer issued by the Community to its officials establishing the identity of the holder. The ECOWAS travel certificate had been established as a travel document.[75] Therefore, any national of a Member State has the right to apply to be issued with one and can seek for extension of the travel certificate provided he has satisfied the requirements stipulated in the laws and regulations of his country of origin. It is the department or office or ministry that issues travel document in the country of origin of the applicant that is the competent authority to issue such certificate.[76] In applying for ECOWAS travel certificate, an applicant should present four photographs, completed forms and a birth certificate; where a birth certificate is not available, a sworn affidavit in lieu of the birth certificate or a national identity card will suffice. The certificate is issued on individual basis, and children under the age of 15 may be included in their parents' certificates.[77] The certificate is valid for 2 years and may be used for several journeys.[78]

It would amount to an offence to seek the issuance of the certificate on presentation of false documents or to use such certificate acquired under false pretence. To transfer a certificate to another would also amount to an offence. That is not all, the act of forging, counterfeiting, altering or using stolen certificate would result in offence.[79] However, it is obvious that the ECOWAS Court has no criminal jurisdiction. Which court, then, has the competence to try any of these offences? The law provides that proceedings may be instituted according to the provisions of the penal code of each ECOWAS Member States.[80] The law[81] could not have provided any better. This is because if it had provided that charges may be preferred based on Article 7,[82] it would have introduced some difficulties. In most countries, including the ECOWAS Member States, a person cannot be charged with an offence that was not, prior to the commission, provided in the statute books of that country. If the

[74] Article 1 Protocol Relating to Free Movement.
[75] Article 1 Decision A/DEC.2/7/85.
[76] Ibid., Article 3 (1) (2).
[77] Ibid., Article 4.
[78] Ibid., Article 6.
[79] Ibid., Article 7.
[80] Ibid.
[81] Ibid.
[82] Ibid.

draftsmen had not employed this technique, the issues of supranationality of ECOWAS law would have been raised, especially in the common law countries.

10.12 Right of Residence

Right of residence means the right of a citizen who is a national of one Member State to reside in a Member State other than his state of origin and which issues him with a residence card or permit that may or may not allow him to hold employment.[83] Every Member State is bound to grant citizens of the Community who are nationals of other Member States the right of residence in its territory for the purpose of seeking and carrying out income-earning employment.[84] As shown earlier,[85] the card or permit issued may or may not entitle a person to seek gainful employment. A good example would be where a Community citizen is seeking for right of residence as a dependent of another resident card or permit holder.

10.12.1 Effect of Right of Residence

Whenever the right of residence has been issued to a Community citizen, it would entitle the holder to the following benefits: (1) apply for jobs effectively offered; (2) travel for this purpose, freely, in the territory of the Member State; (3) reside in that State in order to take up employment in accordance with the legislative and administrative provisions governing employment of national workers; (4) live in the territory of that Member State according to the conditions defined by the legislative and administrative provisions of the host Member State after having held employment there.[86]

10.12.2 Civil/Public Service

It has been stated that some of the implications of being a bearer of right of residence are the liberty to apply for jobs effectively advertised and take up such jobs when the opportunities are presented to the applicants in line with the rules of the host country. However, there is a restriction on applying for jobs in the civil service of Member States. But it will be useful to explain what will constitute civil

[83] Article 1 Supplementary Protocol A/SP.1/7/86 (Right of Residence).
[84] Ibid., Article 2.
[85] Article 7.
[86] Article 3 Supplementary Protocol A/SP.1/7/86.

or public service. Does it mean that every institution owned fully by a government or any of its agencies should be described as civil service for the purpose of restricting access to employment? If this argument holds water, it would mean that no Community citizen living in any Member State other than his or her country of origin should be employed in any government institution like hospitals, schools, airports, etc. Neither the draftsmen nor the Community Court has clarified what the law meant by civil service. But under the European Union law, the Court of Justice interpreted a similar provision in the case of Commission v Belgium.[87] In that case, the Belgium authorities argued that all positions or office in the public service or sector should be reserved for nationals as envisaged in the old Article 39(4) EC, but the Court did not subscribe to that argument. It formed the opinion that the post or office which Article 39(4) relates to must be such that entails the exercise of power or authority as contained in the national laws on public service.

It means that if a Belgian hospital puts up an advert for a vacancy, a foreigner may not apply or access such position if it entails making decision, based on a power derived from national law, and has the ability to affect national interest. Also, it means that where the office advertised for has nothing to do with exercise of public power, then any European citizen may apply for it. By extension, an offer for the post of consultant surgeon may be taken by any European citizen even if the advert was put up by a Belgian government hospital. If ECOWAS decides to import this principle into its jurisprudence, it will then mean that every Community citizen may be allowed to take up appointment in government institutions within the entire Community provided that the office taken does not require the exercise of public authority or power as contained in the national laws of the host State. Therefore, a computer and information technology guru from Sierra Leone can head up the information technology department of a public institution in Ghana or Nigeria in as much as the role does not entail making decision based on granted powers as provided in a law.

10.12.3 Justifiable Restrictions

In addition to restriction on access to civil service employment, there are other grounds capable of restricting the effects of right of residence. All the rights and benefits accruing from right of residence could be hindered by measures put in place by the host country for the purposes of public order, public security and public health. In the meantime, there is dearth of ECOWAS cases on these grounds, but a cursory look into the European Union and the approach of its Court of Justice might be of help. The European Union institutions introduced a Directive[88] which identified the dual health grounds that can justify restriction on entry and residence.

[87] Commission v Belgium 1980, see also Commission v France 1986.

[88] Article 24 Directive 2004/38 cited in Harris and Horspool (2008), p. 253.

They are diseases with epidemic potential, recognised by the World Health Organization to have such potential, and other infections or contagious diseases, but only if restrictions are being imposed on the nationals of the host state who may have the same health challenges.[89] In regard to public security or policy, European Union law[90] prohibits group refusal of exercise of the right to enter or group expulsion. Entry or expulsion of persons should be done in line with the principle of proportionality. For instance, if a western European country is of the opinion that some citizens of a particular eastern European country have been linked to a terrorist attack, the western European state would not be permitted to refuse every citizen from that country entry or to expel all of them based on such opinion.

At all times, the action of that country must be proportionate to the objective which it wants to achieve. Restrictions would only be justified if they are based on the personal conduct of the person targeted.[91] In Van Duyn,[92] the European Court of Justice held that it would be wrong to restrict people because of their race, nation and association. However, an association with a group or organisation may be interpreted as personal conduct if the membership to the organisation shows participation in line with the organisational tenets.[93]

Relating these principles to ECOWAS, it means, if adopted, that any restriction or denial of right of residence on the grounds of public order, health and security must be based on personal conduct and not on perceived collective disposition of citizens from a particular Member State. It also implies that a Member State should neither deny Community citizens right of residence because of political feud nor to even up economic imbalances. The measures taken by the Member States should be proportionate to the set objectives that they want to achieve. If these principles should gauge the gory exercise of mass expulsion of Ghanaians from Nigeria in the 1980s, the exercise would fail both discrimination and proportionality tests. Restriction, therefore, must be based on germane reasons touching on identified public issues and should at all times be proportionate to achieve defined objectives.

10.12.4 Residence Document

Any person wishing to reside in any Member State should acquire from the appropriate authority, in the host state, a document evidencing right to residence. The document could be either an ECOWAS residence card or a residence permit.[94] Every prospective applicant should be ready to deposit with the immigration office

[89] Harris and Horspool (2008), p. 253.
[90] Ibid., p. 254.
[91] Article 27 (2) Directive 2004/38.
[92] See the views of the European Court of Justice in Van Duyn v Home Office 1974, p. 1349.
[93] Ibid.
[94] Article 5 Supplementary Protocol A/SP.1/7/86.

of the host country an application for a residence card or permit in accordance with the laws of that country.[95] Where a Community citizen is at the verge of processing the residence document, such process should not prejudice any employment contract.[96] However, the law did not harmonise the cost of processing such resident permit in all the Member States. While it is legal for each Member State to determine processing mechanism, yet any adopted mechanism that offends the spirit of the ECOWAS laws or deprive the Community citizens the opportunity to acquire the permit because of exorbitant fees—for instance, Ghana demands 500 US dollars from Community citizens as at 2014—should be unacceptable. The application of national laws, in determining the process of issuing permit, therefore should not rob the citizens of their Community rights.

10.13 Workers

The right of residence includes the right to seek for and hold employment in another Member State other than the holder's country of origin. It would be apt at this point to explain the different kinds of workers under the ECOWAS law who may receive protection within the Member States.

10.13.1 Classification of Workers

A person may be classified as a migrant worker if he is a Community citizen from a Member State and has travelled from his country of origin to the territory of another Member State of which he is not a national and seeks to hold or proposes to hold or is holding or has held employment.[97] This term covers all other types of workers under the ECOWAS law; whether one is a border area, seasonal or itinerant worker, one is still a migrant worker.

Specifically, border area workers are migrant workers[98] who, while in employment in one Member State, maintain their normal residence in a neighbouring Member State, which is their country of origin and to which they return each day or at least once a week. This definition did not put into consideration persons who may have come from a Member State (e.g., Nigeria) to live in the border of another Member State (e.g., Benin Republic) and work in another Member State (e.g., Togo). Such persons should be included in the equation; until this is done, the Community Court should expand the meaning of border area workers to

[95] Ibid., Article 6.
[96] Ibid., Article 8.
[97] Ibid., Article 1.
[98] Ibid.

accommodate them. While seasonal workers refer to migrant workers in employment or practising a business on their own account in one Member State, of which they are not nationals, the activity being by its nature dependent on seasonal conditions and capable of being practised only during a part of the year,[99] itinerant workers refer to workers who, normally, residing in one Member State may have to travel to another Member State for a short period for the requirements of their activities.[100]

10.13.2 Exclusions

Under the ECOWAS law, some persons have been excluded from the migrant worker bracket. Persons on official posting who are employed by international organisations and persons employed by a state outside the territory of that state, whose entry into the country and conditions of service are governed by general international law or by specific international agreements or convention, are excluded from the term migrant workers.[101] The other persons excluded from the term migrant workers are persons on official posting who are employed by a state outside the territory of that state for the implementation of co-operation programmes for development agreed on with the host country, the entry into country and conditions of service of such persons being established by specific international agreements or conventions.[102]

Also, a person whose working relations with the employer have not been established in the host Member State[103] will be excluded from the term migrant worker. Where a person works in a host Member State but his main income does not come from the host country, such a worker cannot qualify as a migrant worker. The other persons excluded from the migrant worker bracket are persons who become residents in their capacity as investor in a country other than their country of origin or who, since their arrival in that country, have been carrying out an economic activity as employers.[104]

[99] Ibid.
[100] Ibid.
[101] Ibid., (2).
[102] Ibid.
[103] Ibid.
[104] Ibid.

10.13.3 Special Workers' Rights

Where a person qualifies as a border area worker, he shall enjoy all rights to which he is entitled through his presence and his work in the territory of the host country. However, he may not be entitled to residence and other legal benefits proceedings from it.[105] He is at liberty to choose his employment freely subject to any limitation imposed by the country.[106] A seasonal worker, too, shall enjoy all rights to which he is entitled through his presence and his work in the territory of the host Member State.[107] With regard to an itinerant worker, he shall also enjoy all rights to which he is entitled through his presence in the territory of the host Member State but will not be entitled to rights relating to residence and other legal benefits accruing from it.[108]

10.14 Migrant Workers' Rights (Protection from Expulsion)

Migrant workers shall not be arbitrarily expelled from the territory of the host countries except on specified grounds acceptable under the ECOWAS law. This special protection extends to their families. In order to enjoy this protection, the migrant and his family should have met the residence requirements. Nonetheless, it will be appropriate if expulsion of migrant workers should be based on their personal conducts and not on the grounds of their nationality, race or association. Again, any expulsion mechanism employed should be proportionate to the aims or objective of the expulsion and should not be used as a pretext to achieve other economic or political end.

10.14.1 Grounds for Expulsion

Generally, a migrant worker may be expelled from the territory of a host country on the grounds of national security, public order and morality. Another ground that may justify expulsion is public health, especially where the person fails to obey orders given to him by a public medical authority for the purpose of protecting public health.[109] Furthermore, where there are essential conditions[110] for the

[105] Article 10 Supplementary Protocol A/SP.1/7/86.
[106] Ibid.
[107] Ibid., Article 11.
[108] Ibid., Article 12.
[109] *Ibid.,* Article 14.
[110] *Ibid.*

issuance (or validity) of a person's residence or work permit and the conditions are not fulfilled, it may be a good ground for expulsion. A person may also be expelled on other grounds found in the laws of the host Member State.[111] But obnoxious provisions found in national laws should not be allowed to defeat the integration policy of the Community as entrenched in ECOWAS texts.

10.14.2 Procedure for Expulsion of a Migrant (and Family)

Every form of expulsion must find root in a legal or administrative decision.[112] It should be noted that it must be the appropriate authority empowered by the law of the host country that should make the decision. The person intended to be expelled should be given a written notice of the decision. The host country shall also send copies of written decisions to the President of the Commission and the country of origin of the victim.[113] Where a decision is made, the citizen shall be entitled to a right of appeal in accordance with the laws of the host country. Except where public order and national security are threatened, the citizen's appeal to the appropriate forum would constitute a suspension of the expulsion order.[114] If it happens that before an appeal was lodged the decision has been executed, the citizen shall be entitled to claim damages when the appeal is allowed.[115]

Before an expulsion decision should be executed, the immigrant should be granted reasonable time to enable him to collect any salaries or other allowances due to him from his employer and settle any contractual commitments.[116] The immigrant shall, where it is necessary, for personal security, be allowed to go to any country other than his country of origin. In carrying out the expulsion order or decision, the host country must consider the situation of the family of the immigrant.[117] It seems that the "situation of the family" which must be considered may cover a circumstance where one of the children of the immigrant may be hospitalised or the wife of the immigrant is in labour or has just given birth to a child. Moreover, the host country would bear expenses incurred in expelling any Community citizen. A host country, expelling citizens, shall not pressurise those affected in any way to accept a simplified procedure, such as "voluntary departure", if such affected persons have not expressly requested it.[118]

---

[111] *Ibid.*
[112] *Ibid.,* (2).
[113] *Ibid.,* (3).
[114] *Ibid.,* (4).
[115] *Ibid.,* (5).
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid.,* (7).

10.14.3 Consular and Diplomatic Assistance

Citizens of the Community may find representatives of their countries in the host country. The law expects these missions and embassies to offer assistance and services to their citizens or nationals. In the event of expulsion, the host country shall advise the consular or diplomatic authorities of the country of origin of the migrant worker being expelled of any decision to expel the latter. The same requirement also extends where the host country nurses the intention to expel members of his family. The advice must be given at least forty-eight hours before the expulsion takes effect.[119] In the face of infringement of the rights of a migrant worker and his family, they may well appeal to the consular and diplomatic authorities for assistance and protection. They may also receive advisory services from them in order to defend their rights.[120]

10.15 Legal Status and Transfer of Fund

Under the ECOWAS law, migrant workers, as well as members of their families, are legal personalities.[121] Consequently, the worker has capacity to put forth his claims to any competent body either personally or by his legal representatives.[122] It seems that the capacity to put forth his claim may be in regard to protections found in national laws. Where such claim is based on the provisions of ECOWAS texts, the migrant worker will experience difficulty in pushing through his case because of jurisdictional restrictions, since ECOWAS law is not supranational within the territories of the Member States.

On the other hand, each Member State shall allow the transfer of all or part of the earnings or savings of the migrant worker which he may wish to transfer, according to modalities fixed by legislation.[123] This legal provision applies also where the fund is transferred to the migrant worker as maintenance.[124] The law also provides that each Member State shall, through any means or within ambits of bilateral agreements, allow the transfer of amounts which remain outstanding to migrant workers when they finally leave the host Member State.[125]

[119] Ibid., Article 15.
[120] Ibid., (2).
[121] Ibid., (3).
[122] Ibid.
[123] Ibid., Article 17 (1).
[124] Ibid.
[125] Ibid., (2).

10.16 Duties of Member States

Host countries are expected to hold consultations with other Member States concerned in order to promote healthy, fair and humane conditions to ensure legal immigration of workers and their families.[126] Member States also are expected to set up appropriate public organs to deal with the problems relating to the movements of workers and their families.[127] Member States are enjoined to co-operate in order to prevent and stop illegal or clandestine movement and employment of migrant workers whose status are irregular.[128] For this purpose, the Member States are required, compulsorily, to take appropriate measures against the dissemination of misleading information on emigration and immigration.

Furthermore, they are required to take measures intended to detect and stop the illegal or clandestine movement of migrant workers and members of their families and to impose effective sanctions on persons or bodies that organise or help to organise such movements or participate in them.[129] In addition, every Member State must take measures intended to impose effective sanctions on persons, groups or bodies which resort to violence, threats or intimidation against illegal migrant workers or members of their families.[130] In the same vein, Member States are required to take adequate measures likely to effectively stop the employment of illegal aliens in their territories by imposing sanctions on the persons or bodies which employ such workers. These measures shall not adversely affect the rights of migrant workers vis-à-vis their employers and the rights resulting from their employment.[131] Furthermore, a host country is not permitted to enact a tax law of any kind that may result in a less favourable treatment of immigrants residing or established in their territories—whether the tax is aimed at natural or (artificial) legal persons.[132]

10.17 Inalienability of Migrant Workers' Rights

The rights of the migrant workers are inalienable. Therefore, no provision of the law[133] relating to workers may be given any form of interpretation that would imply that a Member State has the right to engage in an activity or action designed to take away the rights or liberties recognised under the relevant ECOWAS law[134] or to

[126] *Ibid.,* Article 19.
[127] *Ibid.,* Article 20.
[128] *Ibid.,* Article 22.
[129] Article 22 Supplementary Protocol A/SP.1/7/86.
[130] *Ibid.*
[131] *Ibid.,* (3).
[132] Ibid., (4).
[133] Article 24 (2) Supplementary Protocol A/SP.1/7/86.
[134] *Ibid.*

restrict such rights and liberties beyond those stipulated in the law. Where there are favourable rights and liberties provided under the municipal laws of the host country, the courts or administrative body should never, in interpreting the Protocol that relates to workers, disapply such liberal provisions provided in favour of migrant workers in that jurisdiction.[135] In plain terms, those liberal rules and principles contained in the local legislation should be applied in favour of the workers. The right of the migrant worker guaranteed in the Protocol on Right of Residence may not be withdrawn.[136]

Consequently, any form of pressure exerted on migrant workers or members of their families to give up any of these rights or to refrain from exercising them shall be prohibited. The ECOWAS law also prohibits any clause in an agreement or contract designed to force the migrant worker to give up any of these rights or to refrain from exercising them; such clauses or agreement shall be null and void.[137] Under the Community legal order, Member States must guarantee that any person whose rights and liberties have been infringed upon, even if by persons exercising their official functions, shall have the right of recourse[138] and that the competent judicial, administrative or legislative authority shall rule on the rights of the person who is making the appeal.[139] In addition to these inalienable rights, Community citizens who are nationals of a Member State but reside in another Member State are at liberty to prosecute and defend their rights in the jurisdiction of that Member State.[140]

10.18 Conclusion

Freedom of movement of persons is the spine of the common or internal market structure. It must be strong and functional if the Community indeed intends to keep the market single. Where the freedom of movement of persons is promoted and protected, the benefits that enure from such exercises are many and satisfying: in brief, it can galvanise the economy of the Community. But freedom of movement can pose difficulties: it can stir the minds of citizens from poor countries to move to richer countries to participate in their welfare and social benefit bounty without making economic contributions, the freedom can create leeway for growth of organised crime and the host countries may not have social inclusion plans to help immigrants infuse themselves into the nucleus of the society.

[135] Ibid., (1).

[136] Article 25 Supplementary Protocol A/SP.1/7/86.

[137] Ibid., (2) (3).

[138] Ibid., Article 26 (1).

[139] Ibid., (2).

[140] Ibid., (5).

Furthermore, for one to enjoy the freedom of movement and right to residence, one must qualify as a Community citizen. The citizen must acquire the relevant travel document before exercising the right. The possession of document does not warrant using unofficial entry points to enter another Member State. A Member State may for legitimate reasons—public health, security or policy—deny a citizen the right to enter its territory. But the challenge with denial of right of entry is when the ground cannot be justified under the ECOWAS law; the citizen becomes handicapped because he cannot approach the Community Court—for lack of right of access—and his national courts because ECOWAS law is not supranational. It is hoped that the Community Court would, in the future, use its judicial position to mitigate this and other challenges that diminish the enjoyment of the right of citizenship and freedom of movement within the territory of the Community.

References

Legislation

African Charter on Human and People's Right (Ratification and Enforcement) Act Cap 49 LFN 2004
Decision A/DEC.2/7//85 Relating to the Establishment of ECOWAS Travel Certificate for Member States
Decision A/DEC.2/5/90 Establishing a Residence Card in ECOWAS Member States
Directive 2004/389 (European Union)
Immigration Act of Republic of Ghana 2000
Immigration Act of the Federal Republic of Nigeria 1960
Protocol A/P3/5/82 Relating to the Definition of Community Citizens
Protocol A/PI/5/79 Relating to the Free Movement of Persons, Residence and Establishment
Revised Treaty 1993
Supplementary Protocol A/SP.1/6/89 Amending and Complementing the Provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment
Supplementary Protocol A/SP.1/7/86 on the Code of Conduct on the Implementation Protocol on Free Movement of Persons, the Right to Residence
Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment

Cases

Buffalo Case (1993) UN Rep IX 445
Case C-299/01 Commission v Luxembourg [2002] ECR I-5899
Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department [2011] ECR, I-3375
Case C-415/93 Union Royale Belge des Societes de Football Association ASBL v Jean-Marc Bosman [1995] ECR I-4921
Case 200/02 Zhu and Chen [2004] ECR I-9925

Commission v Belgium, Case 149/79 via eu-lex.europa.eu/lex Uri Serv/lex uri Servi do? Uri=celex: 61962C00025: EN:pdf. Accessed 21 October 2013
Commission v France, Case 7/71 via eu-lex.europa.eu/lex Ur Serv/lex uri Servi do? Uri=celex: 61971CJ0007:EN:pdf. Accessed 21 October 2013
Femi Falana & anor v The Republic of Benin & others ECW/CCJ/JUD/02/12 24/1/2012 via www.courtecowas.org/site2012/pdf. Accessed 3 February 2014
Femi Falana & anor v The Republic of Benin & 14 others (2010) C.C.JLR [PT3]
New Patriotic Party v Commissioner of Police [1993] N.L.P.R 73
Olajide Afolabi v Federal Republic of Nigeria (2004–2009) CCJELR
Pinheiro v Republic of Ghana ECW/CCJ/JUD/11/12 via www.courtecowas.org/site2012/pdf. Accessed 25 June 2015
Van Duyn v Home Office via eu-lex.europa.eu/Ur Servi/lex uri Servi do? Uri=celex: 61974CJ0041:EN:pdf. Accessed 20 October 2013

Publications

Brookes I (ed) (2006) Chambers Dictionary, 10th edn. Chambers Harrap Publishers Ltd, Edinburgh
Carera S (2005) What does free movement mean in theory and practice in an enlarged EU? Eur Law J 11(6):699–721. www.efst.unist.hr/~mrnjavac/interno/labsoc/free%20movement.pdf. Accessed 25 June 2015
European Commission (2013) Free movement of people: five actions to benefit citizens, growth and employment in the EU, Press Release http://europa.eu/rapid/press-release_IP-13-1151_en.htm. Accessed 25 June 2015
Eze O (1988) The ECOWAS Treaty and the movement of aliens, goods and services across Nigeria's international boundaries. The Calabar Law Journal Fourth Dimension, Enugu
Garner B (ed) (2004) Black law dictionary, 8th edn. Thomson West, Minnesota
Harris S, Horspool M (2008) EU law (subject guide). University of London Press, London
Law J, Martin E (eds) (2009) Oxford dictionary of law, 6th edn. Oxford University, Oxford

Chapter 11
Right of Establishment (Services) and Free Movement of Capital

Abstract This chapter analyses briefly the right of establishment and free movement of services, as well as free movement of capital, under the ECOWAS legal regime. It distinguishes the right of establishment from right to provide services, justifies the distinction by drawing analogy with practices obtainable under the European Union law. It also evaluates the promotion, protection and transfer of capital under the ECOWAS Rules, together with action for failure to comply with these Community obligations on free movement of capital. The chapter rounds off with a brief comment on the existence of anti-integration legislation that would always affect the exploitation of the right of establishment and free movement of services within the territories of the Member States.

11.1 Introduction

Prior to Pinheiro,[1] the right of establishment, together with other Community rights, has hung in the balance; these Community rights, under the ECOWAS legal regime, appear to be dangling between vested and putative rights. While some are clearly entrenched in the texts, others, like right to provide services, appear to be murky and indistinct. And the Community citizens have been yearning for a definite judicial demarcation of the contours of these interests. When the opportunity finally showed up, the Community Court further dimmed the lines of clarity as to whether Community rights are indeed vested or are mere putative rights in this wording: "There is, at least in the abstract, a consistent and solid legal foundation that points to the right of establishment by a citizen of ECOWAS within any Member States other than the one of its origin."[2] Inferring from this dictum, it is obvious that the Community Court considers, at least, the basis for right of establishment as one orbiting in the abstract. It does not seem that a right which its legal basis is still hovering in the abstract could either be enforced immediately or can constitute vested rights.

[1] Pinheiro v Republic of Ghana 2012, p. 8.

[2] Ibid.

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_11

Reference here to vested right means a "right belonging so absolutely, completely, and unconditionally to a person that it cannot be defeated by the act of any private person and that is entitled to governmental protection usually under a constitutional guarantee".[3] A US court in Brubaker v Deere & co[4] defined it as "a right that's so complete and definitely belongs to a person that it cannot be impaired or taken away without the person's consent". Hence, any right, whether community or otherwise, that is created by law that is complete—not requiring the bearer to perform or fulfil any condition—and is designed to be protected and enforced will certainly be considered as a vested right. It is clear that the requirement of conditionality relates to the bearer and not a third party. In exact terms, the need for the Member States to recognise the rights by taking either judicial or legislative actions does not make the created rights conditional. Rather, the requirement of conditionality refers, as understood, to what the bearer is either required to do or not to do, for if the argument is that a right is not yet a vested right merely because a Member State has not recognised it legislatively, then the argument runs counter to legal experiences of civilised societies. Because a right, normally, can be vested in a person even though a third party has for personal or political reasons refused to recognise it. For instance, the Community rights created in the Rome Treaty were not recognised in the courts of the Member States of the European Economic Community until the decisions of Costa v Enel[5] and Van Gend[6] shook their defiance. The failure to recognise does not, in reality, mutate the vested nature of the right; rather, it only inhibits the benefits, protection and enforcement of the right. Beale was correct to say that all rights are created by law; when a right is created by law, the right becomes a fact. Where the law that has power to change a right has not changed it, then it should be recognised everywhere, for to do that is simply to recognise the existence of fact.[7] It is recognition that appears to be missing in this jural transaction among the Community, the Member States and the citizens and not the vested nature of the Community rights.

It seems the failure, by Member States, to take legislative steps for the purpose of recognition of Community rights within their jurisdictions informed the Court's opinion that the legal foundation for right of establishment exists in the abstract. For the purpose of clarity, abstract means "relating to or involving general ideas or qualities rather than specific people, objects, or actions.[8]. To say that the legal foundation for the right of establishment exists in the abstract would then mean that the legal basis is still within the realms of ideas and cannot be related to in concrete terms. This, with respect, may not be roundly correct; the basis for the right has gone beyond that realm. It does not appear that the Community is still tinkering

[3] Webster Dictionary (online).
[4] 2009.
[5] 1964.
[6] 1963.
[7] Beale (1902), p. 501.
[8] Merriam Webster (2015).

with whether to create the right or not. The right has already been created and vested in the citizens in this wording: "right granted to a citizen who is a national of the Member State to settle or establish in another Member State other than his state of origin, and to have access to economic activities, to carry out these 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 nationals". This legal basis is definite, specific, concrete, relatable and identifiable. What may be lacking is extending legislative or judicial recognition to the Community rights which this concrete legal provision has created and vested in the citizens.

Despite the lack of legislative and judicial recognition, these Community rights on establishment, services and capital will be considered below. And the right of establishment will be separated from the conventional right to provide services in another Member State other than the country of nationality or establishment. The Community does not have a robust legal framework on free movement of capital; however, it will still be evaluated to the extent that the rules on the subject permit.

11.2 Right of Establishment and Services

ECOWAS law has modest provisions on right of establishment. However, it will be admitted that there are few instances, in some ECOWAS acts, where the word services was used. The question now is whether the right to provide services exists under the ECOWAS law or whether the right to provide services, as known in community law, is inherent in the right of establishment? Under the European Union law, establishment has been defined as "the actual pursuit of an economic activity through a fixed establishment in another member state for an indefinite period".[9] The underlying factor in establishment is "the idea of continuity in another Member State". Invariably, where a company that is established or "fixed" in Germany decides to provide services to clients in England once in a while, such enterprise would come under services and not establishment. The line of difference between establishment and services is that establishment applies to an activity which is pursued on a stable and continuous basis in another Member State, while services border on commercial or economic activities of a temporary nature.[10] However, the person or entity intending to provide service may also put up an office, contact place or other useful structure in the state where he or it intends to provide services. Such set up does not detract from his or its status as a service provider.[11]

This distinct line of difference may not have been drawn by experts that drafted ECOWAS instruments. In spite of this indistinctness, if it is shown that such right to

[9] Factortame case 1990.

[10] Gebhard v Consiglio Dell'ordine. Degli Avvocati e Procuratori di Milano 1995.

[11] Harris and Horspool (2008), p. 275.

provide service exists by implication or through teleological interpretation, it would mean that a medical expert established in Niger could be permitted to provide temporary medical services in Nigeria or Ghana without fulfilling the requirement of establishment in any of these countries. It also means that a lawyer from Ghana may be allowed to provide legal services to Nigerian companies which intend to merge with other companies in that jurisdiction.

Establishment generally would pose huge difficulty, especially where the qualification or expertise required for such profession is strictly regulated. In such case, the Member States would be careful to ensure that the experts from other Member States who intend to establish are having the appropriate qualification equivalent to the qualification of their experts in that field or profession. It may be relaxed, somewhat, if the qualification required for the running of such enterprise is basic and loosely regulated.

Right of establishment in ECOWAS law means the right granted to a citizen who is a national of the Member State to settle or establish in another Member State other than his state of origin and to have access to economic activities, to carry out these 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 nationals.[12] The above definition wouldn't leave a reader with the impression that the "right to provide services" was intended. It is classically a provision that took care of the right to enter a country and set up an enterprise or company within the host country.

Where then can one base, as a citizen, one's right to provide services within the territory of a Member State other than one's state of origin or state of establishment? The Revised Treaty provides that the aim of the Community is to promote co-operation and development in all fields of economic activity.[13] For this purpose, the Community should ensure the abolition as between the Member States of the obstacles to the free movement of persons, services and capital[14]. Article 46[15] also provides that Member States should take appropriate measures to harmonise their standards and procedures in order to facilitate free movement of goods and services. The Revised Treaty is the parent law, and its provisions may not be expansive and comprehensive. It is the institutions that should give flesh to any provision found in the Treaty by way of decision, protocols, supplementary acts, regulations, subsidiary instruments and judicial decisions.

It is expected that when the interpretative jurisdiction of the Court is invoked, it would, based on Articles 3 and 46 of the Revised Treaty, Article 4(11) of the Supplementary Protocol on the Implementation of the Third Phase[16] and the objectives for setting up the (ECOWAS) Community, purposively hold that the

[12] Article 1 Supplementary Protocol A/SP 2/5/90.

[13] Article 3 (1) (2) (d). Revised Treaty 1993.

[14] Ibid., Article 3(2)(d)(iii).

[15] Revised Treaty 1993.

[16] A/SP2/5/90.

right of service, distinct from the right of establishment, does exist. It does not matter if the Court holds that such right is linked to right of establishment or that it can be enhanced by the latter. What is of importance is that a citizen of the Community who does not want to move to a particular Member State to settle and establish his business can, from his country of establishment, provide services to clients or customers in any Member State. If the contrary is found, such decision would clearly undermine the provision clearly embedded in Article 3[17] to the effect that the Community should remove obstacles to free movement of services. Conclusively, the clamour for or protection of right to provide service should be hinged on Articles 3 and 46 of the Revised Treaty, as well as Article 4(11) of the Supplementary Protocol on the Implementation of the Third Phase.

11.2.1 Extent of Right of Establishment

According to the law,[18] the right of establishment "includes access to non-salaried activities and exercise of such activities; as well as the creation and management of enterprises and companies subject to the same conditions stipulated by the laws and regulations of the country of establishment for its own nationals". Invariably, setting different rules of enterprise for non-nationals of the host Member State would be in contradistinction to the ECOWAS law where the rules are meant to apply to Community citizens and their companies. But the law did not specify how the Community would ensure that the Member States are not subjecting ECOWAS citizens to different and discriminatory set of conditions and rules. Surprisingly, when the National Association of Nigerian Traders (NANTS) dragged the Republic of Ghana to the Community Court for implementing certain discriminating provisions in its Ghana Investment Promotion Centre Act 2013, which crassly inhibits the participation of Community citizens in the retail sector as well as sets absurd conditions for establishing businesses, the Community Court failed to consider the national law as violation of the Community norms on free movement of persons and goods.[19]

Nonetheless, right of establishment would include affording every Community citizen the opportunity to qualify or satisfy every regulatory requirement that will make the citizen eligible to access the non-salaried activities and competent to participate in such activities in every field of endeavour. For example, where a qualified surgeon from Niger intends to relocate to Nigeria to continue his medical practice, he should be allowed to take any examination or register with any regulatory body in charge of medical practice in Nigeria. Any refusal to allow the surgeon to take part in such qualifying examination or to register with the registry of

[17] Revised Treaty 1993.

[18] Article 2 Supplementary Protocol A/SP2/5/90.

[19] The Nigerian Voice (2014).

practitioners, so long as he fulfils the non-discriminatory conditions, will amount to a violation of the right of establishment. In Pinheiro v Ghana,[20] where a Nigerian who sought to participate in the Ghana Law School qualifying examination was denied that opportunity on the ground of nationality, the Court held that there is legal and consistent foundation, albeit in abstract, for right of establishment for a national of a Member State to establish in another Member. Regrettably, the Court dismissed the matter for want of jurisdiction and pointed out that where such Community right is breached by a Member State, it is not in the place of the bearer of the right to bring the action; rather, the country of nationality of the bearer of the right will be the party with right of access to the Court. This decision does not help the case of any citizen who may wish to fulfil regulatory requirements in order to take advantage of the right of establishment in any Member State.

Perfect examples of a robust protection and extent of the right of establishment in an economic community can be garnered from the case law of the European Union. In Factortame,[21] the Court of Justice considered the imposition of requirements of residence and nationality in relation to the exercise of freedom of establishment as a discrimination and breach of Article 49 TFEU. The Court also held in Reyner[22] that even where there is no directive harmonising national laws on qualification respecting any field or activity, the provisions of Article 49 inherently prohibits such discrimination and that the provisions are directly effective, capable of being relied upon by the citizens in their national courts. But where a particular Member State recognises a certificate issued in a third country, failure of another Member State to accord similar recognition to that qualification would not amount to discrimination.[23] Nevertheless, freedom of establishment can be limited by public health, policy or security under the European Union law. In Apotheker kammer Salandes,[24] the Court held that German rules that provided for certain medicines to be sold by qualified pharmacist run counter to trade; however, they may be justified on the ground of human or public health. These examples, worthy of emulation, demonstrate the Court's intention to protect the freedom of establishment, as well as expand it within the European jurisdiction.

11.2.2 Companies and Eligibility

The Community instrument clearly defined the companies that are eligible to take advantage of the right of establishment within the territories of any Member State. The rule is that every company that is formed and registered as such, in line with the

[20] 2012, pp. 8–9.

[21] 1990, PI-3905.

[22] Case 2/74 *Reyners* [1974] ECR 631.

[23] Case 154/93 *Tawil-Albertini* [1994] ECR I-451.

[24] *Apothekerkammer des Saarlandes* v *Saarland* 2010, p I-4171.

company laws of a Member State, with its headquarters or central seat of administration or principal establishment situated within the Community shall be treated as same as an individual national of a Member State.[25] It also means that it has legal personality within the host country where the business is carried on and should be allowed to take advantage of the right of establishment. The law further provides for a situation where a company only has its statutory headquarters in a Member State but the seat of administration or principal establishment may be outside; for such a company to be eligible to receive similar treatment like other companies or individuals, its activities should have effective and sustained links with the economy of the Member State.[26] While the law may not have explained this "effective and sustained link with the economy of the Member State", it seems that maintaining import/export relationship on a continuous basis with the Member State may satisfy this requirement. Generally, a company that makes consistent and identifiable contributions to the economic growth of a country would pass for an eligible company under that head.

In regard to matters[27] that relate to either establishment or services, every Member State ought to undertake to accord non-discriminatory treatment to nationals and companies of other Member States. This presupposes that decisions, laws and standards designed for nationals and companies from other Member States need not be different from those applied to nationals and companies of that host Member State. However, there are exceptions and exemptions; a Member State may elect to treat nationals and companies from other Member States differently in relation to a specific activity. Where it chooses this approach, it must write the President of the Commission informing the latter that it is unable to accord such treatment to other nationals and companies. The consequences of this approach would be that other Member States would be relieved of the obligation to treat nationals and companies from that Member State in a non-discriminatory manner.[28] In the recent dispute between Nigerian traders in Ghana and the Ghanaian Government, there is no evidence that the Government of Ghana wrote the President of the Commission that it does not want Community citizens in Ghana to engage in retail activities. Therefore, it is clear that the barring of Community citizens from the retail sector in Ghana did not conform to the laws of ECOWAS.

Where for reasons justified by the exigencies of public order, security or public health a Member State creates legislative and administrative instruments that provide for special treatment for non-nationals, such provisions would be applied.[29] In addition, a host State may prohibit non-nationals from carrying on activities which require public authority.[30] It should be noted that since the activities which

[25] Article 3 Supplementary Protocol A/SP 2/5/90.
[26] Ibid.
[27] Ibid., Article 4 (1).
[28] Ibid., (2).
[29] Ibid., (3).
[30] Ibid., (6).

form part of the exercise of public authority are exempted from "non-discriminatory bracket", no action for discriminatory treatment can be sustained on such refusal to carry out activities that require public authority. Consequently, nationals of a Member State or companies registered in another Member State should not cry foul when they are refused access to such activities. But Member States should not hide under the label of "public authority" to deny corporate entities the opportunity to establish within their territories. Public authority should be construed to mean "exercise of public power". Therefore, an eligible company should be allowed to establish and provide services of all kind to the public—even if a state corporation is providing the same services.

11.2.3 Protection of Investment

The Community law also provides for some kind of protection for persons and companies that are established in other countries within the Community. Member States should not subject assets and capital of Community citizens to any act of confiscation or expropriation on a discriminatory basis.[31] The corollary is that where an investment has been made in line with the acceptable rules of the host State, it should not be whisked away through the instrumentality of a national law. However, in the event of confiscation, expropriation or nationalisation done by the host State, it must be followed by fair and equitable compensation. The challenge with this protection is the failure to explain how an affected citizen or company would enforce his or its rights in the event of confiscation and nationalisation. Would such a person approach the national court or rely on the jurisdiction of the Community Court? Reliance on the national court would mean basing the claim purely on national legislation which may not have adequate protection, while seeking the protection of the Community Court means that the action would fail for want of jurisdiction.

11.2.4 Recognition of Certificates[32]

In order to encourage the right to establishment, the Community made policies for the mutual recognition of diplomas, certificates and other qualifications at Community level. In fact, an instrument had been made for such purpose, but it shall be examined under a chapter dealing with discrimination. The essence of this recognition is to improve the ease of establishment and remove discrimination against Community citizens who may wish to establish in another Member State based on

[31] Article 7 Supplementary Protocol A/SP 2/5/90.

[32] Article 4 (5) Supplementary Protocol A/SP 2/5/90.

degrees and academic certificates they obtained from other Member States. The mutual recognition policies would, to an extent, take away the need to undergo the full hog of training in another Member States when the person seeking to establish has been trained, in that field, in another Member State. In that circumstance, the certificate is compared to such held by experts in that field to see if the Community citizen seeking to establish has the requisite knowledge and skills suitable to practise in that profession or conduct business in that sector.

11.3 Free Movement of Capital

The Revised Treaty did provide for removal of obstacles to free movement of capital[33] within the territory of the Community, but it failed to explain what it meant by "capital". Ordinarily, capital covers assets, money, shares, stocks, physical capital (plant and machinery)[34] and other financial capital. But will this definition be extended to capital under the ECOWAS legal norm? Nevertheless, it is taken for granted that free movement of capital would generally entail unimpeded flow of whatever will be considered as capital within the entire territory of the economic Community. Since capital is not yet defined, therefore it is not yet clear what types of transactions would come under 'capital movement'. For instance, would a dividend, grant or loan paid or given to a person in Liberia from Nigeria come under capital movement for the purpose of determining whether they should be free and unimpeded? Or would capital movement, in this wise, be limited to securities, stocks and shares? It is expected that at some point the Community Court may have the privilege to either narrow or stretch the band of what will constitute capital movement for the purpose of ECOWAS law. But in Europe, the Court of Justice has considered a lot of transactions to come under the concept of capital movement. For instance, dividends[35] paid from another country; gifts, whether in money or kind;[36] mortgages;[37] financial[38] or direct[39] investments; and loans or credit[40] have all been considered as capital movement in Europe and therefore should not be impeded.

It is the institutions of ECOWAS, notably the Community Court, which will identify what sort of transaction that should be within the "capital movement" bracket. It is likely that the above transactions that make up the list of capital

[33] Article 53 Revised Treaty 1993.

[34] Law (2006), p. 85.

[35] Staatssecretasris van Financien v Verkooijen 2000, p I-4071.

[36] Hein Persche v Finanzant Ludenscheid 2009, pI-359.

[37] Westdeutsche Landesbank 2001, p I-173.

[38] Commission v Netherlands 2006, pI-9141.

[39] Case C-367/98 Commission v Portugal 2002, P I-4731.

[40] Fidium Finanz AG v Bundesanstalt fur Finanzdienstleistungsaufsicht 2006, p I-9521.

movement in Europe will constitute the Community's list in this wise. Assuredly, any transaction[41] relating to shares, security, stocks, transfer of money, foreign exchange, export financing, capital for investment or payment will come under capital movement within ECOWAS and therefore should not be impeded by any Member State. Any obstruction to the flow of capital related to these listed transactions would amount to breach of right to free movement of capital.

11.3.1 Establishment of Capital Issues Committee

The Treaty established a Capital Issues Committee, which consists of one representative of each of the Member States. The persons who make up this Committee should have experience and qualification in finance, commerce or banking.[42] This experience, it is believed, would help them function adequately and achieve the set objectives. Some of the duties of the Capital Issue Committee are highlighted below.

11.3.2 Duties[43]

The Committee shall ensure the unimpeded flow of capital within the Community. This could be achieved by removal of controls on the transfer of capital among the Member States. It should also encourage the establishment of national and regional stock exchanges and the connecting of capital markets and stock exchanges.[44] It is also the Committee's duty to see to it that nationals of a Member State are given the opportunity of acquiring stocks, shares and other securities in the territories of other Member States; this includes investing in the enterprises within those territories. It is also the Committee's lot to establish a machinery for the wide dissemination in the Member States of stock exchange quotations of each Member States. Also, it has the mandate to establish an appropriate machinery for the regulation of the capital issue market to ensure its proper functioning and the protection of the investors.[45]

In summary, this Committee has been empowered to promote access to information on interstate acquisition of shares, stocks and security. For instance, a Community citizen, who is a Ghanaian national, should be informed of stocks trading in Abidjan and should be permitted to acquire them. Any unlawful

[41] Articles 8, 10 and 11 Supplementary Protocol A/SP 2/5/90, Article 53(2) Revised Treaty 1993.
[42] Article 53 (2) Revised Treaty 1993.
[43] *Ibid.,* 3(a).
[44] *Ibid.*
[45] *Ibid.,* (b)–(d).

restriction that impedes the flow of capital by any person or body would result in the violation of the Community provision on free movement of capital. But for the Committee to have information to pass around, there must be capital market activities. Unfortunately, apart from countries like Nigeria and Ghana with modest capital markets, the rest of the Member States have little visibility and activity in regard to trading in the capital market. It seems appropriate to suggest that the effort of the Committee should be geared towards the establishment and development of capital markets in the Community.

11.3.3 Promotion and Protections of Capital for Investment

With a view to creating conducive measures for the promotion of capital, whether private or public, the Member States undertake separately and collectively to accord fair and equitable treatment to such capital and to put in place conditions which would be favourable to the investment of capital within their territories. They should also implement measures that would help or encourage economic actors to take part in development endeavours within the Community.[46]

The Member States are under an obligation to adopt provisions that would increase the flow of more stable private capital within their territories. These measures should also enlarge the co-financing of productive investment within the private sector. They are also bound to create measures that would make their domestic financial markets more robust and efficient. They should, through their measures and policies, make international financial markets more accessible to the Community citizens. Furthermore, Member States should establish export credit guarantee institutions and improve on regional or national export financing, as part of their monetary and financial co-operation.[47] Each Member State is obliged to put in place regional payment mechanism which would likely facilitate and promote intra-Community trades.[48]

11.3.4 Transfer of Capital and Exchange Control

The ECOWAS law encourages transfer or movement of capital either for investment or current payments.[49] In such transactions, the Member States are compelled by law to refrain from taking exchange control measures which would infringe on

[46] Article 5 Supplementary Protocol A/SP 2/5/90.
[47] *Ibid.,* Article 8.
[48] *Ibid.*
[49] *Ibid.,* Article 10.

relevant ECOWAS instruments[50] or be incompatible with the their Community obligations.

11.3.5 Exception

Notwithstanding the restraint on Member States to avoid setting inimical control measures, a Member State may, on two different grounds, be allowed to put in place restrictive exchange control measures. The first ground would be where there is "grave economic difficulty", while the second is the existence of "serious balance of payment problems". However; the State concerned should inform the decision-making bodies of the Community of such development. Nevertheless, the law did not define either grave economic difficulty or serious balance of payment problems. If the definition of these terms is left to the Member States, then there will be not only lack of uniformity in interpretation but also failure to comply with the law on the pretext that the country is experiencing any of these situations.

11.3.6 Discrimination and Foreign Exchange Transactions

ECOWAS law lends support to lawful foreign exchange transactions.[51] However, where the transaction is related to investment and current payments, Member States should, as far as possible, refrain from taking discriminatory measures and from according preferential treatment to nationals of third countries.[52] In other words, Member States should neither treat any Member State differently from another Member States nor accord better treatment to third countries irrespective of that country's trade relations with that Member State, in matters of foreign exchange.

11.3.7 Action for Failure to Fulfil Obligation and the Roles of Member States

The Community, through its laws, has bestowed on the Member States the duty of hewing the pathway to the success of free movement of capital within the Community. So what would happen if a Member State fails to put measures in place to facilitate free flow of capital or creates policies and laws that restrict the application of the Community laws on capital? The safest approach would be to rely on the

[50] *Ibid.*
[51] *Ibid.,* Article 11.
[52] *Ibid.*

rights vested in the President of the Commission and the Member States to bring action against a State for failing to fulfil an obligation under the ECOWAS law.[53] However, an individual may bring an action, depending on the uniqueness of the circumstances, if he could show that his fundamental human right has been violated.

11.4 Conclusion

The ECOWAS legal regime, in spite of the stance of the Community Court in Pinheiro, provides unequivocally for right of establishment and faintly for right to provide service (free movement of services) within the territories of Member States other than the state of origin or establishment. It has been emphasised that right of establishment differs greatly from right to provide services in a country other than the country of nationality or establishment. In addition, the provision on free movement of capital has been explored; ECOWAS legal regime encourages the Member States to promote transfer or free movement of capital either for current payment or capital from one Member State to another. And where a State fails to introduce measures or remove hindrances that could affect free movement of capital or the right of establishment, the Member States or the Commission may bring an action for failure to fulfil Community obligations.

However, there is a colossal challenge to the realisation of the benefits of these Community rights, which is the existence of legislation that protects the market and economies of the Member States. For instance, prior to the passing of Nigeria Investment Promotion Commission Act 1995, investment and business in Nigeria were restricted because of the provisions of Nigeria Enterprises Promotion Decrees (Acts) of 1972 and 1977. Those laws were less friendly to the citizens of the Community who might have wanted to explore the right of establishment and other connected Community rights. The investment and business terrains have been improved, in terms of legal restrictions, by the enactment of the Nigeria Investment Promotion Commission Act 1995. Any person or company, including the Community citizens, provided there is knowledge of the difficult Nigerian business environment, can establish in any sector of the economy.

This liberalisation of the market does not apply in all the Member States. There are some pieces of legislation in some of the Member States that would not help the integration agenda of the Community. For instance, the Ghana Investment Promotion Centre Act (GIPC Act)[54] is as inimical as the old enterprise decrees of Nigeria. The law[55] against the spirit of integration reserves sales of goods, retail and other small-scale services for Ghanaian citizens and wholly owned Ghanaian companies.

[53] Article 10 (a) Supplementary Protocol Relating to Community Court.
[54] 2013.
[55] Article 27 GIPC Act 2013.

Bearing in mind the degree of poverty existing in West Africa, it is expected that Community citizens living in Ghana would be engaging in such low-capital businesses. What the law has done is to deny the Community citizens the opportunity to establish or provide services in Ghana in regard to the retail sector. To ensure that there is no space for the poor Community citizens within the business environment, the law raises the financial bar which the investors must scale before they can participate in any business other than sale of goods in the market and other low-capital services[56]. Where a Community citizen intends to run a joint venture enterprise, the Community citizen must invest not less than two hundred thousand United States dollars in cash or capital goods, while the citizen is meant to climb a steeper financial hill of five hundred United States dollars, in cash or capital good, should he elect to run the enterprise alone. These requirements are clear violation of the rules and principles on rights of establishment and free movement of persons, even though the Community Court did not agree in NANTS case.[57]

Nonetheless, there could be genuine reasons, economically, why Ghana, a country with good democratic tenets, has introduced this anti-integration law. The economy of Ghana, once touted to be one of the few viable economies in Sub-Saharan Africa, is better experienced than understood from research and statistical reports. The economy is as sensitive to the vagaries of economic dynamics as butter is to heat. The much-reputed cedi, once at par with the United States dollars, is vivaciously volatile as compared to other currencies within the Community. With these economic and fiscal realities, it seems that the country would not mind erring on the side of integration than on the side of complete economic meltdown. Unfortunately, the modalities put in place to help economies that suffer for opening their markets in the Community are either less effective or totally moribund.

References

Legislation

Protocol (A/P1/7/91) on the Community Court of Justice as amended by Supplementary Protocol (A/SP.1/01/05

Supplementary Protocol A/SP 2/5/90 on the Implementation of Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment

Revised Treaty 1993

[56] Ibid., Article 28.

[57] The Nigerian Voice (2014).

Cases

Brubaker v Deer &co 2009 U.S. Dist. LEXIS 102419 (S.D. Iowa Oct. 16, 2009) available via http://definitions.uslegal.com/v/vested-right/. Accessed 21 June 2015
Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes v Saarland [2010] ECR I-4171
Cases C-282/04 and 283/04 Commission v Netherlands [2006] ECR I-9141
Case C-367/98 Commission v Portugal (Golden Share) [2002] ECR I-4731
Case C-452/04 Fidium Finanz AG v Bundesanstalt fur Finanzdienstleistungsaufsicht [2006] ECR I-9521)
Case C-318/07 Hein Persche v Finanzant Ludenscheid [2009] ECR I-359)
Case 2/74 Reyners [1974] ECR I-631
Case C-35/98 Staatssecretasris van Financien v Verkooijen [2000] ECR I-4071
Case 154/93 Tawil-Albertini [1994] ECR I-451
Case C-464/98 Westdeutsche Landesbank [2001] ECR I-173
Costa v Enel C-6/64 15/7/1964 eu-lex.europa.eu/LexUriServ/LexUriServido? Uri=CELEX61964 CJ0006:EN:PDF. Accessed 16 October 2013
Gebhard v Consiglio dell' Ordine degli Avvocat e Procuratori di Milano, Case C-55/94 via eu-/lex Uri serv/lex uri servi do?uri=celex 61994CJ0055:EN:pdf
Pinheiro v Republic of Ghana 2012 ECW/CCJ/JUD/11/12. www.courtecowas.org/site2012/pdf. Accessed 25 June 2015
Queen v Secretary of State For Transport, ex parte Factortame Ltd and others, Case 221/89 via eu-/lex Uri serv/lex uri servi do?uri=celex 61989CJ0221:EN:pdf. Accessed 20 October 2013
Van Gend & Loos v Nederlandse Administrative Der Belastingen C-26/62 5/2/1963 eu-lex. europa.eu/LexUri Serv/LexUri Servido? Uri=CELEX61978CJ0148: EN:PDF. Accessed 17 October 2013

Publications

Beale J (1902) A selection of cases on the conflict of laws. vol 3, p. 501. Available via http://lawweb.usc.edu/users/dklerman/documents/1.BealeCurrieRichman-FirstClass.pdf. Accessed 21 June 2015
Harris S, Horspool M (2008) EU law (subject guide). University of London Press, London
Law J (ed) (2006) Oxford Dictionary of Business and Management, 4th edn. Oxford University Press, Oxford
The Nigerian Voice (2014) Ghana moves to sack Nigerian traders. http://www.thenigerianvoice.com/news/160711/1/ghana-moves-to-sack-nigerian-traders.html. Accessed 25 July 2015
Webster Dictionary (2015) http://www.merriam-webster.com/dictionary/vested%20right. Accessed 21 June 2015

Chapter 12
Free Movement of Goods

Abstract Free movement of goods within an artificially created community will depend on the successful establishment of an internal or common market. Common market, by it features, erodes the internal market barriers of the members of the created community to enable goods to move freely within the borderless economic enclave. This chapter takes a swipe at the exposition of the layers of ECOWAS legal regime on free movement of goods. Meticulously, it explains the concept of goods, common market, liberalisation, common external tariff, European Partnership Act and their impacts on or nexus with the intended seamless movement of goods within ECOWAS.

12.1 Introduction

The Revised Treaty of 1993 made sweeping amendments to the original Treaty of 1975 and altered the integration model of the Community in a remarkable fashion. Principally, it reshaped the model by providing for the establishment of a common market through "the liberalisation of trade by the abolition, among Member States, of customs duties levied on imports and exports, and the abolition, among Member States, of non-tariff barriers in order to establish a free trade area at the Community level".[1] It further provides for "the adoption of a common external tariff and a common trade policy *vis-à-vis* third countries".[2] The net effect of the implementation of these measures would be the emergence of a Community with free trade area, devoid of internal market barriers, which has a common treatment to or outlook on goods of third countries.

Generally, free trade takes place when there is no artificial barriers put in place by governments to restrict flow of goods and services among the trading countries.[3] It can also be defined as the unrestricted purchase of goods and services between

[1] Article 3(d) Revised Treaty.

[2] Ibid.

[3] Department of Foreign Affairs and Trade (2000), p. 1.

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_12

countries without the imposition of restraints such as tariffs, duties and quota.[4] Free trade, when strategically and suitably devised, has alluring economic benefits. David Ricardo theorised, some years ago, that a free trade policy enables nations to concentrate their effort on manufacturing goods and providing services where they have a comparative advantage.[5] The process of concentrating on areas of comparative advantage leads to specialisation. And with specialisation, a country can take advantage of efficiencies generated from economies of scale to improve on its output.[6] Since free trade internationalises the market, a firm or company would have a larger market for its products which will, resultantly, reduce its average cost and increase its output.[7] Also, it can improve the efficiency of resource allocation, which in turn helps to increase productivity and domestic output of goods.[8] Free trade fertilises competition, and competition definitely encourages innovation and the use of technology and effective marketing tools.[9] With more goods in circulation, the consumers can choose from a variety of similar products at reduced prices.[10] There could also be improvement on the employment front, especially in the manufacturing sectors of the economy, as well as increase in foreign exchange, particularly for the exporting companies.[11]

However, free trade has its impactful demerits; for instance, it can expose new companies within a country to cut-throat competition from other healthier companies established in other Member States, which could weaken their growth and quicken their liquidation.[12] Also, a senile or weak industry that requires some protection may fizzle out in the heat of competitions from other healthy outfits with economies of scale.[13] Another demerit of free trade is that it discourages diversification of the economy because, as a model, it encourages specialisation in areas where the members have comparative advantage. Furthermore, it can alter the revenue structure of a duty-dependent country; this can have telling effect on the economy. Free trade will neither help instantly a country that wants to improve on its balance of payment because of excessive importation nor assist it to avoid dumping practices.

But it is still in the realm of theory and speculation how free trade will boost the economies of the members of ECOWAS and how the adopted free trade model will pan out in reality, since little has been seen in terms of volume of interstate trade and harmonisation of the rules among the Member States. In spite of these

[4] Investopedia (2015).

[5] Ibid.

[6] Department of Foreign Affairs and Trade (2000), p. 2.

[7] Department of Foreign Affairs and Trade (2000), p. 2.

[8] Ibid., p. 3.

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Economic Help (2015).

[13] Ibid.

detractions, the institutions of the Community have forged ahead to strengthen their legal framework, on the subject, and expand their trade area by finalising on the common external tariff (CET) scheme and signing the Economic Partnership Agreement (EPA) respectively. It is not clear how all these measures and steps will come together to benefit the trader in Lagos, Nigeria, or the manufacturer in Yamoussoukro, Cote d'Ivoire. It is also uncertain whether the EPA will take the trade relation between Europe and West Africa another notch or will turn the proverbial last straw that broke the camel's (Community's economy) back. It is hoped that the Community enterprises will explore the advantages of these measures to bring the desired economic change for which they were made. And where administrative decisions, political policies and governmental inactions limit the exploration, an aggrieved entity or individual should get effective protection from the Community and national courts. But the decision of the Court in Pinheiro,[14] which denies citizens the right to access the Court in cases of breach of Community rights and the lack of constitutional basis upon which to approach national courts, leave every hope in tatters. It seems, therefore, that the benefits of the free trade policy or how it will work in practice and the protection of the entities that would like to explore the opportunity are all issues hovering in the realms of speculation and theory.

However, a vivid picture of free movement of goods at work and how an institution of an economic grouping could translate free movement policy from the realm of ideas to the state of actuality can be seen through the lens of European case law. In the Art Treasures case,[15] the Court of Justice considered the law on free movement of goods applicable to any product that can be valued in money and can form the subject of economic transactions. While it is commonplace that European Union rules are only triggered when there is a cross-border transaction, yet in Jersey Produce Marketing Organisation Ltd case, where exporters from Channel Island were compelled to register with an organisation before they can export their potatoes to the United Kingdom, the Court held that it can still be triggered in purely internal transaction; therefore, such imposition of condition affects free movement of goods.[16] And in Van Gend en Loos,[17] the Court held that the Treaty provision banning all forms of duties and tariffs can be relied upon, by individuals for their protection, before national courts. Nevertheless, the removal of duties and tariffs does not affect the powers of government to impose indiscriminate internal tax against imported goods as enunciated in *Cooperativa Cofrutta Srl*.[18]

[14] Pinheiro v Republic Ghana 2012, p. 9.

[15] Commissioner v Italy (Art Treasure) 1968, p. 423.

[16] *Jersey Produce Marketing Organisation Ltd* v *States of Jersey* 2005, p I-9543.

[17] *Van Gend en Loos* 1963.

[18] *Cooperativa Cofrutta Srl* 1987, p. 2085.

As the Court held in *Commission* v *Ireland*,[19] a tax can be discriminatory if the method employed in collecting it favours nationals more than other persons from the Union; in this case, the importers were required to pay the tax immediately, while domestic producers were given days of grace. A tax can be directly or indirectly discriminatory; it is directly discriminatory if it targets goods based on their origin and indirectly discriminatory if it appears to apply to both domestic and imported goods, but, in reality, the grounds of its levying will depend on certain characteristics that can be found only in imported version of the goods. But to succeed in establishing indirect discrimination, as shown in the case of Humblot, it will be required to prove that the tax has protective effect.[20] In addition, as held in Walter Rau,[21] any national law that specifies how imported goods should be packaged will likely contravene European Union rules on free movement of goods if the implementation of the specification would affect the price of goods and does not appear proportionate to the aims of the specification. In summary, these cases reflect the pivotal role the Court of Justice of the European Union has played in moving the policy on free movement of goods from state of ideology to reality.

With regard to ECOWAS, it will be necessary for all the institutions of the Community, especially the Community Court of Justice, to get rid of the lethargy and take robust steps that can move the policy on free movement of goods from the phase that it is to a new phase which can be felt in the economies of the countries that make up the Community. Nonetheless, they have put in place layers of legal framework; these layers are examined carefully to see how they all come together to entrench free movement of goods within ECOWAS.

12.2 Understanding Common Market

A common market goes beyond creating or establishing a free trade area. A common market would likely have a free trade area scheme, while a free trade area regime must not include or constitute a common market. The latter would certainly pursue a custom union or a unified approach to goods coming from third countries. Some American legal scholars[22] defined free trade area as "a group of two or more sovereign countries in which import duties and other trade barriers are reduced or eliminated, while a customs union is a free trade area with a common external tariff".[23] A good example of a regime that has a free trade area without a custom union is the North American Free

[19] *Commission* v *Ireland* 1980 481.

[20] 112/84 *Humblot* 1987, p. 1367; see also *Danske Bilimportorer* v *Skatteministeriet* 2003, p I-6065.

[21] *Walter Rau* 1982, p. 3961.

[22] Schafer et al. (2002), p. 411.

[23] Ibid.

Trade Area established by the North American Free Trade Agreement (NAFTA).[24] NAFTA[25] made provision for progressive elimination of custom duties on originating goods among the parties to the agreement.

They do not have a common external tariff policy. Consequently, the United States might decide to increase her tariff against goods coming from any third country, while Mexico might, on the ground of strengthened economic ties, reduce tariff against goods imported from the same third country. Canada, on its part, may, on the basis of fresh trade liberalisation agreement, choose not to impose tariff, at all, on the same goods coming from the same country that America and Mexico had treated differently.

A common market does not work in the same way. The European Union trade regime would be a classical attempt at achieving a common or internal market. In pursuing its dream of creating such a market, the Community subscribed to the abolition of existing barriers to free movement of goods, services, persons and capital. This has been referred to as negative integration.[26] As Harris points out: "This is not enough to achieve a single market for goods. . ."[27] Consequently, the Union proceeded with the adhesive strategy of harmonising the national rules. This has also been labelled positive integration.[28] The Member States of the European Union apply similar tariff to third country goods. No Member State could, without political or legal repercussion, introduce a fresh tariff against third country goods outside the existing customs tariff fixed by the institutions of the European Union.

Apparently, the free movement of goods regime adopted by ECOWAS is patterned after the European Union model rather than the American free trade version. Just like the European Union, the Community created a free trade area, as well as a common external tariff, which will apply to goods imported from third countries into the territories of the Member States. Also, it intends to harmonise legal norms of the members of the Community to achieve a unified response to internal or external trade. So the ECOWAS model is purely a common market structure that will have a free trade area with a common external tariff policy.

12.3 Goods

The Revised Treaty provides for removal, between Member States, of obstacles to free movement of persons, goods, services and capital. Consequently, free movement of goods in ECOWAS will mean unimpeded flow of goods within the created

[24] 1994.

[25] North American Free Trade Agreement 1994; the parties are United States, Canada and United Mexican States.

[26] Harris and Horspool (2008), p. 173.

[27] Ibid.

[28] Ibid.

Community. The question, now, is what class of goods is the law considering? The law provides that goods shall be accepted as eligible for Community tariff treatment if they have been consigned to the territory of the importing Member States from the territory of another Member States and originate from the Community.[29] The same Revised Treaty provides that customs duties or charges levied against the same class of goods should be reduced, and ultimately eliminated.[30] The defining clause, here, is "originate from the Community". This is the class of goods which would receive Community tariff treatment and invariably will, at some point, be able to circulate within the Community without incurring charges or duties. It means that the application of the tariff treatment will depend on whether the goods are of Community origin and whether they are imported from another Member State.

12.3.1 Goods of Community Origin

Goods would be considered as originating in Member States if they have been wholly produced in a Member State,[31] as provided in Article 3. Examples of products that are regarded as wholly produced in the Member States include the following: a. live animals born and raised as wholly produced in the Member States; b. mineral products extracted from the ground, subsoil, or seabed of Member States; c. vegetable products harvested within the Member States; d. products obtained from animals living or raised in the Member States; e. products obtained by hunting or fishing within the Member States; and f. products obtained from the sea, rivers and lakes within the Member States by a vessel belonging to the Member States. The list of products regarded as wholly produced in the Member is long and even touches on items like electricity.[32]

It will be interesting to observe that paragraph (f) is peculiar and therefore will attract some evaluation. The paragraph touches on products obtained from the sea within the Member State. The question is how much of the sea could be within the Member State? Certainly, all the bays, estuaries, waters, etc. that are in the landward side of the baselines are internal waters;[33] therefore, they are within the Member State. Additionally, the territorial sea has been classified as that part of the sea over which the coastal state, laying claim to it, may exercise some form of sovereignty subject to international treaties and international law.[34] Based on this, it

[29] Article 38(1) Revised Treaty.

[30] Ibid., Article 36(1).

[31] Article 2(1) Protocol A/P1/1/03 Relating to the Definition of the Concept of Products Originating from the Member States.

[32] Article 3 Protocol Relating to the Definition of the Concept of Products 2003.

[33] Hiller (1998), p. 377.

[34] Brownlie (2003), p. 174.

may be understandable that a coastal state would consider resources gotten from these water bodies as though they were gotten from its waters. Therefore, Member States that are riparian may appropriate any product from that part of the sea as theirs for the purpose of paragraph f.

Generally, a country that has laid claim to economic zone may appropriate resources lifted from that belt too. However, exclusive economic zone does not belong to the coastal state. If economic zone is not part of a country laying claim to it, then it cannot be part of the Member State for the purpose Article 3 paragraph f.[35] It means that resources exploited from the exclusive economic zone and the high sea may not be considered as a product originating in the coastal state. This kind of interpretation would work hardship on the coastal Member State. It would mean that if a Nigerian trawler lifts 50 tones of prawn from the economic zone and the high sea, such resources or product cannot be exported to Togo without the imposition of duties and tariff. The best approach is to take the paragraph together with Article III(g) of the 1976 Protocol on Definition of Concept, which had earlier provided that product or goods taken from the sea from a vessel of a Member State shall be regarded as having their origin in that State.

Furthermore, there are other criteria employed in determining whether products originate in Member State, for instance, where they have been produced in a Member State but contain raw materials, which were not wholly obtained from Member States but underwent some processes in that State.[36] However, certain processes do not confer "Community origin" to a product. These are packing, bottling, assembling of parts to make up a complete product, labelling, marking, certain mixing of products, screening, sifting, sorting, classifying, washing, painting,[37] salting, freezing, slaughtering, etc. With the exclusion of these processes, any product made in the Member State with materials acquired abroad but had to be used after undergoing some process within the Member State is a good of Community origin.

Another criterion for determining origin is that the product should consist of materials wholly produced or transformed in one or several Member States provided that the sufficient transformation goes beyond the processes that cannot confer Community origin. In such situation, the product would locate its origin from the State where the last transformation took place.[38] The obvious challenge to this criterion is the ability to trace where the transformation stopped in order to determine which Member State produced the finished good.

Most traditional handicrafts would inevitably qualify, at some point, as originating products. "At some point" because the Community has developed the practice of selecting, periodically, certain handicrafts and approving such as traditional handicrafts; until such approval is made, exportation of a product, which

[35] Protocol Relating to the Definition of the concept op. product 2003 op.cit.

[36] Article 2 (1) (b) Protocol Relating to the Definition of the Concept of Product 2003.

[37] Ibid., Article 6.

[38] Ibid., Article 2(2).

would otherwise qualify as handicraft but for lack of approval, might be treated less kindly. For clarity, the law defined traditional handicraft as "articles generally made by hand with or without tools, instruments or devices operated directly by the craftsman, and the raw materials used are essentially of Community origin".[39]

12.3.2 Proof of Community Origin

Where an exporter intends to establish that his goods, product or wares are of Community origin, he shall present to the authority, at the point of entry, a certificate of origin issued by the appropriate office of the Member State (of origin). The certificate would indicate conditions set out in the 2003 Protocol;[40] such certificate is not required for agricultural products. And it shall be issued by the competent authority designated for that purpose, by the Member State where the goods or product was made.[41] The certificate should also be countersigned by the custom department or office of the issuing Member State.[42] However, it is not clear whether all the Member States have set up offices in compliance with this law and whether enterprises are aware of their existence.

12.4 Origin of Goods and Member State Vessels

In a situation where goods or products are made in a vessel at sea, such goods or products shall qualify as goods made within the territory of the Member State that owns the vessel. This is because "In determining the place from which goods originated; marine, river or lake products taken from the sea, river or lake or goods produced therefore at sea or on a river or lake, shall be regarded as having their origin in a Member State if they are taken by or produced in a vessel of that State and have been brought directly to the territories of the Member States".[43] For this purpose, a vessel of a Member State shall be taken as part of that country.[44]

What, then, is a vessel of a Member State? Does it mean government vessel in commercial operation, or must such vessel be fully owned by nationals of that concerned Member State? There exist three criteria for determining whether a vessel is that of a Member State or not. One, the vessel must have been registered

[39] Article (1) (c) (2), (3) Protocol Relating to Definition of the concepts of Products 1976.
[40] Article 10 Protocol Relating to the Definition of the concepts of Product 2003.
[41] Ibid.
[42] Ibid.
[43] Article III (3) Protocol Relating to Definition of Concept of Product 1976.
[44] Ibid.

in a Member State. Two, the vessel carries a complement, including the master of the ship, of which not less than 50 % are national of Member States. Three, the vessel sails under the flag of a Member State.[45] It seems that the first and third criteria may be fulfilled easily; however, the second criterion which requires carrying a complement of which 50 % are of Community citizens poses difficulty for investors. It means they are bound to recruit nationals of Member States to make up the percentage even when the best hands can be recruited abroad. This can be discouraging for investors and Community enterprises.

12.5 Third Country Goods

A third country is a state other than a Member State of the Community. Therefore, goods or products imported into a Member State from such country shall be classified as goods from a third country.[46] The implication for such classification is substantial. Primarily, such goods would be subjected to a treatment different from Community goods. Such goods will neither benefit from the Community tariff treatment, nor can it be brought in, at any time, without attracting custom duties, charges and taxes where applicable. However, with the signing of the Economic Partnership Act[47] by the Heads of State of the countries that make up ECOWAS, it is obvious that European countries that constitute the Union may not be treated as purely third countries but rather would be seen as partners whose goods can enter the territories of the Member States without complete imposition of tariffs and duties.

12.5.1 Third Country Goods Within the Community

However, where goods are imported into a Member State from a third country and the importer takes step to export them into another Member State, different rules would apply to such goods. Where the importer has, at the point of bringing in the goods, paid all duties to the appropriate authority, the person from another Member State buying or importing the goods into that other Member State would bear, in principle, the cost of importation of the goods into the Community. The rule governing this circumstance is reproduced[48] for exactness: *Where any goods, which are imported into a member state of the Community from a third country*

[45] Article 3 (2) Protocol A/PI/1/03.

[46] Article 1 Revised Treaty; goods, largely, may mean product which can be valued in money and form the basis of a commercial transaction: Commission v Italy (Art. Treasures) 1968.

[47] Economic Partnership Act 2010.

[48] Article II (1) Protocol Relating to the Re-exportation 1976.

and in respect of which customs duty has been charged and collected in that state (in this paragraph referred to as "the collecting state) are transferred to one of the other member states of the Community (in this paragraph referred to as the consuming state)...

(a) An administrative fee representing 0.5 % of the C.I.F value of every consignment being re-exported is to be charged by the collecting states;
(b) The collecting state shall refund to the importer within its territory, the full amount of duty paid on the goods while other costs such as C.I.F. port charges etc. involved in the importation are to be included in the invoiced price to be paid by the importer in the consuming state;
(c) The consuming state shall charge and collect the duty payable on such goods.

The Community intends that the consuming country should be the appropriate country to benefit from the import duties since the importer, buying or importing from the first importer, would bear the costs of importation into the Community. All that the first Member State, into whose territory the goods were initially imported, would have is half per cent of the value of every consignment as administrative fee. The point made in paragraph (b) that CIF, port charges, etc. involved in the importation are to be included in the invoiced price to be paid by the importer in the consuming state does not appear groundbreaking. Every business person would certainly include in his price, whether provided in a mercantile law or not, the cost incurred in securing the goods. It seems the provision was included for emphasis and assurance.

Another point that is not addressed in the provision is the "place of time". For instance, what is the duration of time within which the first importer can export the goods to another Member State in order to be eligible to get a refund of his custom duty? If one imports fifty (earth movers) construction equipment and decides after 2 years to export 20 of them that have not been used to a buyer in another Member State, can one get a refund of the duties paid on the goods 2 years ago? Clearly, on the face of it, there is no time line included in the provision; consequently, the Community should take the provision the way it is unless the Community Court would, based on proper appreciation of the circumstances, give it some interpretative colouration.

It is also possible that a citizen of the Community may import materials from a third country for the purpose of manufacturing. If he had made products out of the material and exported them to another Member State, he would be entitled to a refund of the full amount of the manufactured goods.[49] This refund will be made by the collecting States, so long as the importer had paid the custom duties and other charges.[50] However, what is not clear is whether the Member States have the appropriate technology and trained personnel to manage such huge technical task

[49] *Ibid.*, (2).
[50] *Ibid.*

of tracking import/export flow within the Community, and making timely refund where necessary.

12.6 Common External Tariff

A sovereign state, ordinarily, has the discretionary powers to decide how much may levied on imported goods as custom duties, port charges, etc. In fact, it may choose to impose various forms of charges against varieties of goods. Notwithstanding this legal truth, the power of choice may be weakened by international treaties and agreement. One class of treaties that eats deep into the power of choice is "community or economic integration treaty". Where an economic community is created, the members may bind themselves in agreement to share, in common, harmonised rules in respect of imposition of import duties and charges.

The Revised Treaty of the Community has a similar provision: Member States agree to the gradual establishment of a common external tariff in respect of all goods imported into the Member States from third countries.[51] The Member States ought to abolish existing differences in their external tariff rates. Once the harmonisation is achieved, every Member State would apply the tariff rule created by the Community institutions or bodies. To act to the contrary may justify an action against the concerned Member State for failure to fulfil an obligation of the Community legal rules. Recently, the Community has agreed[52] on a common external tariff band which would be implemented from 2015 in all the Member States.

12.7 Trade Liberalisation

Liberalisation means to make or become liberal, while the latter means free, free from restraints.[53] The phrase "trade liberalisation", as intended by the Community, explains the constructive legal and political steps taken to remove all forms of restraints to trade within the (ECOWAS) Community. The ultimate objective is to create a common market where goods would sail from one Member State to the other without the demand for custom duties and tariffs. These restraints may be in two forms: imposition of fiscal import charges—howsoever termed—and other forms of non-fiscal restriction to free trade.

The Treaty clearly provides that "There shall be progressively established in the course of a period of ten (10) years effective from 1st January, 1990 as stipulated in Article 54, a custom union among the Member States. Within this union, customs

[51] Article 37 (1) Revised Treaty.

[52] Declaration of Heads of State 2014.

[53] Brookes (2009), pp. 861–862.

duties or other charges with equivalent effect on Community originating imports shall be eliminated."[54] The customs union should be a vehicle through which the Community attains a common market. The Revised Treaty also provides for the removal of non-fiscal restrictions like quota, quantitative restriction, administrative obstacles, etc.[55]

12.7.1 Imposition of Custom Duties

It has been stated that the ultimate goal of the Community is to remove all fiscal and non-fiscal obstacles erected against goods imported from Member States. But from the time the provision was introduced to the lapse of the time stipulated by the law, goods imported into a Member State from another Member State should have been treated specially. Article 36 of the Treaty reads: "Member states shall reduce and ultimately eliminate customs duties and any other charges with equivalent effect except duties notified in accordance with Article 40 and other charges which fall within that Article, imposed on or in connection with the importation of goods which are eligible for community tariff treatment in accordance with Article 38 of this Treaty."

The effect of Article 36 is that any good eligible for Community tariff treatment should have been charged reduced custom duty. If goods originating from Burkina Faso were charged the same import duty with goods coming from China by another Member State, then Article 36 has not been respected. Prior to absolute elimination of fiscal and non-fiscal obstacles by the Community, each member must take reduced charges in regard to goods of Community origin. Where one elects to interpret Article 35, whether literally or purposively, one would certainly conclude that the 10-year period, within which to liberate the commercial landscape, as stated in the Revised Treaty, has actually elapsed; therefore, the custom union ought to have been established. This argument agrees with the objectives of the Community and should be supported by the Court, especially with the declaration[56] of commitment to implement the CET from 2015. However, in practice, Member States are still exploiting merchants trading within the Community, collecting all sorts of charges from the innocent Community citizens.

12.7.2 Any Other Charges with Equivalent Effect

The Community Court may not have had the opportunity to interpret the clause "any other charges with equivalent effect". However, the European Court of Justice

[54] Article 35 Revised Treaty.
[55] Ibid.
[56] Declaration of the Heads of State 2014.

in a case[57] defined "charges having equivalent effect" as "Any pecuniary charge, however small and whatever its designation and made of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier." If this definition should be extended to the ECOWAS jurisprudence, it would mean that any charge, irrespective of its nomenclature, imposed on goods imported into a Member State from another Member State, merely because the goods were imported, should be removed. The absolute elimination of such charges would be based on establishment of a custom union within ECOWAS. But prior to the time fixed for the establishment or realisation of custom union, charges of equivalent effect should not be levied on goods imported into a Member State from another Member State as though they were imported from a third country.

12.7.3 1979 Consolidation of Import Duties

Before the 1975 Treaty was revised and, chiefly, before the making of other instruments which liberalised certain products and goods, the institution of the Community attempted at consolidating certain charges. A Decision[58] provided that customs duties and any other taxes with equivalent effect on, and non-tariff barriers to goods of Community origin shall be consolidated from 28 May 1979. It is interesting to observe that the choice of the word "consolidation" as the operative term in that law is misleading. Consolidation, generally, achieves some sort of aggregation of points, ideas, rules, something, etc. That provision did not, in reality, haul tax and charge rules of different Member States into a single-harmonised instrument. In fact, the law only created guidelines on what a Member State may or may not do within a given time frame.

According to the law, the consolidation has certain effects, namely "that during the two year period beginning from 28th May 1979, a Member State may not be required to reduce or eliminate import duties. Member States, according to that Decision, should neither impose any new duties and taxes nor increase existing ones".[59] However, it is obvious that the Decision is spent and has been overtaken by events.

12.7.4 Foundation for Specific Liberalisation

In 1981, the Community introduced a Decision[60] which stated all the fiscal charges that would be reduced, absolutely eliminated or harmonised. Under the bracket for

[57] Commission v Italy (Statistical levy) [1969] ECR 193.
[58] Decision 8/5/79.
[59] Ibid., Article 2.
[60] Decision C/DEC.2/11/81.

"Custom Duties and Taxes of Equivalent Effect", the following charges were grouped together: actual custom duties, entry fiscal duties and service taxes. The second classification was "Internal indirect taxes collected on imported goods" which contained charges described as discriminatory by their nature and/or by their rates and non-discriminatory charges. The last classification was "Taxes of equivalent effect to customs duties, (such as taxes on import licenses)".

In regard to "custom duties and taxes of equivalent effect", the law provided that they must be reduced progressively and finally eliminated within a period of 8 years beginning on the 28th of May 1981. It further provided that internal indirect taxes collected in a discriminatory manner should be adjusted while internal indirect taxes collected in a non-discriminatory manner should be retained.[61]

12.7.5 Specific Liberalisation

Despite the drafting pattern of attaching a time frame within which the Community—and the members of course—should achieve the liberalisation exercises either in the Revised Treaty[62] or in any of its legal framework,[63] the institutions, in specific form, made instruments that removed payment of duties in respect of certain products within the Community. These products are considered shortly.

12.7.5.1 Unprocessed Products

The Council of Ministers endorsed[64] certain recommendations on total exoneration of duties and taxes in respect of unprocessed products. The endorsed recommendations include free movement of these products without any quantitative restriction to be supervised by economic operators at the point of entry and absence of compensation for loss of income resulting from the importation of these products. The products include live animals, meat and edible meat offals, fish, live plants, edible fruits, coffee (not roasted or grounded), etc. Consequently, these products should move and circulate within the Community without the demand for duties and assorted charges.

[61] Ibid., Articles 1–4.

[62] See Article 35.

[63] Decision C/DEC.2/11/81 op.cit.

[64] Decision C/DEC.8/11/79.

12.7.5.2 Traditional Handicrafts

Traditional handicrafts have been defined as "articles generally made by hand with or without tools, instruments or devices operated directly by the craftsman; and the raw materials used are essentially of Community origin".[65] Some examples of traditional handicrafts are skins and raw hides (worked by hand), handbags, foreskin and swords.[66] The law provides[67] expressly that trade liberalisation scheme should be applied to traditional handicrafts. The consequences of this provision therefore are that such class of goods should be exonerated totally from import duties and taxes, should move freely without any quantitative restriction and should not attract payment of any compensation for losses of revenue resulting from its importation.[68] It means, therefore, that no persons within the Community should restrict or levy import duties on goods classified as traditional handicrafts. Notwithstanding the clear provision on liberalisation, an importer may be disentitled if he fails to produce or present, at the point of entry, a certificate of origin in respect of his traditional handicraft.[69] But where he is in possession of such certificate, the national authorities should not levy duties and charges on the goods.

12.7.5.3 Industrial Product

In respect of products of Community enterprises, the law, once, provided that such products shall be liberalised immediately they are produced and shall have free access to the Community market duty free.[70] However, a new instrument touching on the same Community policies has replaced Decision A/DEC 10/5/80. Articles 5 and 6 of the new Decision[71] replaced Article 1 and the schedule of the old Decision. Article 5 divided the protected products into priority industrial products and non-priority industrial products and fixed the time frame of 4–10 years within which Member States will gradually eliminate tariffs for both priority and non-priority industrial products. Article 9 of the 1983 Decision provided that the trade liberalisation scheme for industrial products shall enter into force on May 28, 1983; that was not destined to be, because in 1989, Decision A/DEC.6/6/89 amended Article 9 of the 1983 Decision, which read: "The implementation date of the trade liberalisation scheme for industrial products originating from Member

[65] Supplementary Protocol A/SP/1/5/81.
[66] Supplementary Protocol of 1981.
[67] Decision A/DEC.1/5/81.
[68] *Ibid.,* Article 1.
[69] Ibid., Article 2. See also Article 36(2) Revised Treaty.
[70] Schedule 1 Decision A/DEC 18/5/80.
[71] Article 9 A/DEC1/5/83.

States of the Community shall be 1st January 1990". This provision is reiterated in the Revised Treaty of 1993[72].

In 1992, a new Decision[73] was introduced by the Authority, and it abolished the list of priority industrial products—which was contained in C/DEC.3/5/82.[74] The 1992 Decision introduced a new Article 5, which provided a timetable for the elimination of tariffs on industrial product. It grouped the Member States into three. The first group contains Cape Verde, the Gambia, Guinea-Bissau, Burkina Faso, Mali, Mauritania and Niger. These countries were given 10 years to eliminate tariffs levied on industrial products. The second group has the following countries: Benin, Guinea, Liberia, Sierra Leone and Togo. They were given 8 years within which to eliminate tariffs in their various countries. The last group is made up of Nigeria, Cote d'Ivoire and Ghana, and they were meant to eliminate tariffs within their countries in 6 years. For the purpose of this elimination, time is reckoned from 1 January 1990.

Clearly, there was no intention, on the face of the article,[75] to divide the product into priority and non-priority industrial product, as the 1983 Decision did. Based on these provisions, any attempt to impose tariff on industrial product imported from a Member State by another Member State will amount to violation of a Community right of the concerned citizen. However, before a Community enterprise or citizen can benefit from this free circulation principle, the enterprise and the goods must pass through some processes of approval.

12.7.5.4 Approval of Industrial Products and Enterprises

The Council of Ministers made a Decision in 1988 that spells out the procedure for granting approval to enterprises and for industrial product.[76] Enterprises wishing to benefit from the scheme must first apply for approval to national authorities charged with the duty of processing the application. When the national authority has received such application, it shall scrutinise it in order to select those products that conform to the criteria on origin. It shall also ensure that the products are eligible, generally, to benefit from the scheme.

According to the law, the national authority shall forward the application, after scrutiny, to the President of the Commission through ECOWAS national units.[77] The national unit must ensure that the application gets to the Commission before the 28th of February of the year of application.[78] The President of the Commission

[72] Article 35.

[73] Decision A/DEC.6/7/92.

[74] *Ibid.,* Article 6.

[75] Ibid., Article 5.

[76] Preamble to Decision C/DEC/3/6/88.

[77] *Ibid.,* Articles 1–5.

[78] *Ibid.,* Article 5.

shall examine such application and, subsequently, submit it to the mid-year meeting of the Committee on Trade, Customs etc. It is the duty of the Committee to recommend the application to the Council of Ministers for approval.[79]

It must be noted that any of the products that would be approved must pass the originality test. Therefore, the law clearly provides that national authorities should select products that meet the origin criteria and are eligible to benefit from trade liberalisation scheme.[80] However, it does not give room to the national authorities to impose restrictive and arbitrary requirements; the source of law, in such selection exercise, should be the Community law and not the restrictive national laws. In deciding whether a product is eligible to benefit from the liberalisation scheme recourse should be had, always, to Community texts on liberalisation.

12.7.5.5 Withdrawal of Approval

An approval to benefit from the trade liberalisation scheme may be withdrawn. The only institution empowered to make such decision is the Council of Ministers.[81] Before the Council of Ministers shall pass a decision to withdraw approval, it must have received an express request with relevant justification from a Member State. The Council may also make such decision at the instance of one or more Member States where there are accusations of fraudulent practices in the operation of trade in approved products.[82]

Furthermore, the Council may make such a decision where the President of the Commission, after due investigation, sends a proposal to the effect that the approval should be withdrawn.[83] There are other reasons which could be accepted as grounds for withdrawal of approval. They are change in the legal status of an enterprise; approved products no longer complying with the rules of origin; liquidation of the enterprise; case of *force majeure* suffered by the enterprise; the use of the ECOWAS certificate of origin, meant for approved industrial products, to import or export unapproved products or product originating from third countries into or from Member States;[84] extension of the tariff applied to an approved product to third products manufactured in Member States or to non-approved industrial products manufactured in Member States; or any other reason which may be deemed acceptable by the Council of Ministers.[85] These grounds can sustain any proposal for withdrawal of an issued approval.

[79] Ibid., Article 7.
[80] *Ibid.,* Article 4.
[81] New Article 8 Decision C/DEC.4/7/92.
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*

12.7.5.6 Enterprise Registration and Approval Number

The ECOWAS legal regime requires every enterprise eligible to explore the trade liberalisation scheme to be registered. After registration, product approval numbers and registration numbers shall be allocated to the applicant. The allocation is done by the decision of the Council of Ministers. These numbers must be embossed on the applicant's certificate of origin.[86] Since the registration numbers and the product approval numbers are allocated by the decision of the Council of Ministers, it is taken for granted that the process would take place at the Community level. Furthermore, the President of the Commission is bound to notify all Member States of the list of approved enterprises and approved numbers as published in the official journal of the Community.[87] Note also that these registration and approval numbers allocated to applicants are retained subject to good behaviour and non-violation of criteria for approval. In the event of fraud or violation of criteria for approval, the approval shall lapse. Again, the Council of Ministers may withdraw the approval[88] through a decision.

12.8 Non-tariff Barriers

The Revised Treaty[89] provides that "Quota, quantitative or like restrictions or prohibitions and administrative obstacles to trade among the member states shall also be removed". In line with the above principle, the Member States have agreed to, first, relax gradually and, then, remove over a period of 4 years the entire existing quota, quantitative or like restriction or prohibitions which apply to import of goods originating in other Member States, and thereafter refrain from imposing any further restrictions or prohibitions.[90] And the proper date for reckoning the 4-year period is 1 January 1990.[91] It means that by the end of 1994, no country had the right to impose any non-tariff barriers to imported goods. The essence of the removal of non-tariff barriers is to clean the borders of activities that stifle the free movement of goods within the Community.

However, where a Member State had entered into an agreement with another Member State and the terms of the agreement or contract would make it difficult for the concerned Member State to comply with the Treaty rules on removal of

[86] Article 1 Decision C/DEC.14/6/89.
[87] *Ibid.,* Article 2.
[88] *Ibid.,* Article 3.
[89] Article 35.
[90] *Ibid.,* Article 41.
[91] *Ibid.,* Article 51.

non-tariff barriers, the State ought to notify the Council of that restriction. Nonetheless, such agreement or contract ought not to be renewed at its expiry.[92] Examples of non-tariff barriers which can be located in spent Decision[93] of the Council include absolute prohibitions, relative prohibitions, restrictive licensing for imports, global quota for imports and prior or special authorisation.[94]

12.9 Grounds for Restrictions and Prohibition

The general rule is that a Member State should not impose any form of prohibition or restriction to Community goods. However, a Member State may, on certain grounds, be permitted to impose restrictions or prohibit certain goods from entering its sovereign territory. This exceptional provision does not accrue to a Member State unconditionally; the Member State should notify the President of the Commission, as well as the other Member States. But where the restriction or prohibition had been in progress, the concerned State is bound, also, to notify both the President of the Commission and the Member States;[95] where it fails to do so, such restriction and prohibition would contravene the Community law.

Furthermore, a Member State may restrict or prohibit imported goods in the course of applying its security laws or controlling of arms or protecting human, animal or plant health or life. The other grounds that could justify restrictions include protection of public morality; transfer of gold, silver and precious and semi-precious stones; protection of national artistic and cultural property. Also, a Member State can limit importation of goods in order to check drug trafficking.[96] However, these listed grounds shall not entitle any Member State to take any restrictive or prohibitive measure in such a manner that would affect the free movement of goods intended by the relevant provisions of the Treaty.[97]

12.10 Directly and Indirectly Discriminatory Taxes

Article 40 of the Revised Treaty[98] frowns at the application of fiscal charges in excess of those applied to 'like domestic goods' to imported goods from a Member State. It also abhors the imposition of such charges where the intention is to

[92] *Ibid.,* Article 41.
[93] Decision C/DEC.4/5/82.
[94] Ibid., Article 2.
[95] Article 41 (3) Revised Treaty.
[96] *Ibid.*
[97] *Ibid.,* (5).
[98] Revised Treaty.

effectively protect domestic goods. It matters little that the measure taken to achieve any of these is direct or indirect in nature. It is commonplace that charges that is levied on goods merely because it crossed the frontier will constitute direct charges while charges that do not attach to goods merely on the ground of crossing the frontier but applies to both imported and domestic goods albeit a feature in the imported version makes them more susceptible to the charges will be indirect in nature.

12.10.1 Direct Fiscal Charges

It would be helpful to explain further what the Community legal instrument means by direct fiscal charges. These are charges (or taxes) levied on imported goods because they were brought from another country. They are often directly discriminatory and do not apply to domestic goods of the same equivalence. On the face of those charges, they polarise goods of same equivalence into imported or domestic goods. Any imposition of such charges against goods imported from a Member State would qualify as direct discrimination and therefore in contradistinction to the laws of the Community.

12.10.2 Indirect Fiscal Charges

These are charges levied on same or like goods. Such charges would apply both to the domestic and imported goods, but in reality they impose greater burden on the imported goods than they would to same or like domestic products. "Like Goods" may mean goods of similar characteristics which meet the same needs from the point of view of consumers.[99] A good example would be foreign beer and locally made alcoholic beverages. In indirect fiscal charges, there is always a feature which distinguishes the imported version from the like domestic product. For instance, where a country grows particular species of cocoa (brown cocoa) and creates charges to be paid by all cocoa merchant, whether domestic or otherwise; however, the policy may provide that where the cocoa is not brown cocoa, the merchants shall pay additional fees. Since most of the imported cocoa may not be brown cocoa, the charges would then impose huge difficulty for the importers. Any imposition of charges which attaches to imported goods more than like domestic product, because of distinct characteristics, would be caught by the rules on discriminatory charges.

[99] Commission v France (Re French Taxation of Spirit) [1980] ECR 347. See also Fairhurst and Vincenzi (2003), p. 361.

12.10.3 Internal Taxes and Protectionism

The law also provides that Member States should eliminate all effective internal taxes or other internal charges that are made for the protection of domestic goods.[100] Consequently, States should not levy on imported goods taxes that are different from those imposed on (same or) like domestic goods, nor should they impose higher taxes on different foreign goods that are in competition with domestic goods of different nature. Where, for example, a country is good at tapping sweet palm wine and does not manufacture beer but its citizens are beginning to appreciate imported beer, the State should not impose heavy internal tax on the imported beer merely because it wants to extend protection to the palm wine. The Member State should not also impose taxes that are indirectly discriminatory against imported goods merely to protect similar domestic goods. However, in Humblot,[101] the European Court of Justice held that where it is claimed that the tax is indirectly discriminatory, it is necessary for the person laying the claim to establish that the tax is designed to protect domestic products in order for the claim to succeed.

However, where a Member State is under an obligation arising from a contract, which has made the application of the provision on elimination of protective taxes impossible, such Member State has a duty to inform the Council. At the expiry of such inhibiting contract, as provided by the law, it should never be renewed.[102] In addition to internal taxes and charges, the law provides for elimination of all forms of revenue designed to protect domestic goods.[103] Generally, these provisions limit the powers of Member States to impose contribution, charges, levies or taxes in order to protect domestic goods, whether similar to the imported product or otherwise. Any measure or policy that contravenes the Community rules and principles becomes an obstacle on the path of free movement of goods.

12.11 Understanding Goods

It is necessary to explain what exactly will qualify as goods. It has been provided that goods shall be of Community origin before it can be protected, and the definition of Community origin has been given. The Revised Treaty of 1993 did not, singularly, define what goods are; rather, it makes provisions for their free movement. Traditional handicraft has been noted as goods, as well as industrial products, but what has not been defined is the concept of goods or products. The European Court Justice defined goods as "product which can be valued in money

[100] Article 40 (2) Revised Treaty.
[101] *Humblot* 1987, p. 1367.
[102] *Article 40* (2) Revised Treaty.
[103] *Ibid.,* (3).

and form the basis of commercial transaction".[104] The new Protocol on Definition of Concept of Goods defined goods as materials and product,[105] while materials means any ingredient, raw material, component or part used in the manufacture of goods; on the other hand, product means finished product, even if the product is to be used thereafter in the manufacture of another product.

12.11.1 Transit of Goods

The countries within the ECOWAS do share boundaries with one another. Therefore, it is expected that most of their interstate trades would involve road transportation. The consequence is that both subtle and obvious restrictions to vehicular movement, in and out of the Member States, would constitute a large part of the contravention of the freedom of movement. To this end, series of measures were made to ease movement of goods, within the Community, by road. An interstate road transit regime was established in 1982.[106] Interstate road transit means "Regime that allows the transportation of goods by road from one customs office in a Member State to another customs office in another Member State through one or more Member States free of duties, taxes and restrictions while in transit. Furthermore, such goods shall be accompanied with a set of customs documents and shall not be off loaded or transferred while in transit."[107]

To apply the last leg of the definition in isolation will, certainly, work hardship on the drivers or principal obligee.[108] It will be absurd to insist that in the event of danger, breakdown or accident, goods loaded in the vehicle cannot be offloaded or transferred to another vehicle. Help can be found in other articles[109] of the Convention which provide that goods can be transferred in the face of danger or in the case of accident.[110]

The Convention on Interstate Road Transit of Goods, however, excluded certain goods from the class to which it will apply. These are goods transported under international railway transit system, postal articles and lethal goods. Some of the lethal weapons excluded are prepared explosives, pyrotechnic articles, firearms, artillery weapons, ammunition, etc.

---

[104] Commission v Italy (Art Treasure) 1968.

[105] Protocol A/P1/1/03.

[106] Article 2 Convention A/P4/5/82.

[107] *Ibid.,* Art 1.

[108] Any natural or legal person who by a customs declaration applies to carry out an interstate road transit operation and is thus responsible to the competent authorities for the regular execution of this operation; see Article 1.

[109] Articles 20, 22, 23.

[110] Ibid.

Furthermore, the vehicle in use ought to be the approved type.[111] For instance, the vehicle shall be constructed and fitted out in such a form that custom seals can be affixed; no merchandise may be extracted or introduced without leaving traces behind or breaking the seal; there are no hidden compartments; the doors and locking devices should be in such a way that custom can easily seal them; etc.

It is provided that for one to enjoy the interstate road transit system, one should possess interstate road transit declaration (booklet), and the goods must be covered in that declaration.

The declaration shall contain leaflets, which will be deposited at office of departure and destination, as well as other passage offices.[112] The declaration will contain some kind of guarantee where the guarantor may agree to take care of the debts or financial obligation which the principal obligee or driver may incur while transporting the goods through the Member States.[113] As to the printing and issuing of booklet, the Members States shall be responsible for these in relation to their nationals that may need the booklet.[114]

12.11.2 Transfer of Goods in Transit

Generally, when goods are in transit, moving from one Member State to another, the managers of the vehicle are neither permitted to transfer the goods to another vehicle nor permitted to offload the same.[115] Nonetheless, the right to offload or transfer may arise in certain circumstances. Goods listed on interstate transit declaration can be transferred to any other means of transportation, but it must be done under the supervision of the customs authorities of the Member State where the transfer took place. In such circumstances, the principal obligee or driver or managers of the vehicle may not be required to renew the declaration.[116]

There are certain situations that would justify in-transit transfers. One of them is accident; where it occurs, the transporter would be permitted, in law, to transfer the goods to another means of transport.[117] The customs officer who supervised the transfer of goods must mark the declaration leaflets appropriately—representing on it the event of transfer. In case there is no customs authority within the vicinity, any other competent authority may represent the occurrence on the declaration.

The Convention did not state expressly who the competent authority would be: however a policeman, immigration officer, a soldier or any other member of a

[111] Ibid., Article 4, Annex B.
[112] Ibid., Articles 5 and 6.
[113] Ibid., Article 27, 28, Annex C.
[114] Ibid., Article 2 Annex C.
[115] Ibid., Article 1.
[116] Ibid., Article 20.
[117] Ibid., Article 22.

security unit in a Member State may pass for one. Where there is imminent danger which could be subverted by offloading the goods partially or totally, the transporter may proceed to do so, provided that he represents these events on all the necessary declaration leaflets.[118]

Furthermore, a new law[119] has strengthened the provisions of the 1982 Convention Relating to Interstate Road Transit of Goods. It established a "guarantee mechanism" which should consist of national bodies responsible for guaranteeing the payment of duties, taxes and other impositions incurred in the territory of the Member States[120] during the course of transit. The Supplementary Convention did not specify what it meant by imposition and duties; if the latter meant import duties or charges levied on goods for crossing frontiers, then they would be in contradistinction to the spirit of the Revised Treaty. Internal taxation that is not discriminatory is allowed within the ambits of ECOWAS legal rules.[121] Consequently, duties, taxes, levies or contributions that are not in consonance with common market principles and the spirit of the Revised Treaty should never be allowed.

12.12 Vehicle in Transit and Insurance (Brown Card)

In 1982, the Community institution established an insurance scheme for vehicles moving around the ECOWAS. The Protocol of 1982 established what it referred to as 'Brown Card', which shall constitute proof of the existence of an insurance policy. Therefore, the card, in itself, is not an insurance policy but a certification by a national institution that one has been granted. It also means that a card would be effective only if the insurance policy, which it evidences, is in force.[122] The card would be issued by a national bureau, established for this purpose,[123] through an insurance company. How does this scheme work? A participant, that is a Member State, should set up a national bureau. The bureau should arrange with the insurance company or companies to take up the responsibility of underwriting liabilities incurred by road users within the Community. Where such insurance company, known as subsidiary participant, had given out an insurance policy to a motorist or transporter, it would, on behalf of the national bureau, issue a certificate, which would be termed "Brown Card", as evidence of the policy. To comply with this policy, Nigeria passed a law[124] designating the National Insurance Corporation as the national bureau of the Federal Republic of Nigeria.

[118] Ibid., Article 23.

[119] Supplementary Convention A/SP.1/5/90.

[120] *Ibid.,* Article 3 (1).

[121] Article 36 Revised Treaty.

[122] Article 4 (8) Protocol A/P1/5/82.

[123] *Ibid.*

[124] Motor Vehicle Act 1986.

It is the national bureau that settles on behalf of subsidiary participants (insurer companies)[125] claims arising from accidents caused, within its territory, by holders of cards issued by the national bureau of other Member States, as well as claims arising from accident caused abroad by holders of the cards it issued.[126] Generally, the scheme is third party insurance and the guarantee provided by the card should cover the liability incurred by the holder of the card in accordance with the relevant law of the country visited by the holder.[127] Irrespective of the exact terms of the insurance policy to which the card relates, the latter must guarantee to take care of all situations that are coverable under the third party insurance rules of the State where the accident occurred.[128]

However, where there are limitations contained in the policy and such limitations have legal basis justifying them within the context of the law of the issuing State, then they would be upheld. Furthermore, the guarantee that would be provided by the card should correspond to the third party liability acceptable in the place of accident if the holder's Member State does not have compulsory law on insurance.[129] Also, a Member State might opt out of the scheme provided it notifies the Commission, and the withdrawal would take effect 12 months after the notification.[130]

Recently, at the sixth extraordinary general assembly held in Banjul, the Council of Bureaux Brown Card adopted a new Brown Card scheme designed by the Secretariat of ECOWAS Brown Card Insurance Scheme in Togo. The new Brown Card replaces the old version in order to eradicate fake Brown Card in the Community. Also, the Secretariat has plans to develop online claim management software to fast-track the processing of claims.[131] These measures are put in place to reposition the third party insurance scheme for the purpose of strengthening the free movement of goods and persons within the Community.

12.13 Check Points and Free Movement of Goods

Another traditional instrument of violation of right to free movement of goods has been the erection of legal and illegal check points. While it is admitted that an illegal check point would obstruct movement and contravene, automatically, Community and human rights anywhere in the democratic world, a legal check point could as well introduce the same vicious consequence as would an illegal one.

[125] *Ibid.,* Article 2(2).
[126] *Ibid.,* Article 1 (4).
[127] *Ibid.,* Article 4 (4).
[128] *Ibid.,* (5).
[129] *Ibid.,* (7).
[130] *Ibid.,* Article 7.
[131] Alabadan (2014).

There is a soft Community law on check points[132] made in 1990. It simply urged Member States to take all necessary measures to effectively reduce the number of check points on interstate roads. Since it is a soft law, it appears doubtful whether the breach of the Resolution alone could ground an action, at the instance of the President of the Commission, for failure to fulfil an obligation under the Community law. It seems such action may succeed when the provisions of the Resolution is taken together with the Revised Treaty and other Community texts of same equivalence. Nonetheless, an attempt at challenging the existence of toll gates at the borders of the Member States was made in Falana v The Republic of Benin & Ors;[133] the Member States, preliminarily, objected to the suit on jurisdictional grounds, but the Court allowed it at the time. When the matter was heard on its merit, the action failed in its entirety because the applicants did not demonstrate sufficiently how their rights were infringed upon.[134]

12.14 Liberalisation and Loss of Revenue

The annual revenue of a Member State may depend hugely on import duties and levies. Therefore, the introduction of trade liberalisation scheme would certainly, at least in the meantime, pose risk of financial loss. To nip this economic reality in the bud, the Community introduced an arrangement to solve challenges of loss of revenue. The President of the Commission has been given the powers to determine the appropriate compensation to pay in the event of loss of revenue.[135] The compensation would only be paid where the loss was incurred because of the application of the rules of trade liberalisation.[136] Where such application for compensation has been made and approved, the Community shall pay to the concerned State the appropriate compensation.[137] The compensation scheme, under the 2003 law, was meant to run for 4 years.[138] In calculating what a Member State may have lost, the Community would base it on the total short fall in receipts recorded by the Member State as a result of its importation of approved originating industrial product. The financing for such compensation would be raised through Community levy.[139]

[132] Resolution C/RES/4/5/90.

[133] *Supra*.

[134] FemiFalana & Anor. v The Republic of Benin & 2 others ECW/CCJ/JUD/02/12, 24/1/2012. www.904courtecowas.org/2012. Accessed 21 March 2014.

[135] Article 8 Protocol A/P 2/01/03.

[136] *Ibid.,* Article 2.

[137] *Ibid.,* Article 8.

[138] *Ibid*., Article 6.

[139] Article 10.

12.15 Economic Partnership Agreement and Free Movement of Goods

The Economic Partnership Agreement (EPA) is a free trade agreement between the European Union on the one hand and Africa, Caribbean and the Pacific countries on the other hand.[140] It was signed in Cotonou in 2000, revised in Luxembourg in 2005[141] and in Ouagadougou in 2010. The EPA is designed to ensure that Africa, Caribbean and Pacific countries have duty-free quota-free (DFQF) access to European market; it is also an economic developmental tool[142] for the parties that are signatories to the agreement. The actual negotiation for the EPA began in 2000 and was meant to be concluded by December of 2007; however, by 2008, only 19 African countries had concluded the interim version, and four countries—Madagascar, Mauritius, Seychelles and Zimbabwe—out of the 19 had signed and started implementing the EPA.[143] The other countries, out of the 19, made a volte-face and sought for time within which to consult more at the regional level in order to clarify some contentious concerns. However, with the view to maintaining trade relations with and expanding time within which to conclude the EPA for other countries, the European Union institutions made the Market Access Regulation 1528 in 2008, which fast-tracked the application of the EPA in those countries until 1 October 2014. As the date loomed, it became clearer to the signatories to the interim version—including ECOWAS—that failure to sign the final version before the date would have some trade consequences. For countries like Nigeria, Ghana and Cote d'Ivoire that are not in the least developed countries classification, it meant that they would lose the right to access European market both duty-free and quota-free.[144] In contemplation of this consequence, ECOWAS signed the final version[145] of the EPA before the date.

Nonetheless, an expert[146] has identified the significance of signing the EPA across the board. With respect to African states, signing the EPAs collectively helps to strengthen them as a regional block, as well as ensures coherence of their integration agenda. In regard to the EU, the signing of the EPA aligns its policy with other EPAs across the globe, as well as strengthens the uniformity of its goals on building regional integration.[147] Generally, the signing of the EPA between ECOWAS/WAEMU and the EU enhances their political resolve to cooperate on all areas of commerce and trade for economic expansion in Europe and West Africa.

[140] Economic Partnership Agreement 2010.
[141] Economic Partnership Agreement 2005.
[142] Ramdoo (2014), p. v.
[143] Ibid.
[144] Ramdoo (2014), p. iv.
[145] EPA 2014 (ECOWAS/WAEMU and EU).
[146] Ramdoo (2014), p. v.
[147] Ibid.

The ECOWAS EPA[148] intends, among other things, to establish swift job creating economic growth, reduce and eventually eradicate poverty, foster integration, integrate West Africa into global economy and strengthen trade relations.[149] Under the EPA, goods originating from West Africa, with some exception though, are meant to be exported to the European Union free of custom duties, while goods of European origin are meant to be imported into West Africa with custom duties paid. However, the West African States are obliged to reduce gradually and progressively custom duties in relation to goods of European origin.[150] All quantitative restrictions or prohibitions to trade between the parties have also been removed.[151] Specifically, ECOWAS countries are required to liberalise their tariff lines by 75 % for over 20 years based on their common external tariff. Protectively, some agricultural and finished product goods are excluded from the class.[152] Also, there are safeguard clauses which West African countries can rely upon to raise duties on export, on temporary basis, provided they consult with the EU in dire economic situations.[153]

In spite of these provisions which appear capable of enhancing economic development in West Africa, there are some challenges that have been rightly observed.[154] EPA, as it is, does not extend beyond goods; it means that none of its provisions can serve as legal basis for providing services in the territories of states that signed it. Also, doubt is cast on whether the EPA can foster the broader integration agenda of Africa because of lock-in effects, consequences of multi trade arrangements and overlapping membership in different economic communities or groupings. Since the EPA does not preclude the EU from engaging new regional trade partners, there is latent fear that new deals with other blocks might lead to preference erosion and change in regulatory framework. Importantly, the roles of the EU financial institutions and members are not clearly identified in respect of the required financial support needed to realise the objectives of the EPA; hence, the signing of the EPA may not introduce automatic economic development in West Africa.[155]

Expectedly, EPA will have some impacts in the West African countries where it is meant to be implemented. For instance, the anticipated impacts in Nigeria have already been examined and documented by World Bank. It is projected that the liberalisation will result in loss of tariff revenue to the tune of 140 billion naira per year.[156] World Bank estimates that once the EPA is fully implemented, it will drive

[148] 2014.
[149] Article 1 EPA 2014.
[150] Ibid., Article 10.
[151] Ibid., Article 34.
[152] Ramdoo (2014), p. v.
[153] Ibid., p. vi.
[154] Ibid.
[155] Ramdoo (2014), pp. vi–vii.
[156] von Uexkull et al. (2014), p. 14.

down the price of average consumption bundle of households by 0.26 and 0.3 %.[157] The implementation at different stages will have either positive or negative impact on firms; positive effect will be experienced in regard to reduction in input prices, while the negative effect will be felt because of reduction in output price.[158] Another limitation close to these factors is the inability of most firms in Nigeria and other ECOWAS countries to satisfy the requirements as per standardisation and quality control, especially in exportation of finished or manufactured products. This obstacle will certainly limit their business plans and strategies to exploit the free trade regime, while the European firms will easily export to the ECOWAS countries because of their capacities to meet effortlessly the standards set by the West African countries.

There are also legal implications that flow from the signing of the EPA. Generally, it expands the free trade area of the members of ECOWAS; consequently, the free trade area of ECOWAS extends to the territories of the members of the European Union, while it will, in the future, to the extent of liberalisation of the tariff lines, extend free trade area of the EU. It also introduces the principle of "goods in free circulation". Once goods cross a frontier into any Member State of ECOWAS from EU countries, they will only attract a single payment of custom duties and they automatically become goods in free circulation. The exporter will be at liberty to re-export or distribute those goods to all other countries that make up ECOWAS without attracting the payment of further custom duties. This means that the ECOWAS rules[159] applicable to goods imported from a third party state will no longer govern any importation made from EU territories. Also, where there is dispute or intention to avoid one regarding the interpretation of the EPA, the parties would have recourse first to consultation, failing which mediation, and an arbitration panel where the two alternative dispute resolution channels have failed to aid resolution.[160]

12.16 Action for Violation of Right to Free Movement of Goods

Unless an action can be sustained under the provisions of African Charter solely on violation of human rights, individuals are incapacitated to bring actions against Member States for violation of their Community rights. As the Court held in Pinheiro,[161] where a Member State has not taken steps which it is obliged to take in order to make a Community text part of its internal legal order and the

[157] Ibid., p. 16.

[158] von Uexkull et al. (2014), p. 18.

[159] Article II (1) Protocol Relating to the Re-exportation 1976.

[160] Article 64–67 EPA 2014.

[161] Pinheiro v Republic of Ghana 2012, p. 9.

Community right of a citizen is consequently violated, the proper party that should access the Court is the State of nationality because the inaction only amounts to failure to fulfil Treaty obligations. Another option would have been to approach a national court; unfortunately, ECOWAS texts do not constitute the laws of the Member States, at least in the meantime. Therefore, a bearer of Community right, under the ECOWAS legal regime, does not have an existing judicial platform to protect the vested rights.

12.17 Conclusion

The strategic application of the provisions of the Revised Treaty of 1993 and other ECOWAS texts which relate to free movement of goods would certainly result in the creation of a community with free trade area which has no internal barriers. Free trade, on its part, flourishes in situation where there are no artificial barriers between the trading countries. Although free trade has numerous benefits, like enlarging the market for local companies, yet it has some demerits; for example, it can expose local companies to unhealthy competition. As ECOWAS introduces policies on common market and free trade, it is not yet clear how all these would certainly impact, in reality, the businesses of Community citizens and enterprises.

For the purpose of applying the ECOWAS regime on free movement of goods, the participating enterprises as well as the goods they intend to move around the Community must be approved and given certificate of origin respectively by the appropriate authorities. Such goods of Community origin benefit from Community tariff treatment as well as outright liberalisation. Some of the products or goods which have been liberalised are unprocessed products, traditional handicrafts and industrial products. To leverage the application of ECOWAS regime on free movement of goods, the Community has introduced a third party insurance policy scheme. The holder of such insurance policy is expected to be issued with an evidential document termed Brown Card. In addition, the Community has also enlarged the free trade area by signing the EPA. But where these policies are not properly implemented by the Member State to the extent that the Community rights of the citizens are violated, the Community Court may not entertain any application brought by individual solely on violation of rights arising from free movement of goods, unless there is human right element to the violation.

References

Laws

African Charter on Human and Peoples' Rights 1981
Brownlie I (2003) Principles of public international law, 6th edn. Oxford University Press, Oxford

Convention A/P4/5/82 Relating to Interstate Road Transit of Goods
Declaration of Heads of State and Government of the Economic Community of West African States on the Implementation of the ECOWAS Common External Tariff (CET)
Decision A/DEC.6/7/92 amending Decision A/DEC.11/5/83 Relating to the Adoption and Implementation of a Single Trade Liberalisation Scheme for Industrial Products Originating from ECOWAS Member States
Decision A/DEC11/5/83 Relating to the Adoption and the implementation of a Single Trade Liberalisation Scheme for Industrial Product
Decision A/DEC.8/5/79 Relating to the Consolidation of Import Duties and Non-Tariff Barriers
Decision A/DEC 18/5/80 Relating to Trade Liberalization in Industrial Product
Decision A/DEC.1/5/81 Relating to Trade Liberalisation in respect of Traditional Handicraft
Decision C/DEC.4/7/92 Completing Decision C/DEC.3/6/88 Dated 21/6/88 Defining the Procedure for Approval of Industrial Product and Enterprises to Benefit From the ECOWAS Trade Liberalisation Scheme
Decision C/DEC3/6/88 Defining the Procedure for Approval of Industrial Products and Enterprises to Benefit from ECOWAS Trade Liberalisation Scheme
Decision C/DEC.I4/6/89 Establishing the Modalities for the Allocation of Numbers to Industrial Enterprises Scheme
Decision C/DEC.2/11/81 Establishing the Classification of Import Duties and Taxes and Indirect Internal Taxes and Duties to be Reduced and Eliminated or Harmonized in Conformity with the Provisions of Articles 13 and 17 of the ECOWAS Treaty
Decision C/DEC.8/11/79 (of the Council of Ministers) on Trade Liberalisation of unprocessed Products
Decision C/DEC.4/5/82 Relating to the Definition and Nomenclature of the Non-Tariff Barriers which must be eliminated at the Discretion of the Member States within a Period of Four (4) Years from 29th May 1981
Economic Partnership Agreement 2005
Economic Partnership Agreement 2010
Economic Partnership Agreement 2014 (ECOWAS/WAEMU and EU)
Harris S, Horspool M (2008) EU law (subject guide). University of London Press, London
Motor Vehicle (Third Party Liability Insurance) (ECOWAS Brown Card Scheme) Act 1986
North America Free Trade Agreement 1994
Protocol A/P2/01/03 Relating to the Application of Compensation Procedures for Loss of Revenue Incurred by ECOWAS Member States
Protocol Relating to the Definition of the Concept of Products Originating from Member States of the Economic Community of West African States 1976
Protocol A/P1/1/03 Relating to the Definition of the Concept of Products Originating from Member States of the Economic Community of West African States
Protocol A/P1/5/82 on the Establishment of an ECOWAS Card Relating to Motor Vehicle Third Party Liability Insurance
Protocol Relating to the Re exportation within the Economic Community of West African States of Goods Imported from Third Countries 1976
Resolution C/RES/4/5/90 on the Reduction of the Number of Road Check Point in ECOWAS Member States
Revised Treaty of the Economic Community of West African States
Supplementary Convention A/SP.1/5/90 Establishing Community Guarantee Mechanism for Interstate Road Transit of Goods
Supplementary Protocol A/SP/1/5/81
Supplementary Protocol of 1981 (List of Traditional Handicrafts Approved for Full Exemption from Import Tax Duties)

Cases

Case C-193/85 *Cooperativa Cofrutta Srl* [1987] ECR 2085
Case 55/79 *Commission* v *Ireland* [1980] ECR 48128
Case C-383/01 *Danske Bilimportorer* v *Skatteministeriet* [2003] ECR I-6065
Case 112/84 Humblot [1987] ECR 1367
Case C-293/02 *Jersey Produce Marketing Organisation Ltd* v *States of Jersey* [2005] ECR 9543
Case 261/81 *Walter Rau* [1982] ECR 3961
Commission v France Case 168/78 27/2/1980 via eu-lex.europa.eu/lex Uri Serv/lex Uri Servi do? Uri=CELEX:61978CJ0168. Accessed 24/10/2013
Commission v Italy Case 7/68 10/12/1968 via eu-lex.europa.eu/lex Uri Serv/lex Uri Servi do? Uri=CELEX:61968CJ0007pdf. Accessed 24/10/2013
Commission v Italy Case 8/70 18/11/1970 via eu-lex.europa.eu/lex Uri Serv/lex Uri Servi do? Uri=CELEX:61970CJ0008:EN:pdf. Accessed 23/10/2013

Publications

Alabadan S (2014) New ECOWAS Brown Card effective from 2015 Daily Independent. http://dailyindependentnig.com/2014/07/new-ecowas-brown-card-effective-2015/. Accessed 4 Aug 2015
Brookes I (ed) (2009) Chambers Dictionary, 10th edn. Chamber Harrap Publishers Ltd, Edinburgh
Department of Foreign Affairs and Trade (2000) Extracts from opening markets, the benefits for Australia via http://pegsnet.pegs.vic.edu.au/studentdownloads/Economics/Students/Year%2011. Accessed June 2015
Economics Help (2015) http://www.economicshelp.org/trade/arguments-against-free-trade/. Accessed July 2015
Fairhurst J, Vincenzi C (2003) Law of the European Community, 4th edn. Pearson Longman, Edinburgh
Hiller T (1998) Sourcebook on public international law, 1st edn. Cavendish Publishing Ltd, London
Investopedia (2015) Free Trade www.investopedia.com/terms/f/free-trade.asp. Accessed June 2015
Ramdoo I (2014) ECOWAS and SADC economic partnership agreements: a comparative analysis. Discussion paper No. 165, European Centre for Developmental Policy Management. http://ecdpm.org/wp-content/uploads/ecowas-sadc-economic-partnership-agreement-dp-165-september-2014.pdf. Accessed 30 June 2015
Schafer R et al (2002) International business law and its environment, 5th edn. Thomson Learning, Ohio
von Uexkull EJ, Njinkeu D, Maur J-C, Coste A, Shui L (2014) ECOWAS economic partnership agreement with the EU and Nigerian trade and development. Washington, DC: World Bank Group. http://documents.worldbank.org/curated/en/2014/09/23025209/ecowas-economic-partnership-agreement-eu-nigerian-trade-development. Accessed 29 July 2015

Chapter 13
Discrimination

Abstract This chapter examines briefly a range of legal norms which the Community has introduced to tackle common discriminatory practices within the Member States. Specifically, it assesses the relatively new law made by ECOWAS to encourage equal treatment to certificates and eliminate discrimination based on place of issuance of academic certificates. It throws light also on pay and gender discrimination, as well as identifies Community measures on equal treatment to migrant workers and rights of security personnel. It concludes with itemisation of the actual and expected challenges that will impinge on the anti-discrimination policy of ECOWAS.

13.1 Introduction

Discrimination has been defined[1] as "Treating a person less favourably than others on grounds unrelated to merit, usually because he or she belongs to a particular group or category". Group or category, as envisaged by this definition, relates to nationality, sex, gender, age, race, colour, class, status, etc. It would be hugely difficult to develop a common market in an environment burdened by discrimination; if people should move from one state to another for residence, work or establishment, they must be accepted for who they are in the host states. To refuse entry to a person because he has a different colour or speaks in another foreign language would certainly ground an action for discriminatory treatment.

The Revised Treaty[2] provides, as one of its principles, the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. According to the Charter[3]: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic or any other opinion, national and social origin, fortune, birth or

[1] Law (2003), p. 175.

[2] Article 4.

[3] Article 2 African Charter.

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_13

any status." This point has been strengthened by the Charter[4] in this wording: "All people shall be equal: they shall enjoy the same respect and shall have the same rights." The intention of ECOWAS is to entrench the culture of equal treatment to all the Member States and their citizens.[5]

In spite of these legal provisions, Community citizens within the Member States, whether in their countries of nationality or otherwise, have been experiencing different shades of discrimination perpetuated by persons or authorities from their countries or host countries. In Ghana, for instance, it is common fact that West Africans were compelled-as at 2014-to pay $500 (five hundred dollars) as fee for resident permit, in addition to a payment of $120 (one hundred and twenty dollars) for non- citizen identity card. The surprising aspect of this unfair treatment is that Community citizens in Ghana receive the same treatment as though they were citizens from third countries like China, Indian, etc., while Ghanaians in other West African countries are not subjected to such exorbitant charges for resident permit. Under the investment laws of Ghana,[6] West Africans are also not entitled to engage in retail businesses while in that country, thereby suffering some sort economic discrimination. Happily, though, Ghanaian citizens in other West African countries like Nigeria are allowed under the laws[7] to invest and engage in all kinds of businesses and trades. When a group of Nigerians[8] took their grievance to the Community Court for being discriminated against and barred from Ghanaian retail sector, the Community Court upheld the Ghanaian discriminatory practices to the detriment of the Community's objectives and aspiration.

Unfortunately, these issues that touch on host country discrimination may not be solved by the application of the provisions of the African Charter on Human and Peoples' Rights because it seems, from the reasoning of the Court in Falana case,[9] that the African Charter on Human and Peoples' Rights may not be applied where the violation is purely on Community rights which a host state has not recognised through some obligatory legislative steps. Obviously, the panacea would have been to rely on the Community laws on free movement of persons, goods, services and capital. Regrettably, in the same case, the Community Court held that where the Community rights of a citizen are violated, it is the state of nationality rather than the aggrieved citizen that should have the right of access to the Community Court. This is not only impracticable but inimical to the objectives of the integration aspiration.

Observably, the laws on free movement[10] are the likely Community norms that would generate most of the discrimination cases within the Community, yet the

[4] *Ibid.,* Article 19.

[5] Article 4 (a) Revised Treaty.

[6] Ghana Investment and Promotion Centre Act 2013.

[7] Nigerian Investment Promotion Commission Act 1995.

[8] The Nigerian Voice (2014).

[9] 2012, p. 17.

[10] These freedoms are treated in other chapters extensively.

citizens are not allowed to access the Community Court solely to protect such Community rights as contained in those laws. One wonders whether, indeed, the Community intended to curb discrimination against Community citizens within the Member States. If laws on free movement cannot be enforced by citizens at the Community Court and the protective provisions in the African Charter on Human and Peoples' Rights are only applied to violations that occur within a country and the ECOWAS laws are not supranational and applicable in domestic court, how would Community citizens in other Member States other than their countries of nationality air their grievance in the event of discrimination?

Nonetheless, some of the other protective norms introduced by ECOWAS, exclusive of laws on the freedoms, are examined below. These norms are not, in themselves, supranational and will still be limited in application and impact, at least, in the meantime. The examination is restricted to equal treatment of certificates, gender discrimination, pay discrimination, equal treatment to migrant workers and rights of security personnel.

13.2 Equal Treatment of Certificates

In 2003, the Community made a Convention on the recognition of certificates obtained within the Community and beyond. The objectives are to promote regional co-operation as regards assessment and recognition of qualifications and to enhance co-operation in the use of manpower.[11] The Member States of the Community have agreed to recognise the validity or equivalence of degrees awarded by their respective training institutions.[12] It means that a certificate issued in Niger, if it is equivalent to a certificate issued in Senegal, should be recognised in Senegal. Therefore, a degree obtained in Ghana could be used in Cote d'Ivoire for work, business and educational purposes as though it were acquired in an institution in that country provided it is comparable to a degree issued in Cote d'Ivoire. Comparability, in this context, means recognition of qualifications with the same academic value.[13]

13.2.1 Criteria for Comparability

How then could a Member State determine that a certificate issued in another Member State has the same validity or equivalence, thereby having the same academic value? The Convention did set out four criteria for determining whether

[11] Article 2 General Convention A/C.1/1/03.

[12] *Ibid.,* Article 3.

[13] *Ibid.,* Article 1.

a foreign certificate has the same academic value with that issued in the host country:

1. *It should consider the comparable status of establishment which awards the degree*.

   This head includes examining the level of equipment, facilities and the qualification of teachers in that establishment or institution.
2. *It should consider whether there exists similar conditions of entry to courses*.

   It is important to note that what is required, here, is similar condition and not "same condition". If the two phrases were to be swapped, it could be difficult to achieve the comparability test, for it may not be possible to have the same conditions for admissions. In some universities in West Africa, for instance University of Ghana, one may not be permitted to study law unless one has previously acquired at least a first degree. Where such specialised requirement is not a general rule in the host Member State, then such special requirement should not also be used while carrying out the comparability test in regard to certificates issued in other Member States.
3. *It should consider comparability of duration*[14] *of studies and academic value*.

   If, for instance, a university in Nigeria offers medicine for 6 years and other universities in another Member State run the same programme for 4 years, then it could be a ground to treat the certificate cautiously but not discriminatorily. But where the certificate issued by another university in another Member State was obtained after a stretch of time close to 6 years, then it must be treated as a comparable certificate.
4. *It should also consider similar course contents*, *study programmes*, *and assessment method for aptitude and knowledge*.[15]

   The Convention, it must be admitted, is very brief and couldn't have sorted out all the obvious issues that might crop up. For instance, where there is disparity in duration of an academic programme offered by two institutions from different Member States but the course contents are obviously similar, would it be justified under the law for the State whose institution has a longer duration of studies to reject the certificate from that other Member State? It seems that the whole criteria should be taken together and not in isolation. Isolating any of the criteria and applying it, alone, to certificates issued in another Member State could be an avenue for "discrimination". A university that is technologically equipped with uniquely crafted curriculum can run a 5-year programme in 3 years, while a traditional institution with a colonial-era curriculum could insist on 6 years for the same programme. For this reality, the whole criteria should be taken together in order to avoid a sincere but mistaken decision.

[14] *Ibid.,* Article 4.

[15] *Ibid.*

13.3 Gender[16] Discrimination

The Community adopted the ECOWAS Gender Policy in 2005.[17] Under the same Decision, the Member States were mandated to place gender equity and equality issues on their national development agenda.[18] Furthermore, Article 18(3) of the African Charter on Human and Peoples' Rights[19] places obligation on states to ensure the elimination of discrimination against women and also to ensure the protection of the rights of women and child. Gender discrimination borders on the application of different treatment to a person merely on the ground of sex.

The Community, by virtue of adopting the African Charter on Human and Peoples' Rights, would certainly apply any provision found therein that extends protection to people in the face of gender-based discrimination. The protection of rights of women as covered by Article 18(3) of the Charter extends to all shades of women's rights that could be located in international declarations. It is provided that all the Member States shall commit themselves to modify the social and cultural patterns of conduct of women and men so that they can eliminate harmful cultural and traditional practices which are anchored on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.[20] A woman, on the basis of her sex, should not be discriminated against politically,[21] educationally,[22] economically and socially.[23] The proof of the existence of such discrimination could attract the award of damages by the Community Court.

It is not only men that could be entrapped by gender-discrimination net; it could extend its reach to all sexes. If it could be established that a man has suffered discrimination, merely because he is a male, the Community Court could award damages. It is common knowledge that African society is patriarchal in nature; therefore, it may be presumed that a man would not find himself in such a position where his affairs would be decided in a discriminatory manner because of his sex. This presumption is wrong; what with crave for affirmative action and the rise of women within the political and corporate space, it has become possible, now, to witness gender discrimination against a man.

Where there are events culminating in violation of gender rights, the victim may base the claim on the provisions of the African Charter or other international instruments. In awarding damages to a plaintiff in one case,[24] because she suffered unpardonable discrimination, the Community Court had recourse to Convention on

[16] Decision A/DEC.1/01/05.

[17] *Ibid.,* Article 3.

[18] *Ibid.*, Article 3 (iv).

[19] 1981.

[20] Article 2 (2) Protocol to the African Charter.

[21] *Ibid.,* Article 9; see also Article 2 Protocol A/SP 1/12/01.

[22] *Ibid.,* Article 12.

[23] *Ibid.,* Article 13.

[24] Koraou v The Republic of Niger 2008, p. 243.

the Elimination of all forms of Discrimination against Women of 1979. The implication of this wider scope of protection is that an act which would not qualify as gender discrimination under the African Charter may be considered as one provided that such act has been proscribed by an international convention.

However, it is not very clear how the Court would respond to any application which would be brought by any transgender alleging discrimination solely on the basis of newly acquired gender. The Protocol to the African Charter on rights of women had no specific provision on transgender. Nonetheless, the vent through which the litigants could bring in international provisions is wide enough. Therefore, it is very likely that a transsexual would, one day, approach the Court—clutching a relevant provision of an international instrument. In exercising the judicial function of recognition of rights in a society, account should, at all times, be taken of the values of that society. While practices and tradition that drain humanity should be discarded, practices and behaviours that strengthen societal values should be considered when deciding whether to recognise rights or dispel choices.

13.4 Pay Discrimination

Under the ECOWAS legal regime, persons who do equal work should receive equal pay;[25] consequently, where two persons are doing the same work but the employer decides, arbitrarily, to pay one of the workers more than the other, such discriminatory payment might sustain an action for damage. However, as the Community Court[26] once said, "where the employer justifies the difference in treatment by objective factors not related to any form of discrimination", the action for damages would likely fail.

It is, therefore, expected that the plaintiff in such an action must show that there is discrimination in payment. On the other hand, a defendant must establish that there are other objective factors that justify the disparity in payment in order to wriggle out of the rope. It seems that quality of service, high efficiency and advanced skills may be accepted as objective factors, especially where these attributes imbue the work, performed by the worker, with fresh value and when they are not being flaunted fraudulently as justification for discrimination. It must be evidently clear that the employer was sincere in his reasons for paying the workers differently. It seems that where the disparity in payment could be attributed to the other benefits which accrue to the plaintiff but not to other workers doing the same job, then it may be justified. For instance, where a worker lives in an official house while other workers doing the same job live in personally rented apartments, then the disparity in payment has been made up by enjoyment of official house.

[25] Article 15 African Charter.

[26] Professor Essien 2007, p. 124.

Equal pay must be demanded when there is equal work. Where persons are employed to do the same work but one of them receives additional task different from the original one, then "equal pay for equal work" may not be applied. It should be noted also that the difference in the mode of performance should not justify pay discrimination. If two persons were employed as secretaries to do the same work, the fact that one of them performs hers with an upgraded-model computer while the other makes use of an old electric typewriter would not justify the disparity in payment. After all, they all received the tools from the same employer; it does not matter that the employer has reasons why he assigned a computer to one and an electric typewriter to the other.

But where the sources of fund for payment of salaries are not the same,[27] the principle of equal pay for equal work would not be applied. In Professor Essien case, the plaintiff was paid from the fund set up by Commonwealth, while his colleagues were paid from the government purse. When Commonwealth ceased to maintain the fund, the University of the Gambia had no other option than to offer him "dalasis" from the government coffers instead of dollars with which he was previously paid. The Community Court was of the view that the change in source has altered that responsibility to continue the payment in dollars and at that particular scale existing when the Commonwealth fund was maintained.

Another unique point in Professor Essien case was that his demand for equal pay for equal work was not relative to other lecturers in the same Faculty of Medicine. Rather, his demand was relative to his previous payment. That is, if I have done job A in the previous year and received salary A+, if I do job A in the current year I should receive salary A+. However accurate this logic may appear, it may not be sustained where the employer or the organisation has no money to pay the same salary that was paid the previous year. So where an organisation is hit by the wave of economic crisis and elects to reduce pay, but not workload, for every staff indiscriminatingly, an action for discrimination premised on this kind of event may not survive. A person aggrieved by such reduction may pursue other legal actions[28] but not discrimination in payment.

Generally, where there is discrimination in pay because of disparity in length of service, the employer is not required to justify it.[29] The essence of this principle is that when employees have gathered experience, they tend to perform better. In order to reward this experience, employers would likely use the length of service criterion as their yardstick. It has been the practice that an employer is not bound to establish that his reliance on the length of service criterion is appropriate, unless an employee introduces evidence which casts doubt on the link between length of service and better performance.[30] And where it happens, then the employer would

[27] Professor Essien 2007, p. 126.

[28] Action for constructive dismissal.

[29] Cadman v Health & Safety Executive 2006, p I-9623; Danfoss (1989), p. 3228.

[30] Harris and Horspool (2008), p. 309.

have no other option than to show that his reliance on the length of service criterion was appropriate[31] and that the length of service had caused better performance.

13.5 Work of Equal Value

Another angle to the concept of equal pay for equal work is that the equal work may be extended to situations where two different but equivalent professions perform work of equal value. In such scenario, the pay for the two professions should not vary. A good example would be where immigration personnel in a country are paid salaries different from what their colleagues at customs and excise office receive. If it could be shown that the service provided by one of the professions is of equal value with the other, then discrepancy on rates of payment may amount to pay discrimination.

Discrepancy in pay rates often takes a sex or gender dimension,[32] for instance, where one of the professions dominated by a particular sex provides service (work) of equal value with that provided by employees of another profession which may be dominated by another sex. Nursing in West Africa is dominated by women. If it could be established that nursing is work of equal value with laboratory technology, which, presumably, is dominated by men, any variation of rate of payment that places laboratory technologists or personnel in a financial advantage over nurses may amount to discrimination. This sort of discrimination is often classified as indirect discrimination.

13.6 Equal Treatment to Migrant Workers

A migrant worker who conforms to residence (legal) requirements in a host Member State should not be given any treatment different from what a national of that host country would be given. This equal treatment provision touches on various affairs of the migrant worker. In his or her place of work, every policy, term or rule which applies to a national for the purpose of securing the latter employment[33] shall also apply to the migrant worker. His or her employment shall not be less secured than that of another colleague who is a national of that host state. The application of this provision should not be prejudicial to an employer's right of choice. An employer may elect to offer a fixed-term employment contract to a migrant worker; that, *per se*, may not amount to discrimination, provided that the same contractual pattern is used for nationals. But where the other nationals in that

[31] *Ibid.*

[32] *Ibid.,* 307; see also Commission v United Kingdom 1982, P3432.

[33] Article 23 Supplementary Protocol A/SP.1/7/86.

establishment are full-time workers, without the limitation of fixed duration, while the migrant workers in the same establishment are either part-time workers or workers with fixed short-term contracts, then the transient nature of the employment structure may lead to that conclusion—discrimination!

Furthermore, a migrant worker should find it possible, within the host country, to participate in social and cultural activities.[34] Any discriminatory policy that restricts such participation would be caught by the provision of the law. He or she should be allowed access to any social and cultural amenities under the same conditions that apply to nationals. Where for instance he attends a theatre to see a stage performance, he should not be required to pay more because he is a migrant worker. Should he or she wish to go to a beach for sun basking, he or she should not be barred because of nationality, nor should the authorities or management of the facilities charge him or her more. Any form of discriminatory treatment dispensed to a migrant worker in social or cultural circle merely because he is from another Member State would be adjudged offensive. However, equal treatment does not rule out the possibility of the existence of cultural practices which would require only the participation of indigenes. In such situation, exclusion of a migrant worker would be justified on cultural and traditional grounds.

Furthermore, where a migrant worker is relieved of his or her appointment in a workplace because of economic reasons, he or she should find it possible to be re-employed.[35] Such loss of employment should not be a stigma that hunts every other possibility of re-employment. If the opportunity of re-employment exists for nationals, it should also be available to a migrant worker. But a migrant worker should not cry wolf because he or she has not been re-employed, especially where there are other genuine eligibility or economic reasons that hindered the re-employment. But a migrant worker already living in a host state should be given priority over newly admitted workers in regard to employment.[36]

A migrant worker should be at liberty to access normal and advanced professional training within the host state. In as much as he has conformed to the same requirements as expected of a national, he should be permitted to benefit from such capacity-building exercises. Also, a migrant worker, together with his children, should be permitted to have access to institutions, whether professional or general in nature. Any institution of learning, which a national can enrol in, should be accessible to all migrant workers and their children; provided that they fulfil the same conditions required of nationals. Additional requirement which does not agree, directly or indirectly, with the Community rules and principles or cannot be justified under the Community legal regime would be discriminatory.

Furthermore, a migrant worker is eligible to have access to social, cultural and health facilities.[37] Neither of these should be kept away from a migrant worker

[34] *Ibid.,* (b).
[35] *Ibid.,* (e).
[36] *Ibid.*
[37] *Ibid.*, (f).

merely because he is from another Member State. Should there be a health insurance scheme that allows nationals to visit certain designated hospitals on identified conditions, the migrant worker should be allowed to participate in the scheme, visit the designated hospitals on the same conditions applicable to the nationals.

In regard to practice of a profession, a migrant worker should be placed at the same pedestal with other nationals in that profession. If there are laurels to be won, he should be eligible to fight for them; if there are awards to be received, his performance must be considered in the decision process. None should be left out merely because of the tag of "a migrant worker". In every aspect of employment, unless ruled out by the law, a migrant worker should not be discriminated[38] against. In the event of actual discrimination, the aggrieved person might proceed to the Community Court and air his or her grievances through the vent of Article 10(d) of the Supplementary Protocol.[39]

But where the discrimination stems from failure, on the part of a Member State, to apply or recognise a Community text, it is obvious that the Community Court will refuse to grant such application. In Pinheiro,[40] where a Nigerian lawyer alleged that he was discriminated against by the authorities of Ghanaian Law School because of his nationality, the Community Court, in spite of the weight of evidence, did not determine the case in his favour. The Court was of the view that where a Community right of a citizen has been violated because a Member State has not taken steps to recognise the right as contained in a protocol, the right party to access the Court is the State of origin of the aggrieved citizen rather than the citizen himself.[41]

13.7 Security Personnel and Discrimination

Non-discriminatory practices thrive under the civil environment of rule of law and the enhanced human right regime. Civil environment introduces clarity, openness, equality and predictability. Nonetheless, it may be accepted, for defined reasons, to restrict the enjoyment of rights in a society. It may be to ensure the protection of the whole society from health, security, moral and policy challenges. Any measure taken in this direction should not only be the kind that could achieve the set objective but should be proportionate in the circumstances.

Every Member State of the Community has its own fair share of restrictive rules and regulations. It is not out of place for a sovereign state to have laws specifically designed for her armed forces. It is also agreed that such laws may contain some restrictive provisions that would help the personnel to function within the rules of

[38] *Ibid.*, (2).

[39] Supplementary Protocol SP.1/01/05.

[40] Pinheiro v Republic of Ghana 2012, pp. 8–9.

[41] Ibid.

engagement. The question has been whether the existence of such laws has taken away, from the personnel, the right not to be discriminated against; in other words, whether the existence of such laws has disentitled them from enjoying all the other statutory benefits which would have otherwise accrued to them as, first, the citizens of that country.

Another way to look at it could be whether the existence of such laws and regulations justify the application of a different treatment to military personnel. Where, for instance, a senior military personnel slaps or assaults the wife of a junior officer, can the junior officer, in spite of a restrictive provision in a special rule or regulation, enforce his right in a normal forum as a citizen?

Where a senior officer assaults a female officer, can she enforce her right ordinarily in a court if she did not get justice from a military disciplinary arrangement? If she appeals from a court martial and succeeds, would she not be singled out for discreet prejudicial treatment or vituperations? Under the ECOWAS law, armed and security forces personnel, as citizens, shall be entitled to all the rights set out in the constitution of their countries of nationality.[42] However, where there are special regulations disentitling them from bearing such rights, the applications of such constitutional provision may be put in abeyance.

The trouble has not always been with what is contained in that regulation but how senior officers interpret and apply them. The trouble also brews in the importation of practices that may not have been envisaged by the rules into the martial legal environment. Officers and personnel in the defence institutions should never be discriminated against either by the senior officer or by authorities. They should be entitled to all that the constitution could offer to the citizens. Where there is restriction, it must be shown that it is proportionate to what it intends to cure or achieve. The principle of proportionality should always be used in weighing regulated restriction in Member States.

How proportionate is the rule that encourages "non-disclosure of information to the public" when the information which the officer would like to disclose has no bearing on military strategy, sensitive data and security practices? For instance, a junior officer whose wife was assaulted by a senior officer should not be stopped from communicating the incidence to human right groups. They have rights and should be protected the same way the rights of the rest of the citizens are protected.

13.8 Conclusion

By introducing the law on equal treatment of certificates, the Community has taken commendable steps to tackle actual and perceived discrimination against certificates obtained from other Member States. As stated above, the Community also has advanced its anti-discrimination programmes by introducing Gender Policy, which

[42] Article 21A/SP1/12/01.

seeks to eliminate discrimination, especially against women, and to cause Member States to mainstream gender equity and equality in their political agenda. The chapter also highlighted on other protective norms relating to equal pay, equal treatment to migrant workers and the rights of security personnel in the Member States.

But there are obvious challenges to the anti-discrimination objectives of the Community. First, the laws that provide for the protection of the rights of the Community citizens are not supranational; therefore, an aggrieved person may not call in aid any of the protective provisions in a domestic court. Second, most Member States are not eager to transpose or incorporate these laws in their legislation in order to make them part of their national laws. Third, the law that provides for equal treatment of certificate appears not to be in force in the meantime (at least as at the second quarter of 2015). Fourth, there is no Community mode or mechanism to ensure that Member States actually implement the provisions of the Gender Policy of the Community. Fifth, since ECOWAS cannot achieve its anti-discrimination objectives without robust enforcement of the Community rights contained in all the laws on freedom of movement, the failure by the institutions of the Community—including the Court—to empower individuals to vent their grievances in matters of discrimination is a perfect clog on the wheel of success.

References

Laws

African Charter on Human and Peoples Right 1981
Decision A/DEC.1/01/05 Relating to the Adoption of the ECOWAS Gender Policy and all its Implementation Instruments
General Convention A/C.1/1/03 on the Recognition and Equivalence of Degrees, Diploma, Certificates and other Qualification in ECOWAS Member States
Ghana Investment Promotion Centre Act 2013
Nigeria Investment Promotion Commission Act 1995
Protocol to the African Charter on Human and Peoples Right on Right of Women in Africa
Protocol A/SP1/12/01 on Democracy and Good Governance
Revised Treaty of the Economic Community of West African States 1993
Supplementary Protocol SP.1/1/05 Amending Protocol A/P1/7/91 Relating to the Community Court
Supplementary Protocol A/SP.1/7/86

Cases

Cadman v Health Safety Executive, C-17/05 10/2/2006 via curia.europa.eu/juris/show Pdf.jsf; Jsessionid=9ea? d2dc30db54d1b8d5387f4e687&pageIndex=0&doclang=EN&mode=1st&dir &occ=first&part=1&cid=672499. Accessed 24 October 2013

Commission v United Kingdom, C-165/82 via eu-lex.europa.eu/lex Uri Serv/Lex Uri Servi do? Uri= CELEX61962C00025: EN: PDF. Accessed 16 October 2013
Danfoss (Handels-og Kontor Funktionaerernes Fobund I Danmark v Dansk Arbejdsgiverforening) C-109/88 17/10/89 via eu-lex.europa.eu/lex Uri Serv/Lex Uri Servi do? Uri= CELEX 61988CJ0109:EN::PDF. Accessed 25 October 2013
Femi Falana & anor. v The Republic of Benin & 2 others ECW/CCJ/JUD/02/12, 24/1/2012. www.courtecowas.org/2012. Accessed 21 March 2014
Hadijatou Mani Karaou v The Republic of Niger (2004–2009) CCJELR
Prof. Etim Moses Essien v The Republic of the Gambia & Anor (2004-2009) CCJELR

Publications

Harris S, Horspool M (2008) EU Law (Subject Guide). Oxford University Press, Oxford
Law J (ed) (2003) Oxford Dictionary of Laws. Oxford University Press, Oxford
The Nigerian Voice (2014) Ghana moves to Sack Nigerian traders. http://www.thenigerianvoice.com/news/160711/1/ghana-moves-to-sack-nigerian-traders.html. Accessed 25 July 2015

Chapter 14
Competition Policy

Abstract Competition policy keeps undertakings or enterprises in track in a competitive market to avoid compromises and practices that could diminish competition. It is not every compromise or concertation that will result in breach of competition policy; however, where the enterprise or undertaking has a substantial share of the market and wields such dominance abusively, the law inevitably catches up with the entity. To unravel the place of competition in the integration scheme of the Community, this chapter carefully explores the ECOWAS framework on competition and unearths the concepts of agreement, concerted practice, abuse and substantial share of the market. In sum, it explains the practices, agreements and acts that would contravene the competition rules, exception to the rules as well as the role of the Competition Authority in creating a balance in the market.

14.1 Introduction

Competition policy borders on the application of rules, principles and standards with a view to creating an equal platform that helps businesses and companies compete fairly with each other.[1] The benefits of having a competition regime in a country or region are commonly identifiable. Competition often leads to price cuts because the companies would want to grab larger share of the market by offering good prices. The consumers would certainly benefit hugely from such prices and would be able to afford more goods. The prospect of affording more at low prices will help to enrich consumer well-being and strengthen the profit margin of the companies, which in turn leads to more production. Companies in a competitive market are eager to devise strategic means and tools to retain the customs of the citizens; therefore, they ensure their goods are of impeccable quality in order to retain patronage.[2]

[1] European Commission (2015).

[2] Ibid.

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8_14

Apart from gauging the quality of goods and services bandied around the market, competition also improves variety. This is because the companies are always infusing some tinge of uniqueness that distinguishes their products from their competitors. Consequently, assorted goods flood the market daily, thereby enlarging the pool from which consumers can choose. In order to add that tinge of uniqueness, companies ought to be innovative[3] in developing their product's concept, design and production techniques. So competition spurs companies on along the lines of creativity and innovation. The Supreme Court of the United States captures the merits of keeping a market competitive in this concise wording: '. . .that all elements of a bargain-quality, service, safety, and durability-and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers'.[4]

But competition may not always create that market utopia that governments and citizens crave for and may not at all times benefit the society. Sometimes competition presents its imperfect side, or what Stucke[5] rightly describes as 'antitrust blind spot'. In some situation, competition may transform from cure to problems of the market and the society. For instance, competition can raise issues of ethical conduct in society, as the Supreme Court of the US noted that competition is 'not entirely conducive to ethical behavior'.[6] Somehow it engenders animosity and bad blood among competitors and leads to conducts that appear unethically right. Some of these conducts are demonstrated through negative advertising, which the citizens can sip in as acceptable means of protecting one's interest in a competitive society. Furthermore, competition can create an avenue for, as Stucke described it, behavioural exploitation; this is typified when companies exploit the demand-driven biases of the consumers using their products. The exploitation may be effected through reducing a surcharge on product and making the reduction look as though it were a discount and using deceptive advertising to make customers think that their products are of greater quality because of pegged high price.[7] Competition can be unusually inimical to the culture of growing and sustaining enterprises in a country. The larger and stronger companies would never leave a space for infant companies or startups within the market; they can achieve this suffocating feat through unfair low pricing system and endless advertising.

However, despite these anomalies, creating competition regime is still crucial to the actualisation of economic goals. Where there is regional economic community, it would be difficult to achieve an internal or common market without effective competition rules. Competition rules often help to carve or hew a fair and just path through which every corporate entity or business person could pass without being confronted with disadvantageous trade practices capable of taking the market away

[3] Ibid.

[4] National Society of Professional Engineers v US 1978, p. 695.

[5] Stucke (2013), p. 162.

[6] National Society of Professional Engineers v US 1978, p. 695.

[7] Stucke (2013), pp. 174–175.

from the entity or person. The rules would prevent the natural tendency of dividing the markets across national lines.

Sometimes, in order to cause an erosion of competition, entities may collude by agreement or concerted practice either to share the market or form unhealthy allies that will affect trades within the region. Whether they have colluded under the bond of written agreement or united by the force of unwritten understanding, their activities would be caught by the web of "anti-competitive practice". Anti-competitive practice is "any practice coming from a physical or moral person the object or effect of which is to restrain competition to the disadvantage of the common market".[8] In regard to what would amount to concerted practice, the Supplementary Act specifies that "a practice involving direct or indirect contacts between competitors falling short of an actual agreement[9]" qualifies as one. Invariably, competition policy guards against unfair competition in a market, protects new entities and helps countries or region achieve their economic objectives.

A region that has stepped closer, comparatively, to its economic aspiration is the European Union, and the enforcement of competition policy has been instrumental to its visible economic growth. In this economic equation, the Commission and the Court of Justice act as the steam that propels the vision. Probably, an outline of some the major decisions of the Court will help put in perspective the roles they have played in defining and creating a fairer competitive market in Europe. Primarily, under the European Union law, the three sets of events capable of violating competition rules[10] are agreement/collusion between undertakings or decision of association of undertakings, events creating an effect on trade between Member States and when agreement and collusion have the object of preventing, restricting or distorting competition to an appreciable extent.[11] In defining "undertaking" for the purpose of applying the competition rules, the Court held that "the concept of undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed".[12]

In considering the extent of the application of the word "agreement", the Court formed the opinion that it covers both horizontal and vertical agreements[13] and need not be "one off" but may include the result of process lasting for many years.[14] The Court also seised the opportunity in Dyestuff[15] to distinguish concerted practice from agreement in these words: "a form of co-ordination between undertakings, which without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between

[8] Article 1 Supplementary Act A/SA.1/12/08.

[9] Ibid.

[10] Article 101 Treaty on the Functioning of European Union.

[11] P163.

[12] *Höfner and Elser* 1991, p I-1979.

[13] Consten and Grundig v Commission 1966, p. 339.

[14] Polypropylene 1988, p. 347.

[15] *ICI* v *Commission (Dyestuffs)* 1972, p. 619, para. 64.

them for the risks of competition". However, it is not all breaches of the provision of Article 101 of TFEU that will be enforced; where the companies involved are relatively small and the impact of their activities on the competitive market is negligible, then it should be disregarded. This is referred to as de *minimis rule*. This outline of cases reflects the degree of the contribution which the institutions have made concerning the application and enforcement of competition policy in Europe.

With regard to ECOWAS, the competition policy is as contained in the Supplementary Act.[16] The law was made to promote competition, prohibit any anti-competitive business conduct, ensure consumer welfare and expand opportunities for domestic enterprises in Member States.[17] It is hoped that the institutions and organs of the ECOWAS will borrow a leaf from the constructive decisions which the institutions of the EU—the European Commission and Court of Justice of the European Union—have been making to strengthen adherence to competition rules within the European market. Nevertheless, the competition rules of ECOWAS, as they exist, are considered below.

14.2 Application of Competition Rules

It is important to clarify, firstly, that the competition rules of the Community apply to both state enterprises and private entities.[18] The rules are aimed at agreements, practices, mergers and distortions caused by Member States—and their undertakings—which are likely to have an effect on trade within ECOWAS.[19] Consequently, agreements or practices, merger or distortion which are able or likely to impact on trade and businesses within the Community in such a way that will diminish competition will contravene competition rules. Agreement, in this context, means "any agreement, arrangement or understanding, whether oral or in writing and whether or not it is intended to be legally enforceable".[20] Furthermore, this raft of rules targets acts which directly affect regional trade and investment flows. It also applies to conduct that may not be eliminated other than within the framework of regional co-operation.[21]

[16] *Ibid.,* Article 2.
[17] *Ibid.,* Article 3.
[18] *Ibid.,* Article 4 (3).
[19] *Ibid.,* (1).
[20] *Ibid.,* Article 1.
[21] *Ibid.,* Article 4 (1).

14.3 Concept of Agreement

It is reiterated that agreement means "any agreement, arrangement or understanding, whether oral or in writing and whether or not it is intended to be legally enforceable".[22] A distinct feature of the definition is that it ropes in written and oral agreements. So if company A enters into an oral agreement with company C to push out new enterprises from the market by reducing the price of their common products to the amount equivalent to the cost of production, such an oral agreement would be caught by competition rules. The idea of including unwritten agreement in the forbidden list is not unique to ECOWAS competition rules. In the European Union jurisdiction, such an oral representation would, certainly, be caught by competition rules.[23] It does not matter that the agreement might not have been crafted in such an enforceable form; its existence alone would fall foul of the competition rules.

One question that arose, at the early stage of applying European competition policy, was whether agreements should be restricted to those entered into by companies at the horizontal level or whether they should be extended to vertical agreements as well.[24] The European Court of Justice disagreed with the argument of restriction and held that agreement, in that context, covers both horizontal and vertical arrangements. Horizontal agreement means terms and conditions applicable between entities at the same level of production, supply, etc. If company A and company Z are manufactures of litmus paper, factually they are operating at the same level. But if company A is the manufacturer while company Z is the distributor or retailer, then the arrangement is vertical in nature. Analogously, it is hoped that the Community Court of ECOWAS would extend the reach of agreement to both vertical and horizontal arrangement when similar issues are brought before the Court.

Another interesting point which the ECOWAS jurisdiction might encounter would be the place of "unilateral agreement" in the competition rules equation. If company A, the manufacturer of litmus paper, creates terms that restrict competition and insists that failure to comply with them, on the part of the distributors, would result in discontinuance of supply to such distributors, would the distributors be found wanting, merely because they continued to receive supply on those terms? It seems that under European competition rules, such distributors would be caught for continuing to trade with such company under those terms, so far as it could be shown that there was tacit acquiescence.[25] But it would not be sufficient to infer the existence of such agreement, capable of restricting competition, solely from the acts or measures adopted by the manufacturer; there must be some kind of tacit acceptance from the distributors or wholesalers before such conclusion would be

[22] *Ibid.,* Article 1.

[23] ACF Chemiefarma NV v Commission 1970, Pp 700, 701.

[24] Consten and Grundig v Commission 1966, p. 339.

[25] Volwagen v Commission 2000.

made.[26] As the competition rules are applied, it is expected that the Community Court of Justice (ECOWAS) will be guided by this European practice should such or similar issues arise.

14.4 Concept of Concerted Practice

Concerted Practice has been defined under the ECOWAS competition rules as "a practice involving direct or indirect contacts between competitors falling short of an actual agreement".[27] Examining how the Court of Justice of the European Union has responded to concerted practice would, certainly, widen one's understanding. In Dyestuffs case,[28] the Court defined it as "a form of co-ordination between undertakings, which without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition".

The facts were that the Commission of the European Union conducted an investigation on series of uniform increases in the prices of dyestuff, which began in 1964, in Italy, the Netherlands, Belgium, Luxembourg, Germany and France; it came to a conclusion that there was concertation among the undertakings concerned; consequently, it imposed certain sanctions on them. When the matter came before the Court, having found that the dyestuff market was divided into five along national lines; that independent subsidiaries took instruction from the parent company in regard to pricing and were influenced, especially the evidence that there were exchanges of telex messages among those undertakings on the subject of pricing; and that the parties who put these practices into effect sought to reduce to a minimum the risk of changing the conditions of competition, it held that there was concerted practice. But in Ahlstrom v Commission,[29] the Court took a different stand notwithstanding parallel conducts like different pricing systems introduced uniformly in different countries in regard to wood pulp. The Court held that concertation is not the only plausible explanation for the parallel conduct. It took into cognizance the peculiar nature of the wood pulp market: the transparency which could justify uniform price announcements, the prevailing oligopolistic tendency which could explain the price following and the long-term nature of the market which could justify the system of price announcement (as rational response) before reaching the decision. Furthermore, any direct or indirect co-operation by companies capable of undermining competition may qualify as concerted practice.

[26] Bai and Commission v Bayer 2004.

[27] Article 1 Supplementary Act A/SA.1/12/08.

[28] ICI v *Commission (Dyestuffs)* 1972, p. 619, para. 64.

[29] 1994, pI-199.

So concerted practice serves as a web that catches behaviours, short of agreement, among companies which diminish competition in a market.

14.5 Prohibited Agreements and Practices

Certain agreements and practices have been identified and included in the prohibition list because of their incompatibility status in relation to common market. These are "all agreements between enterprises, decisions by associations of enterprises and concerted practices which may affect trade between ECOWAS Member States and the objects or effect of which are or may be the prevention, restriction, distortion or elimination of competition within the common market".[30] So long as an act exists, which can lead to prevention, restriction, distortion or elimination of competition, and the said act stemmed from mutual understanding or consequences of having contact with each other, it would be enough to categorise the act as prohibited. It would not be in their place to say that the act or understanding was not intended to limit competition.

Having made a general classification of prohibited agreements and practices, the law clearly identified particular practices, decisions and agreements that have been prohibited. This class covers agreements, decisions and practices which (1) directly or indirectly fix purchases or selling prices, terms of sale or any other trading conditions; (2) limit or control production, markets, technical development or investment; (3) share markets, customers or sources of supply; (4) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or (5) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract.

Where any agreement or practice has been caught by the general or particular prohibition rule found in Article 5 (1),[31] it would automatically become void and of no legal effect in any of the States that make up ECOWAS (Community).[32] Compliance with the terms of such agreement or continuance with such practice would certainly be a contravention of the rules on competition.

[30] Article 5 Supplementary Act A/SA.1/12/08.
[31] Ibid.
[32] Ibid., (2).

14.6 Excluded Agreements and Activities

The rules on competition may not apply to all shades of agreements and activities. Clearly, activities and agreements that relate to collective bargaining or those that protect the interests of the management and employees in their employment relation may be excluded.[33] A full complement of agreements and activities excluded from the stop-list is stated below:

(1) collective bargaining agreements for the purpose of fixing terms and conditions;
(2) agreements and trade practices approved by a regional competition organ of ECOWAS;
(3) activities expressly exempted by virtue of any treaty or any instrument or agreement in relation thereto or flowing therefrom, so long as the activities are not inconsistent with the purposes of the Supplementary Act on rules of competition;
(4) activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public;
(5) Such other activity declared after consultation with the ECOWAS Competition Authority by the Council of Ministers.[34]

14.7 Exemptions

The prohibition of certain agreements and concerted practices has been provided in Article 5; however, the article may be declared inapplicable to some agreements and concerted practices by the Competition Authority. For any agreement or concerted practice to be exempted from the prohibition, it must be the kind that contributes to the improvement of production or distribution of goods or promotion of technical or economic progress while allowing consumers a fair share of the resulting benefit and which does not (a) impose on the concerted enterprises restriction, which are not indispensable to the attainment of these objectives, and (b) afford such enterprises the possibility of eliminating competition in respect of a substantial part of the products in question.[35] It seems that enterprises which seek such exemption in regard to agreements or practices they are involved in must take deliberate steps to convince the Competition Authority that they have satisfied the above requirements for exemption.

[33] Ibid., 4 (2).
[34] Ibid.
[35] Ibid., Article 11.

14.8 Abuse of Dominant Position and Prohibition

The Supplementary Act[36] explains what constitutes dominant position in this form: "one or more enterprises hold a dominant position in a relevant market if, singularly or collectively, it/they possess a substantial share of the market that enables it/them to control prices or to exclude competition". Also, the European Court of Justice has defined dominant position to be "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".[37] Accordingly, where a company (or more) is in control of a substantial part of a geographical or product market and abuses the dominance in a way that could affect trade between Member States, the law would prohibit such abuse.[38]

14.9 Enterprises

In order to determine whether an entity is an enterprise for the purpose of being in a dominant position, the Supplementary Act defined enterprise as "any person or group of person engaged in business".[39] And "person", as used here, covers individuals; partnership; body, whether corporate or otherwise; and any association of persons.[40] Furthermore, it should be understood that where a company is an affiliate of another, both shall be treated as interconnected companies. The rule also applies to two companies that are subsidiary of a company.[41] It is interesting to note that a group of interconnected companies shall be treated as a single enterprise.[42]

14.10 Substantial Share of the Market

What does the phrase "substantial share of the market" mean in relation to dominant position? The Supplementary Act did not define the phrase and the Court has not been invoked to interpret it. However, the Court of Justice of the European Union did hold in a case[43] that an undertaking that has 50 % of the market share would

[36] Ibid., Article 6.
[37] United Brands Company v Commission 1978.
[38] *Ibid.*
[39] Article 1.
[40] *Ibid.*
[41] *Ibid.,* Article 1 (2)
[42] *Ibid.,* (2) (b).
[43] Akzo Chemie v Commission (2014), p. I-3360.

certainly be in a dominant position. Furthermore, the Court also considered British Airways to be in a dominant position because it held 39.7 % of the market share for air travel services, while other competitors held less than 6 % each. If these events had taken place within the ECOWAS common market, then the above companies would have been considered as having a substantial share of the market. And relevant market under ECOWAS law means "the supply to a geographical area, of products which the consumer regards as substitutable in terms of price and use".[44]

Inferentially, if a particular product does not have quick substitutes, then such products would likely dominate. Also, it implies that if prices are increased, the customers would still be patronising the manufacturers because of lack of quick substitutes. But where the product can be easily substituted by any other product within the product market, then the degree of the first product being dominant is less. Where there are few makers of bottled water in a given Member State, ranging from manufacturers A to Z, if it is shown that manufacturer A has 50 % of the market share (product market for water), it would likely be in a dominant position. If manufacturer A decides to alter the dynamics of supply, such alteration would certainty affect the whole country. Where it abuses this position, by raising price for example, the law would certainly frown at it. What the law seeks to achieve is to restrain organisations whose products have little or no substitute in a market in which they have substantial share from using their privilege positions abusively.

14.11 Substantial Part of the Common Market

It has been stated that the law prohibits the abuse of dominant position within the ECOWAS common market or a substantial part of it. What portion of the territory would constitute substantial part? If, for instance, company X manufactures candle in eastern part of Togo and the produce is sold only in that area, if it has 50 % of the market share in regard to candle supply and abuses its dominant position, can it be said that eastern part of Togo is a substantial part of the ECOWAS market? The Competition Authority in charge of the implementation of the competition rule may not have decided on such issue, nor has there been a referral to the Community Court touching on the same subject. But the European Court of Justice had held that a part of a state could qualify as "substantial".[45] Analogically, it would be expected that the Community Court would hold, when approached, that a part of a Member State fulfils the "substantial part" requirement.

[44] Article 1 Supplementary Act A/SA.1/12/08.

[45] Suiker Unie (1975), p. 1993.

14.12 Abuse and Types of Abuse

All that the Supplementary Act did was to display different kinds of abuse; the law did not define it. It is obvious that the meaning of abuse, under the competition policy of ECOWAS, has been left to the Court's construction. However, European Court of Justice has defined abuse as "an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".[46] In summary, it seems that the behaviour must be assessed objectively, and the company must be in a dominant position capable of interfering with the market to the extent of weakening competition or inhibiting its growth.

Nonetheless, the Supplementary Act did provide that abuse consists of (1) limiting access to a relevant market or otherwise unduly restraining competition; (2) directly or indirectly imposing unfair trading conditions; (3) limiting production, markets or technical development to the prejudice of consumers; (4) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage and; (5) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of contracts.[47] It does not seem that the list is exhaustive; where an event fits the definition of abuse given by the European Court, such event might come under abuse.

14.13 Merger and Acquisition

Certain mergers and acquisitions are not acceptable under the ECOWAS competition policy. Where such arrangement have been prohibited, it shall become automatically void and shall have no legal effect.[48] The prohibited arrangements are mergers, takeover, joint venture, acquisition, business combination and interconnected directorship, whether vertical or horizontal between or among enterprises where the resultant market share in the ECOWAS common market or any significant part of it shall result in abuse of dominant market position and lead to substantial reduction of competition.[49] Despite the prohibition of certain mergers and acquisition, it is possible to exempt or authorise them in certain circumstances.

[46] Hoffman—La Rocche v Commission 1979, p. 541.
[47] Article 6 (2) (a)–(e) Supplementary Act A/SA.1/12/08.
[48] *Ibid.,* Article 7 (2).
[49] *Ibid.,* (1).

For such exemption or authorisation to take place, it must be shown that the arrangement or transaction is in the interest of the public.[50]

14.14 State Aid

Any form of aid granted by a Member State or from its resources which favours certain enterprises or goods, distorting or threatening to distort competition, shall be incompatible with ECOWAS competition rules, provided it affects inter-trade.[51] But incompatibility,[52] in this context, may not extend to indiscriminate aid to individual consumers or to remedy disaster or exceptional occurrences. Also, incompatibility will not affect aids granted for community projects, enhancement of economic activities, and promotion of culture and heritage.[53]

14.15 ECOWAS Competition Authority

The Authority was established to implement the Community competition rules,[54] and it is headed by an Executive Director, who is assisted by two directors and staff members.[55] The duties of the Authority include keeping under review activities in the market in order to discover practices that inhibit efficient operation, investigating conduct of business, eliminating practices amounting to abuse of dominant position, issuing of advisory opinion regarding the interpretation of Community competition rules at the request of executive or judicial authorities, making information that concerns rights and obligation under competition laws available to consumers and persons engaged in business.[56]

The ECOWAS Competition Authority has expansive powers which are either administrative or regulatory or quasi-judicial in nature. For instance, it has powers to issue injunctions: ordering the termination of contract, prohibiting contracts and imposing terms which could reduce competition, prohibiting discrimination or preferences in price matters and requiring the publication of commercial

[50] *Ibid.*, (3).
[51] *Ibid.*, Article 8.
[52] *Ibid.*, (2) (a) (b).
[53] *Ibid.*, (3).
[54] Article 1 Supplementary Act A/SA.2/12/08.
[55] *Ibid.*, Article 2.
[56] *Ibid.*, Article 3.

information.[57] Also, the Authority has powers to request national institutions to carry out search, inspect and remove temporarily any documents or extracts for the purpose of making copies therefrom. This is used where there is need to gather evidence of anti- competition practices.[58] It has powers to discontinue investigation or enquiry.[59] The Authority has powers, on completion of its investigation, to impose appropriate sanctions, provided that there are pieces of evidence upon which it can presume the violation of competition rules. Apart from powers to impose fines, the Authority can pay compensation to victims of the anti-competition practices.[60]

14.16 Decisions

The decision of the Authority can be appealed against. Such appeals, of course, lie in the Community Court.[61] The Community Court, when considering such decisions, sits in its appellate capacity, and any decision made, at that realm, is final. Decisions of the Authority or the appellate decision flowing from the Competition Authority's decision can be enforced. It is the civil procedure rules of the relevant Member State that should guide the enforcement. It is also expected that Member States should appoint national institutions which would receive and implement such decisions;[62] however, the Community Court has powers to suspend the enforcement of any given decision.[63]

14.17 Conclusion

Competition policy relates to the application of rules, principles and standards intended to create a level playing field that encourages fair competition among companies or enterprises in a given market. Competition could be a good means of allocating resources; it can stir companies to invent more and can create options in terms of choice of goods. But as Stucke observed, competition too has a blind spot. Companies can exploit demand-driven biases of their customers in different manner. Also, competition can raise ethical questions about the conduct of competitors and the impact such conduct would have on the morale of the society.

---

[57] *Ibid*., Article 4 (1).
[58] *Ibid.,* Article 5.
[59] *Ibid*.
[60] *Ibid.,* Articles 8 (2) (3); 9 (3);4(14); 7(1); 10.
[61] *Ibid.,* Article 7 (3).
[62] *Ibid.,* Article 11 (1)–(4).
[63] *Ibid.,* (5).

However, the absence of it would yield more harm than all the facets of the blind spot put together. This is where the rules of competition come in to align this ethical dilemma. Under the competition rules of ECOWAS, agreement and concerted practices that could affect trade and competition among the Member States are prohibited. The rules also prohibit the abuse of dominate position by enterprises that have a substantial share of the market. The Competition Authority, endowed with powers, can investigate these conducts or practices by enterprises and can even issue injunctions. The Community Court, however, under its specific appellate jurisdiction, can reconsider any of the decisions made by the Competition Authority.

However, there are issues capable of stunting results. Competition policy as a legal tool of market control is uncommon in West Africa; the legal culture has never been entrenched. This will certainly blur the perception of the people and their willingness to either support the policy or yield their enterprises to the cause. Where an enterprise is obstinate to submit to the decision of the Competition Authority, there is little any of the institutions of ECOWAS could do in terms of enforcement because ECOWAS rules are neither supranational nor incorporated in the laws of the Member States—this is another huge challenge to the entire competition exercise. It is not also clear that the Competition Authority has the adequate fund and personnel suitable to tackle the Community-wide tasks which the law has assigned to it. These challenges must be embraced and strategically solved in other to have a fair playing field for all the enterprises in the Community.

References

Laws

Supplementary Act A/SA.1/12/08 Adopting Community Competition Rules and the Modalities of their Application within ECOWAS

Supplementary Act A/SA.2/12/08 on the Establishment, Functions and Operation of the Regional Competition Authority for ECOWAS

Cases

ACF Chemiefarma NV v Commission, C- 41/69 15/7/1970 via eu-lex.europa.eu/Lex UriServ/Lex Uri Servi do? Uri=CELEX:61969CJ0041:EN:PDF Accessed 28 October 2013

Akzo Chemie BV v Commission of the European Communities. Available http://Curia.europa.eu/juris/lists.jsf?language=en&jur=CT,F&num=62/86&td=AC. Accessed 20 Sept 2014

Bai and Commission v Bayer C-2/01, C-3/01 6/1/2004 via curia.europa.eu/juris/show Pdf.jsf?text=&docid=48819&pageIndex=O&doclang=EN&mode=1st7dor=&occ=first&part=i&cid=143586

(Case 48/69 *ICI* v *Commission (Dyestuffs)* [1972] ECR 619 para. 64).

C-40/73 Suiker Unie and others v Commission 1975. http://www.Curia.europa.eu/juris/liste.jsf?language=en&num=40/70. Accessed 26 Dec 2015
(C-41/90 *Höfner and Elser* [1991] ECR I-1979).
Consten and Grundig v Commission C-56/58/64 13/7/1966 via eu-lex.europa.eu/Lex UriServ/Lex Uri Servi do? Uri=CELEX:61964CJ0056:EN:PDF
C-89 etc/85 *Re Woodpulp* (*Ahlstrom Oy* v *Commission*) [1994] ECR I-99.
Hoffman-La Roche & Co v Commission C-85/76 13/2/1979 via eu-lex.europa.eu/Lex UriServ/Lex Uri Servi do? Uri=CELEX:61976CJ0085:EN:PDF
National Society of Professional Engineers v US 435 US 679, 695 (1978).
Polypropylene [1988] 4 CMLR 347

Publications

European Commission (2015) Why is competition policy important for consumers? http://ec.europa.eu/competition/consumers/why_en.html. Accessed 4 Aug 2015
Stucke M (2013) Is competition always good. J Antitrust Enforcement 1(1):162–197. www.oxfordjournals.org/page/5090/. Accessed July 2015

Index

A
Abuse, 8, 56, 113, 127, 134, 260, 268, 355–358, 360
Abuse of Court's process, 78
Abuse of power, 56, 132, 236
Access to Court, 43, 82, 184, 241, 253
Access to information, 294
Acemoglu, D., 7, 8
Acte clair, 224, 226
Acte eclaire, 226
Action for damages, 76, 82, 84, 231–236, 243, 338
Action for failure to fulfill obligation, 296–297
Action for reparation of damages, 235
Action for violation of right, 67, 75, 183, 184, 329–330
Action on legality, 236–243
Actions, 13, 17, 28, 36, 41, 46, 57, 59, 65, 67, 75–78, 80–86, 128, 148, 172, 175, 181, 183–187, 189–191, 203, 205, 209, 212, 213, 223, 224, 226–228, 231–244, 247, 248, 253–257, 264, 275, 281, 286, 290, 292, 296–297, 311, 326, 329–330, 333, 337–339
Acts of the institutions, 83, 206, 211
Actual discrimination, 342
Administrative law, 28, 232, 236, 238, 268
Advocate General, 86
African Charter, 136, 161, 172, 176–182, 184, 186, 187, 190, 192, 261, 264, 265, 329, 333, 337, 338
African Economic Community, 3, 22
African Union, 22, 48, 104, 114, 143, 176
Agreement, 3, 14–16, 24, 28, 34, 36, 46, 76, 78, 85, 139, 140, 143–147, 151, 154–156, 184, 205, 215, 219, 220, 247–252, 256, 282, 305, 311, 318, 319, 327, 349–354, 360
Al-Qaeda in the Islamic Maghreb (AQIM), 107, 108
Anglophone, 3, 12, 13, 16
Anglophone countries, 4, 11–13, 17, 215
Annexure, 25, 26, 34, 37, 225
Anti-competition practices, 359
Appeal, 17, 78, 96, 128, 129, 140, 178, 186, 225–227, 229, 239, 248, 254–256, 279, 280, 282, 343, 359
Appeal process, 80, 82, 253–255
Application for intervention, 77
Approval of industrial product, 316–317
AQIM. *See* Al-Qaeda in the Islamic Maghreb (AQIM)
Arbitration Tribunal, 70, 76
Argument, 6, 9, 10, 32, 35–37, 78, 88, 93, 95, 110, 116, 121, 124, 134, 237, 274, 286, 312, 351
Armed groups, 127, 130, 138, 139, 148, 152–156, 252
Artificial persons, 82, 261
Assembly, 13, 15, 103, 104, 112, 113, 215, 325
Authority
  functions, 56–57
  responsibility, 56
  supreme institution, 56
Authority of Heads of State, 42, 53, 56–60, 64, 68, 75, 158, 267
Automatic force, 39

© Springer International Publishing Switzerland 2016

J. Ukaigwe, *ECOWAS Law*, DOI 10.1007/978-3-319-26233-8

B
Basis
judicial, 175
legislative, 175, 205, 212, 286
Bilateral agreement, 78, 280
trans-national character, 172
Boko Haram, 13, 105–108, 115–118, 122, 127, 134
Border, 2, 11, 26, 33, 109, 112, 117, 137, 172, 173, 179, 183, 184, 186, 202, 228, 236, 252, 260, 261, 264, 271, 276–278, 287, 303, 318, 326, 337, 347
Brown card, 54, 324–325, 330

C
Capital Issues Committee, 294
CET. *See* Common External Tariff (CET)
Chairman of the Council, 41, 60, 61
Charges, 14, 40, 59, 66, 69, 78, 86, 185, 188, 263, 272, 289, 306, 309–315, 319–321, 324, 334, 341, 356
Check points, 44, 186, 325–326
Chief Executive Officer, 66
Chief Registrar, 87, 90, 94
Choice of forum clauses, 156, 248, 249, 252, 257
Choice of law, 248, 251
Civil service, 274
CJEU. *See* Court of Justice of the European Union (CJEU)
Classification of law, 47–50
Classification of peace agreement, 144
Close of Pleadings, 88–89
Collecting State, 310
Collective bargaining, 354
Commercial activity, 267
Commission, 23, 24, 38, 40, 41, 43, 53, 55–59, 61, 62, 64–66, 70, 72, 77, 82–84, 97, 98, 109, 163, 165, 173, 178, 179, 192, 194, 195, 228, 233, 235–240, 242, 243, 254, 262, 267, 271, 272, 274, 279, 291, 297, 316–319, 325, 326, 349, 350, 352
abuja, 3, 9, 63, 64, 87, 159
The Commission, 55, 57, 64–66, 68, 165, 179, 195
Commissioners, 64–66, 113, 132, 176, 260, 261, 303
single term, 65
Committee of Eminent persons, 14, 211
Common External Tariff (CET), 23, 301, 303–305, 311, 312, 328
Common heritage of mankind, 182
Common law, 32, 161
Common law countries, 87, 95, 116, 121, 161, 192, 213, 214, 218, 220, 252, 273
Common market, 4, 12, 13, 23, 171, 203, 216, 220, 304–305, 311, 312, 324, 330, 333, 348, 349, 353, 356, 357
Common Wealth, 339
Community citizen, 55, 220, 229, 249, 260–264, 270, 271, 273–276, 279, 282, 283, 285, 289, 291, 292, 294, 295, 297, 298, 309, 312, 330, 334, 335, 344
Community Court, 17, 18, 20, 25–28, 33, 35–37, 40–48, 50, 55–57, 65, 67, 70–101, 130, 150, 156, 171–173, 175, 177, 178, 183–197, 207, 210, 211, 213, 217, 218, 223, 225–229, 231–233, 236–242, 244, 248–252, 256, 257, 261, 262, 264, 268, 269, 274, 277, 283, 285, 289, 292, 293, 297, 298, 310, 312, 330, 334, 335, 337, 339, 342, 356, 359, 360
appellate capacity, 359
Community Court of Justice
composition, 71–72
immunities, 73
quorum, 72
resignation, 72–73
terms of office, 72–73
Community enterprises, 303, 309, 315, 316
Community institutions, 13, 27, 56, 76, 80, 82–85, 99, 119. 165, 185, 195, 216, 231, 234, 238, 240, 253, 254, 257, 324
Community instruments, 77, 114, 204, 213, 237, 239, 240, 290
Community law, 8, 16, 17, 19, 20, 28, 40, 42, 46, 67, 71, 99, 202, 207–211, 213, 214, 217, 220, 223, 224, 226–229, 232, 233, 236, 262, 287, 292, 296, 317, 319, 326, 334
Community legal order, 17, 50, 96, 210, 211, 223, 226, 227, 236
Community levy, 69, 70, 326
Community official, 28, 76, 77, 83, 84, 231, 232, 234, 238, 240, 241, 243, 248
Community origin, 11, 12, 306–308, 312, 313, 315, 321, 330
Community right, 18, 19, 43, 80, 171–173, 179, 184, 185, 195, 220, 224, 226, 228, 229, 261, 262, 264, 267, 268, 276, 285–287, 290, 297, 329, 330, 334, 335, 342, 344
Community staff, 96
Community staff action, 247–257

Community tariff treatment, 306, 312
Community text, 16–19, 28, 42, 83, 84, 100, 195, 203, 211, 215, 217, 218, 223, 229, 236–241, 243, 326, 329, 342
Community trade, 5, 6, 295
Community tribunal, 70, 267
Comparability, 335–336
Comparability test, 336
Compensation for losses, 314, 315
Compensation scheme, 326
Competent authority, 57, 100, 272, 308, 322, 323
Competition policy, 28, 96, 347–360
Competition rules, 258–260, 348–352, 356
Compulsory reference, 229
Concertation, 352
Concerted practice, 349, 352–354
Condition precedent, 16, 35, 74
Confidential documents, 95
Conflict prevention, 8, 25, 109–111, 136, 157–165
Consolidation of import duties, 313
Constitution, 15, 16, 79, 115, 133–135, 149, 161, 162, 175, 197, 208, 209, 212–216, 218–220, 229, 343
Constitutional barriers, 16, 162, 212, 214–220
Constitutional supremacy., 217–220
Consuming state, 310
Convention right
  compatible, 80
  incompatible, 80
Council of Ministers, 22, 24, 36, 40–43, 53, 54, 59–61, 64, 65, 75, 77, 82–84, 97, 100, 232, 235–237, 239, 240, 242, 243, 254, 256, 314, 316–318, 354
  responsibility, 59
Counter-terrorism measures, 109, 111–136
Counter terrorism Strategy, 111–115, 117, 120, 122–125, 128, 129, 131, 133
Court of Justice of the European Union (CJEU), 18, 19, 172, 197, 207, 208, 224–226, 228, 237, 261, 303, 304, 350, 352, 355, 356
Current payment, 295, 296
Custom duties, 305, 309–312, 314, 328, 329
Custom union, 4, 203, 304, 311–313

D

Damages, 28, 65, 67, 76, 79, 82, 84, 85, 104, 186–188, 191, 192, 196, 231–244, 247, 252, 255–257, 279, 337, 338
Decision, 8, 13, 17–19, 25, 32, 33, 35, 38–41, 44–50, 55, 56, 58, 60, 62, 63, 65–67, 73, 76–79, 83, 84, 91, 94, 96, 97, 99–100, 117, 129, 144, 179–181, 183, 185, 186, 194–197, 203, 205, 207–213, 216, 223–229, 233–236, 238, 239, 247, 252–254, 256, 274, 279, 280, 286, 288–291, 303, 313, 315–319, 336, 337, 342, 349, 350, 353, 359, 360
Decisional supranationalism, 202
Definition
  ECOWAS law, 27–28
de minimis rule, 350
Democracy and good governance., 8, 27, 160–163, 175, 344
Deportation, 128–130, 265, 268, 269
Deputy Executive Secretaries, 99
Diplomatic assistance, 580
Diplomatic forum, 183
Diplomatic immunity, 190, 194
Direct agreement, 267
Direct and individual concern, 84, 241
Direct applicability, 204, 211–213
Direct effect, 39, 67, 159, 204–206, 213–214, 224
Direct fiscal charges, 320
Directive, 33, 42–44, 47, 49, 56–59, 61, 67, 76, 83, 206, 207, 236, 239, 274, 290
Directly discriminatory taxes, 319–321
Discretionary powers, 228, 311
Discrimination, 28, 112, 125, 141, 176, 177, 203, 259, 261, 275, 290, 292, 296, 304, 320, 333–344, 358
Discriminatory policy, 341
Doctrine of sovereignty, 14, 205
Domestic financial market, 295
Dominant position, 355–357
  abuse, 355
Dualism, 15, 208
Due process, 74, 125, 128, 130
Dumping, 302
Duty to refer, 224, 227–229
  discretionary, 227–229
  obligatory, 227–229

E

Early warning system, 110, 111, 159, 165
Economic crisis, 339
Economic grouping, 4, 210, 259, 260, 264, 303
Economic integration, 3, 4, 6, 11, 15, 17, 20, 25, 46, 49, 54, 59, 143, 157, 171, 201, 210, 217, 220, 311
Economic Partnership Agreement (EPA), 43, 303, 327–330
Economic union, 4

ECOWAS
affairs, ministers for foreign affairs, 59
common market, substantial part, 356
Competition Authority, 358–359
Court, 25, 83, 253, 272
Jurisprudence, 26, 37, 83, 186, 223, 235
law, 14, 16, 17, 19, 20, 25, 27, 28, 31–50, 79, 86, 92, 97, 100, 150, 161, 162, 165, 175, 183, 189, 193, 196, 201–220, 225–228, 241, 248, 252, 253, 268, 272, 273, 276–278, 280–283, 287–289, 293, 295–297, 335, 343, 356
National Unit, 4, 316
Parliament, 53, 55, 61–63, 100, 233, 235
Travel Certificate, 263, 272–273
ECOWAS Conflict Prevention Framework (ECPF), 110, 111, 163, 165
ECPF. *See* ECOWAS Conflict Prevention Framework (ECPF)
Eligibility, 290–292, 341
Employment right, 248, 255–257, 269
Enterprise registration, 318
Enterprises, 6, 66, 117, 196, 250, 287–289, 294, 297, 298, 308, 316–318, 330, 348, 350, 351, 353–355, 357–360
Entry clearance, 263, 267
abolition, 267
EPA. *See* Economic Partnership Agreement (EPA)
Equality and Interdependence, 14
member states, 14
Equal pay, 180, 188–189, 339, 340, 344
Equal treatment, 28, 334–336, 340–344
certificate, 28, 335–336, 343, 344
Equal Work, 180, 188–189, 338–340
Erga omnes, 16
European Commission, 259, 260, 347, 350
European competition policy, 350
European Court, 17, 19, 20, 39, 43, 84, 129, 150, 183, 204, 206, 207, 209, 225, 274, 275, 312, 321, 351, 352, 355, 357
European Union, 4, 9, 17–19, 28, 43, 46, 80, 81, 84, 86, 172, 197, 201, 203–220, 225, 226, 228, 229, 232, 235, 237, 252, 261, 274, 287, 303–305, 327–329, 349, 352, 355–357
European Union Law, 39, 80, 82, 197, 201, 207–209, 212, 224, 226, 227, 232, 241, 274, 275, 290, 349
Exchange control, 295–296
Exchange control measures, 295, 296
Excluded Agreement, 354
Exclusive economic zone, 307
Execution of judgment, 252–253
Executive, 10, 66, 107, 117, 138, 162, 358
Executive Secretariat, 33
Executive Secretary, 33, 34, 38, 71, 75, 82, 83, 98, 99, 142, 237, 238, 254–256
Exhaustion of local remedy, 186, 187, 193–194, 264
Expansion clause, 327–328
Expedited actions, 255
Expedited procedure, 88, 93–94
Expelled immigrant, 269, 270
Expert, 3, 8, 14, 21, 45, 70, 71, 79, 86, 90–92, 109, 126, 162, 163, 173, 174, 209, 212, 214, 233, 251, 259, 287, 288, 293, 327
Expulsion, 12, 125, 128, 179, 268–270, 275, 278–280
Expulsion order, 268, 269, 279
Extension, 5, 214, 232, 263, 266, 272, 274, 317
Extension of time, 88
External relation, 66
Extradition treaty, 79
Extrajudicial killing, 124, 130–133, 166

F

Failure to fulfill obligation action, 296–297
Fair and equitable compensation, 292
Fair hearing, 17, 78, 135, 178
Federal Republic of Nigeria, 15, 17, 36, 50, 64, 75, 76, 78, 79, 115, 133–135, 177, 183, 191, 192, 196, 210, 215, 264, 324
Fiscal charges, 313, 319, 320
Foreign domination, 182
Foreign law, 32, 251
Forerunner, 183
Forum shopping, 247, 248, 257
Francophone, 3, 4, 11–13, 15, 16, 161, 215, 218, 220
Franc Zone, 20, 21, 24, 25
Free circulation, 316, 329
Freedom of information, 191
Freedom of movement, 18, 75, 172, 173, 179, 184, 185, 261–263, 265, 266, 282, 283, 322, 344
Freedoms, 1, 11, 18, 19, 55, 75, 80, 104, 118, 139, 140, 172–174, 176, 178, 179, 182, 184, 185, 187, 191, 261–263, 265, 266, 282, 283, 290, 322, 333, 335, 344
Free movement of capital, 285, 287, 293–298
Free movement of goods, 6, 172, 288, 301–330
Free movement of persons, 23, 28, 35, 53, 58, 68, 158, 184, 186–187, 259–283, 288, 289, 298, 305, 334

Free trade, 203, 217, 259, 301–305, 311, 327, 329, 330
Free trade area, 203, 217, 259, 301, 304, 305, 329, 330
Functions of the president, 66

G
Gender discrimination, 335, 337–338
Gender equity, 337, 344
Ghana, 2, 3, 9–13, 15, 17–19, 91, 114, 115, 142, 143, 161, 162, 172, 176, 184, 185, 189, 196, 211, 213–216, 218, 260, 261, 265, 268–270, 274–276, 288–291, 294, 295, 297, 298, 303, 316, 327, 329, 334–336, 342
GIABA, 10, 54, 69–70, 81, 99, 100, 119
Goods, 4, 35, 58, 108, 172, 233, 253, 264, 289, 301–330, 334, 347
Goods-in transit, 322–323
  leaflet, 323
Goods of community origin, 306–308, 312, 313, 330
Grounds for expulsion
  national security, 278
  public health, 278
  public morality, 319
  public order, 278
Grounds for restriction, 319
Group expulsion, 275

H
Hartley, T., 18, 208, 209, 232–234
Headquarters, 22, 63, 148, 149, 254, 291
  Abuja, 3, 9, 63, 64, 87, 159
Hohfeld, W., 174
Holden, Holding, 87
Horizontal and vertical arrangement, 351
Human dignity, 124, 133–136, 177, 185, 270
Human right
  groups, 343
  law, 113, 171, 243
  principles, 209

I
Illegal immigrants, 268–270
Immunity, 73, 173, 174, 190, 194
Import duties, 304, 310–313, 315, 324, 326
Inadmissible immigrant, 265
Indirect discrimination, 304, 340
Indirect effect, 43, 206–207
Indirect fiscal charges, 320
Indirectly discriminatory taxes, 319–321
Industrial product, 315–317, 326
Inefficient institutions, 7–11
Infrastructure deficit, 4–7
Institutions, 7–11, 33, 53–101, 104, 171, 202, 231, 248, 260, 288, 303, 350
Insurance policy, 266, 324, 325, 330
Integration
  negative, 305
  positive, 305
Integration and co-operation, 4, 35
Interconnected companies, 355
Intermediate procedures, 89
Internal indirect taxes, 314
Internal taxes, 321
International convention, 32, 48, 104, 161, 179, 338
International court of justice, 31–33, 43, 45, 47, 48, 50, 78, 148, 194, 251
International health certificate, 263
International humanitarian law, 113, 131, 154, 155
International human right instruments, 175
International law
  entities subject to, 14
  peremptory norms, 145
International organisation, 4, 14, 21, 22, 100, 104, 114, 115, 143, 146–148, 171, 201, 202, 210
International treaties, 46, 209, 215, 306
Interpretation and application, 45, 49, 74, 76, 81, 183
Interpretation and review of judgment, 96–97
Interpretation, narrow broader approach, 27
Interpretation of judgment, 96–97
Interstate road transit declaration, 323
Interstate trade, 302, 322
Intervener, 93, 95
Intervention, 14, 28, 77, 94, 95, 97, 100, 103–166, 197, 202
Issue estoppels, 78

J
Judge rapporteur, 85, 86, 88, 89
Judgment, 17, 19, 27, 36, 48–50, 55, 70, 71, 79, 89, 94–97, 99–101, 130, 131, 185, 192, 194–197, 207, 208, 228, 247, 252–253, 257, 271
Judgment by default, 96
Judicial comity, 78
Judicial monism, 17, 210, 211, 223, 227

Judicial pronouncement, 220, 228
Judicial sagacity, 79
Jurisconsult, 71
Jurisdiction, 15, 16, 18, 19, 23, 25, 27, 32, 35, 36, 42–45, 48, 54, 65, 73–76, 78, 80, 81, 84, 86, 96, 99–101, 107, 114–121, 123, 124, 128–130, 135, 146, 156, 166, 174, 176, 183–187, 190, 191, 194, 195, 197, 201, 203, 209, 210, 212–220, 224, 225, 229, 247–254, 256, 257, 261, 264, 268, 280, 282, 286, 288, 290, 292, 351, 360
Jurisdictional clause, 190
Jurisdictional powers, 44, 184
Jurisdictional problems, 183
Jurisdictional restriction, 121, 164, 280
Jus cogen, 16
Just and equitable reparation., 194
Justiciability, 191
Justifiable restrictions, 274–275

K
Kelsen, 15, 210, 211

L
Lauterpacht, 15, 210
Legal basis, 16, 79, 81, 108–111, 143, 224, 229, 233, 261, 285–287, 325, 328
Legal capacity, 237, 238
legal clog, 14–20
Legal history, 36, 207, 212
Legal instrument, 33, 44, 47, 49, 50, 76, 236, 239, 320, 337
Legality, 10, 28, 76, 77, 79, 82–84, 130, 231–244
Legality of action, 237, 238
Legality of community text, 28, 83, 236, 237, 239, 241
Legal opinion, 42, 43, 86, 97
Legal personality, 148, 149, 156, 280, 291
Legal status, 83, 144, 146–148, 154, 177, 182, 217, 242, 244, 280, 317, 349
Legislative measure, 197
Length of service, 339, 340
Liberalisation, 12, 297, 305, 311–318, 326, 328–330
Liberalisation of trade, 301
Limitation of time, 77
Litigation, 67
Living standards, 4, 6, 46
locus standi, 191, 238, 264
Loss of revenue, 326

M
Market
  geographic, 355
  integration, 203, 220
  product, 355, 356
  substantial share, 255–356, 360
Martial, legal environment, 343
Marxian model, 9
Matters of law/fact, 88
Measures of inquiry, 86
Meetings
  extraordinary, 57, 60
  ordinary session, 57, 59
Member States, 6–8, 11, 14, 17, 33, 40, 41, 46, 55–57, 67, 70, 71, 77, 82, 99, 100, 108–110, 113, 119, 123, 125, 128, 129, 157, 158, 160, 162, 165, 166, 172, 183, 184, 195–197, 201, 204, 208–212, 216, 223, 226, 228, 232, 252, 260, 262–264, 266, 267, 271, 273, 275–277, 280–282, 285–297, 301, 305–313, 317–319, 321, 326, 334–336, 342, 349
Merger and acquisition, 357–358
Migrant worker, 276–282, 340–342, 344
Millennium Development Goals, 112
MNLA. *See* National Movement for the Liberation of Azzawad (MNLA)
Monetary and financial co-operation, 295
Monetary Union, 20, 21, 23, 24
Monism, 15, 17, 208–211, 223, 227
Most favoured nation treatment, 304
MT Capbretton, 188
MUJWA, 107, 108
Musa Saidykhan, 27, 29, 35, 99, 178, 188

N
NAFTA. *See* North American Free Trade Agreement (NAFTA)
National Association of Nigerian Traders (NANTS), 289, 298
National court, 20, 22, 24, 28, 39, 40, 43, 44, 67, 78, 80, 81, 100, 129, 130, 172, 183, 194, 196, 204–207, 210, 213, 217, 220, 223–229, 249, 283, 290, 292, 303, 330
National law, 17–19, 23, 45, 79, 80, 135, 153, 161, 178, 201–220, 224, 228, 251, 274, 276, 279, 280, 289, 290, 292, 304, 317, 344
National legislation, 17, 20, 206, 211, 214, 224, 292
National Movement for the Liberation of Azzawad (MNLA), 107, 108

National of third countries, 296
National security, 278, 279
Natural/fundamental law, 174
NEPAD. *See* New Partnership for African Development (NEPAD)
New Article, 45, 61, 62, 64, 65, 69, 75, 76, 81, 184, 316, 317
New Partnership for African Development (NEPAD), 13, 55, 69
Nigeria, 3, 9–13, 15, 17, 18, 35, 36, 50, 64, 75, 76, 78, 79, 81, 85, 87, 99, 105, 107–110, 114–117, 119, 121, 122, 126, 130, 131, 133–135, 137, 139, 142, 161, 162, 177, 183, 186–192, 194–197, 201, 210, 213, 215, 218, 225, 250, 260, 261, 264, 265, 270, 274–276, 288, 289, 293, 295, 297, 303, 316, 324, 327–329, 334, 336
Non-contractual liability, 76, 85, 231, 233–235
Non-discriminatory act, 80
Non-discriminatory treatment, 291
Non-international armed conflict, 130, 154
Non-Member states, 262, 263, 296, 311
Non-nationals, 179, 289, 291
Non-salaried Activities, 289
Non-tariff barriers, 12, 301, 313, 318–319
Normative supra-nationalism, 202
North American Free Trade Agreement (NAFTA), 305
Nuremberg international tribunal, 150

O

Obligation to immigrants, 271
Obligation under the treaty, 67, 76
Observance of law, 74
Odafe, 36, 82, 83
Official acts, 76, 231, 233–234
Official duties, 76, 85, 231–233
Official entry point, 263, 283
Official functions, 76, 84, 231, 232, 234, 282
Official language, 3
OHADA, 21–22
Oil exploration and exploitation, 192
Old Article 9, 20, 45, 81
Omissions, 57, 76, 85, 89, 119, 128, 178, 180, 181, 228, 231, 232, 234–236, 254, 256
Oral declaration, 98

P

Parallel conduct, 352
Parliamentary acts, 208, 212
Pay discrimination, 335, 338–340
Peace agreement, 136, 138, 140, 142–148, 152, 155, 156, 165, 166, 249
Pending cases, 78
Personal capacity, 75
Pinheiro, 17–19, 40, 172, 173, 184, 185, 195, 211, 213, 216, 217, 223, 229, 261, 268, 285, 290, 297, 303, 329, 342
Pleading, 88, 89, 93, 190
Pleas in law, 95
Political dynamics, 11–13
Power to refer, 57, 225, 226
Preliminary stage, 89
Preparatory inquiry, 85, 89–92, 96
President, 3, 5, 33, 40, 41, 43, 56, 58, 59, 61, 62, 64–67, 69, 72, 73, 75, 77, 81–86, 88, 90–92, 94–99, 138–140, 142, 143, 150, 159, 162, 173, 175, 194, 228, 235–238, 240, 242, 243, 254, 267, 271, 279, 291, 297, 316–319, 326
President of the commission, 40, 43, 58, 59, 61, 62, 64–65, 77, 82–84, 98, 228, 235, 237, 238, 240, 242, 243, 254, 267, 279, 291, 297, 316, 318, 326
  commissioners, 64–66
  vice president, 64, 65
Presumption of innocence, 134, 178, 190
Primacy, 15, 208, 210, 211, 218
Principle of proportionality, 46, 343
Principles of equity, 45, 74
Problem of internal security, 271
Procedural hitches, 234
Procedure, 17, 28, 34, 56, 62, 67, 73, 78, 85–100, 162, 188, 195–197, 219, 224–229, 232, 236–238, 241, 243, 252, 256, 257, 261, 267, 269, 279, 288, 316, 359
  oral, 85, 86, 89, 92–93, 96
  written, 86–88, 93, 97
Procedure for expulsion, 279
Processes, 5, 11, 13, 14, 18, 20, 21, 36, 38, 54, 64, 72, 74, 78, 80, 82, 86–88, 93, 95, 106, 109, 114, 125, 128–130, 134, 142–144, 146, 157, 164, 166, 171, 172, 235, 248, 249, 253–255, 270, 276, 302, 307, 316, 318, 342, 349
Prohibited agreement, 353
Prohibited immigrant, 265, 269
Prohibitive measure, 319
Proof of community origin
  certificate of origin, 308
Property, 7, 10, 78, 104, 105, 107, 119, 120, 127, 137, 173, 179, 180, 182, 189–190, 196, 269, 270, 319

Protection from expulsion, 278–280, 303
Protectionism, 11, 118, 321
Protection of investment, 292
Publications, 38, 39, 41, 58, 61, 77, 95, 191, 215, 358
Public law, 71, 162, 166, 236

Q
Quasi judicial powers, 358

R
Reception of European Union laws, 208–209
Recognition of certificates, 292–293, 335
Recommendation, 33, 40, 42–43, 47, 56, 59–62, 64, 65, 72, 89, 269, 314
Reference for interpretation, 223–229
Reference procedure, 28, 224, 226–229
Regional integration law, 71
Regional security
  eruption of wars, 111
  religious extremism, 123
  terrorism, 103–136
Registration Committee, 225
Reinstatement, 238, 255–257
Relief, 76, 83, 84, 89, 94, 118, 150, 158, 184, 186, 188, 194, 206, 234, 242–244, 248, 252, 255–257
Removal, 12, 67, 79, 268–270, 293, 294, 303, 305, 312, 318
Reparation, 76, 186, 194, 231, 234, 235, 256
Repatriation, 128, 268–270
Res Communis, 182
Residence document, 275–276
  residence card, 75, 76
  residence permit, 275
Residence requirement, 278
Res judicata, 194
Responsible by reason of inaction, 192–193
Retroactivity, 78
Reviewable instrument, 239
Revised Treaty, African Charter on Human and Peoples' Rights, 3, 175, 193, 333
Revision of judgment, 96, 97
Right of access, 19, 35, 172, 237, 238, 240–242, 244, 248, 264, 290, 334
  mass expulsion, 179, 270, 275
  protection of rights, 45, 177, 179, 236, 289
Right of access to court, 43, 184
Right of appeal, 239, 279
Right of establishment, 11, 19, 28, 184, 261, 285–293, 297, 298
right of establishment and services, 287–293
Right of residence, 28, 58, 262, 267, 273–276
  effects, 273
Right of service, 289
Right of Standing, 65, 242, 243
Rights
  fundamental, 67, 130, 173–175, 209, 269, 270, 297
  human, 11, 14, 18, 28, 48, 55, 75–77, 79, 80, 83, 99–101, 112, 113, 115, 121–125, 127, 129–131, 133–136, 138, 149, 150, 158–161, 164, 165, 171–197, 207, 209, 212, 214, 218, 232, 243, 261, 264, 265, 269, 270, 297, 325, 329, 330, 342, 343
Right to education, 181, 191–192
Right to existence, 181
Right to fair remuneration, 189
Right to liberty, 124, 135, 178, 187–188
Right to property, 179, 189–190
Right to quality education, 191
Right to satisfactory environment, 2, 192
Rule of law, 7, 8, 11, 18, 32, 112–115, 119, 123, 127, 138, 158–160, 164–166, 225, 342
Rules of procedure, 56, 62, 98, 188, 237, 238

S
Safe guard clause, 328
Secretary General, 41, 63, 65, 82, 112, 142, 240
Security personnel, 127, 130, 134, 141, 263, 264, 335, 342, 344
Selected-forum actions, 28, 249–253
Self determination, 147, 151, 181, 182
Service
  address for, 87
  fax, 87
  technical means, 87
Sierra Leone, 3, 15, 109, 114, 136–138, 141, 145, 146, 155, 156, 216, 274, 316
Slavery, 2, 176, 177, 185, 186, 191, 193
Social engineering, 20
Soft Community law, 326
Sources of law, 31, 32, 47–49
Sovereignty, 8, 14, 16, 18, 20, 24, 25, 116, 152, 157, 172, 201–205, 208, 210, 212, 216, 220, 306
Speaker of parliament, 63, 238
  appointment, 63
  functions, 63
Special workers right, 278
State aid, 358
State liability, 191, 224, 226, 228

Statement of objection, 91
State vessels, 308–309
Statute of International Court of Justice, 43, 45, 251
Statutory appointees, 40, 59, 65, 67, 99
Statutory appointment, 66–67
Strict legalism, 145
Structure of parliament, 62–63
  bureau, 62–63
  conference of committees, 63
  plenary, 62
Subjects of international law, 144, 146–149, 151–153, 155
Subsidiary committees, 68
Subsidiary legal instruments, 33, 44, 49, 50, 76, 236, 239
Substantial part of the market, 356
Substantial share of the market, 355–356, 360
Supplementary acts, 33, 38, 48, 57, 66, 111, 114, 116, 212, 216, 225, 239, 288, 349, 352–358
Supranational, 8, 14, 16–17, 20, 22, 24, 25, 38, 39, 99, 100, 115, 117, 120, 121, 161, 162, 164–166, 172, 176, 183, 196, 201–203, 210, 211, 213, 214, 216, 217, 219, 220, 223, 257, 261, 268, 280, 283, 335, 344, 360
Supranationality, 14, 16, 17, 20, 38, 201, 203, 210–211, 213, 214, 216, 217, 220, 227, 273
Supremacy thesis, 208, 209, 212

T
Tariff, 12, 23, 301–307, 309, 311, 312, 315–317, 328–330
Taxes, 2, 57, 281, 303, 304, 309, 313–315, 319–322, 324
Technical committees, 68
Teleological approach, 18, 84
Teleological interpretation, 18, 20, 288
Territorial jurisdiction, 23, 225
Territorial sea, 306
Territorial waters, 188
Terror, 103, 142
Terrorism, 28, 54, 69, 70, 103–136, 165, 166, 260
The mechanism, 157–160
Theory of special purpose associations, 202
Third countries, 70, 253, 290, 296, 301, 304, 305, 313, 317, 334
Third country goods, 305, 309–311
Third party procedure, 94
Torture, 124–130, 134, 136, 166, 177
Trade liberalisation, 12, 301, 311–318, 326
Traditional handicraft, 307, 308, 315, 321, 330
Transitional period, 98
Transit of goods, 38, 322–324
Trans-national law, 260
Treaty, 3, 14, 15, 25–27, 33–35, 37–43, 46, 53, 56–19, 60, 61, 64, 66–68, 70, 74, 76, 84, 108, 144, 146, 147, 156, 157, 171, 204, 205, 208, 209, 211, 212, 215, 216, 225, 235, 251, 286, 288, 301, 311, 312, 319, 321, 324, 333, 349
Tribunal, 17, 32, 44, 50, 70, 76, 78, 80, 148, 150, 155, 178, 204, 208, 225, 228, 236, 256, 267
Tribunal of the Community, 70
Triumvirate rights, 9

U
UEMOA. *See* Union Economique et Monetaire Ouest Africaine (UEMOA)
Ugokwe, 17, 19, 20, 36, 43, 210, 211, 216, 223, 226, 227
Union Economique et Monetaire Ouest Africaine (UEMOA), 21–25
Unprocessed product, 314, 330
Uzoechina, 109–111, 121, 158–160, 164

V
Valid travel document, 263, 271–273
Van Gend, 43, 205, 227, 286, 303
Vehicle, 6, 46, 50, 187, 226, 266–267, 312, 322, 323
Vehicle in transit, 324–325
Vertical and horizontal agreements, 349, 351
Vicarious liability, 192, 193
Violation of right, 41, 79, 128, 131, 133, 134, 136, 185, 187–189, 243, 244, 325, 329–330
Voluntary departure, 279
Voting systems, 58, 60

W
Wahiya practice, 185, 186
West Africa, 1–6, 8, 11–13, 15, 20, 22–25, 28, 33, 37, 46, 48, 54, 55, 69–70, 74, 87, 91, 99, 100, 105, 107–111, 114–117, 119–121, 123, 124, 126, 127, 129, 131–134, 136, 140, 142–144, 146–148, 152–156, 159–166, 171–173, 175, 187, 193, 214, 215, 218, 225, 249, 260, 298, 303, 327–329, 334, 336, 340, 360

West African currency, 119, 163
Withdrawal of approval, 317
Workers
  border area, 276–278
  immigrant, 141, 276–282, 335, 340–342, 344
  itinerant, 276–278
  seasonal, 276–278
Work of equal value, 340
World Bank, 4–6, 113, 189, 328
Written observation, 92, 96–98
Written proceedings
  application, 86–88, 93, 97
  defence, 86–88, 93
  rejoinder, 86, 88
  reply, 86, 88, 93