



Chapter Four

Current ECOWAS human rights practice: the conundrum of efficacy and symmetry

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4.1 Introduction

In the course of its existence, ECOWAS has experienced a major shift in its approach to human rights as a Community. From a treaty regime that paid little or no conscious attention to human rights, the Community has moved to a regime that can lay claim to a delicate but apparent competence in human rights. Admittedly, this competence is buried in the Treaty, instruments and documents of the Community and gives rise to questions of propriety and legitimacy. However, the previous two chapters have attempted to show that the newly developed human rights regime of the Community is within the legal boundaries of the organisation. It has been demonstrated that human rights realisation is incidental to and necessary for the achievement of successful economic integration that adds value to the life of ECOWAS citizens. Thus, a human rights regime in the ECOWAS framework does not conflict with the objective of economic advancement and does not lead to abandonment of economic goals.

As the emerging ECOWAS human rights regime operates within the territories of member states and within the jurisdiction of the African human rights system, the need for symmetry with both national and continental human rights mechanisms cannot be overemphasised. Hence, while it seeks efficacy in order to be relevant, it is essential for the ECOWAS regime to ensure that it complements rather than disrupt the existing human rights architecture. To the extent that it relies on national and continental human rights norms, the duty to find symmetry rests with the ECOWAS regime. Thus, this chapter analyses the actual human rights practice of the ECOWAS Community and its institutions in order to evaluate if and how the regime balances efficacy with symmetry. While assessing the usefulness of ECOWAS interventions, the impact of such interventions on intra- and inter-organisational relations will be evaluated to bring out issues of jurisdictional conflicts, inconsistencies and duplication. The chapter will also seek to identify mechanisms in the regime that are applied to find organisational balance. Taking an institutional rather than a thematic approach, the human rights work of each primary and subsidiary institutions of ECOWAS is analysed along the lines set out above before a conclusion is drawn.

4.2 The Authority: beyond the conferences

Generally, international organisations function through the activities of their primary and subsidiary organs. The distinction between primary and subsidiary organs lies in the fact that whereas primary organs are created in the founding treaty of an organisation, subsidiary organs are often creations of a primary organ in exercise of powers granted in a treaty.⁵⁶¹ One of the most common treaty-created primary organs in international organisations is the plenary assembly. The plenary assembly of international organisations is very often the organ that consists of all member states, usually represented by Heads of State and Government.⁵⁶² Although the hierarchical status of plenary assemblies depends on the intention of the converging states as laid out in the founding treaty of an organisation, they usually play an important role in determining the direction of international institutions.

Within the ECOWAS framework, the Authority of Heads of State and Government (the Authority) is a primary organ and the plenary assembly of the Community. As already indicated, the Authority is the supreme organ or institution and the highest decision-making body of the ECOWAS. It is responsible for the overall control of the Community.⁵⁶³ Under the prevailing legal framework of ECOWAS, the Authority acts by Supplementary Acts which, depending on the subject matter, may be adopted by unanimity, consensus or two-third majority.⁵⁶⁴ The revised Treaty does not confer an express human rights mandate on the Authority but institutional responsibility for human rights is evident in the work of the Authority. Under the revised Treaty, the human rights work of the Authority can be found in the general policy directions of the Authority, in the responsibility to implement the decisions of the Community and in the Authority's control of Community institutions. Aspects of human rights can also be found in powers conferred under some of the protocols of the Community. In most cases, the Heads of State and Government are members of the corresponding organ in the AU. They also head the governments at the national level. Thus, greater

⁵⁶¹ Schermers & Blokker (2003) 153.

⁵⁶² Amerasinghe (2005) 131.

⁵⁶³ As stated in chapter three, see arts 6 and 7 of the revised ECOWAS Treaty.

⁵⁶⁴ By art 9 of the revised Treaty, the Authority was to act by decisions adopted by unanimity, consensus or two-third majority. Following the adoption of Supplementary Protocol A/SP.I/06/06 Amending the Revised Treaty, a new art 9 was introduced. The new art 9 replaces decisions with supplementary acts as tools of the Authority.

responsibility ought to lie with this body to ensure coordination and to avoid conflicting obligations, loyalties and jurisdiction of institutions.

4.2.1 General policy directions

The most significant human rights work of the Authority relates to its general policy direction giving function. In this context, the Authority determines the overall human rights course of ECOWAS within its treaty framework, the actual scope of the human rights content in the activities of the Community and the limits of the powers exercisable by Community institutions in this issue area. Acting upon powers granted under article 63 of the 1975 original ECOWAS Treaty, members of the Authority, in their capacity as member states of ECOWAS seized the opportunity of treaty revision to introduce the idea of ‘recognition, promotion and protection of human and peoples’ rights’ as a fundamental principle upon which they will act in pursuit of the objectives of the Community.⁵⁶⁵ This is arguably the clearest statement in the treaty of an intention to include or at least defer to human rights in the functioning of the Community.⁵⁶⁶ It may very well have provided treaty foundation for the inclusion of human rights considerations in other documents of ECOWAS. In its capacity as a Community institution rather than a collection of member states, the Authority has built on the provisions of article 4(g) of the revised Treaty by including robust aspects of human rights, democracy and humanitarian law in some protocols adopted in the epoch of the revised Treaty.⁵⁶⁷

In mainstreaming human rights within the treaty and the overall legal framework of the Community, member states of ECOWAS acting through the Authority arguably operate in accordance with the principle of cooperating to ensure respect human rights contained in the Charter of the UN.⁵⁶⁸ Consequently the Authority consciously or unconsciously brings the Community in compliance with the duty incumbent on UN

⁵⁶⁵ Art 4(g) of the revised Treaty.

⁵⁶⁶ Constant reference to art 4(g) of the revised Treaty by the ECCJ in its determination of human rights cases supports this position.

⁵⁶⁷ Notable in this category are the Conflict Prevention Protocol and the Democracy Protocol. It has to be borne in mind that under the initial legal framework of the revised Treaty, the line between member states in their character as independent member states strictly and as the Authority by way of a Community institution was very thin as the Authority acted in an intergovernmental fashion that required members of the Authority to revert to the character of heads of states and government for the purpose of making treaties. Thus, treaty making for example began as a function of the Authority but usually ended as an action of individual states.

⁵⁶⁸ Art 1(3) of the UN Charter.

member states under article 103 of the UN Charter to avoid the conclusion of other treaties that would negate obligations undertaken under the UN Charter.⁵⁶⁹ However, the Authority has obviously also expanded the powers and activities of the Community beyond the original conception of the founding fathers. The question that arises then is whether the Authority has acted lawfully in this regard. Clearly, states have a right in international law to enter into treaties of any kind on any matter that is not prohibited by international law. States are also at liberty to determine the means by which the objectives of an organisation they have formed should be realised. Thus, the inclusion of article 4(g) in the revised Treaty is within the legal rights of ECOWAS member states. A presumption can be made that in taking the decision to enact article 4(g) in the revised Treaty, ECOWAS Heads of State and Government were aware of the existing treaty obligations and other human rights obligations under the AU framework. They were arguably also aware of the potential consequence that an obligation under article 4(g) of the 1993 revised ECOWAS Treaty would have for the various national human rights regimes. However, this is at best a rebuttable presumption and leaves open the question whether Heads of State and Government averted their minds to these concerns and the consequent need to provide mechanisms to avoid jurisdictional conflicts and inconsistencies.

There is no theoretical or practical guide on the exact interpretation and consequence of provisions listed as ‘fundamental principles’ in integration treaties but they are apparently understood in the ECOWAS context to require that the Authority takes human rights concerns into account in the pursuit of Community objectives. Additionally, the revised Treaty appears to have given the Authority leverage to ‘take all measures to ensure ... progressive development and the realisation of ... objectives’ of the Community.⁵⁷⁰ The cumulative effect of articles 4(g) and 7(2) of the revised Treaty seemingly gives legality to the approach of the Authority. Some commentators concede that member states of an international organisation may validly consent to new powers on the basis of the concept of customary powers.⁵⁷¹ Perhaps, the spillover into the realm of politics and the consequent need for restriction of the exercise of public powers has prompted the present regime by which member

⁵⁶⁹ It has been argued that the formula in the UN Charter provision relates to all obligations that result from the Charter. See B Simma (ed) (1995) *The Charter of the United Nations: A Commentary* 1120.

⁵⁷⁰ See the second limb of art 7(2) of the revised Treaty.

⁵⁷¹ Schermers & Blokker (2003) 176.

states consent to the conferment on and exercise of human rights competence by ECOWAS as an organisation.

The inclusion of human rights within the legal framework of the ECOWAS Community may also be seen as a move by the Authority to adopt a human rights approach to integration and development in West Africa. If, as some have argued,⁵⁷² ECOWAS can be conceptualised as a mechanism for the realisation of the right to development, taking a human rights approach should set ‘the achievement of human rights as an objective of development’.⁵⁷³ One of the ways of doing this is by ‘taking human rights as a frame of reference’ through ‘reference to and starting from human rights treaties’.⁵⁷⁴ As the Community organ or institution with legislative powers, the Authority is best placed to put ECOWAS in this context. By creating new legislative instruments with ample reference to the promotion and protection of rights recognised in the African Charter, the Authority builds on article 4(g) of the revised ECOWAS Treaty and sets the Community on a course of taking a human rights approach to development. Further, it avoids the complications that would have arisen if institutions of the Community were to operate under a legislative framework bereft of human rights values. In such a situation, ECOWAS institutions may have either been in breach of the human rights obligations of ECOWAS member states undertaken under other treaties or they would have been forced to read in human rights value into their functions.

Pursuant to its function of providing general policy directions for the Community, in 2001, the Authority adopted a regional plan of action to address the scourge of trafficking in persons in West Africa.⁵⁷⁵ By focusing on establishing appropriate criminal justice responses to tackle the scourge while initiating protection and rehabilitation measures for victims of trafficking, the Authority has positioned the Community to address one possible consequence of the free movement aspect of

⁵⁷² See N Nwogu, ‘Regional Integration as an Instrument of Human Rights: Reconceptualising ECOWAS’ (2007) 6 *Journal of Human Rights* 345 for example.

⁵⁷³ The Overseas Development Institute, *What Can We Do with a Rights-Based Approach to Development?* 3 Briefing Paper 1, (1999) available at http://www.odi.org.uk/briefing/3_99.html states that ‘a human rights approach to development sets the achievement of human rights as an objective of development’.

⁵⁷⁴ BI Hamm, ‘A human rights approach to development’ (2001) 23 *Human Rights Quarterly* 1005, 1011.

⁵⁷⁵ 2004 Annual Report of the ECOWAS Executive Secretary, 70.

integration.⁵⁷⁶ The propriety of ECOWAS engagement in this area may be open to challenge as questions may be asked whether such activities fall within the treaty competence of the Community. But as Viljoen has noted, the cross-border nature of human trafficking justifies intervention by RECs.⁵⁷⁷ It would be noted that the approach in ECOWAS has been to adopt policy papers rather than a binding instrument that adds to the body of regulatory norms or that impose new obligations on member states. This approach has the potential to positively impact on implementation of existing norms and mechanisms by reinforcing and coordinating member states' efforts without upsetting the existing structure. Arguably, this is a complementary approach to human rights realisation since it focuses on non-judicial and non-hierarchical aspect of implementation while giving a supervisory role to the collective over individual state mechanisms. However, it would be observed that there is no effort to link the Plan of Action to existing continental structures and procedures.

4.2.2 Creation, modification and control of Community institutions

Connected to the function of providing general policy direction, the power of the Authority to create, modify and control or oversee ECOWAS Community institutions has implications for human rights and has been applied in that regard by the Authority. The power to control and oversee the functioning of Community institutions is granted to the Authority in article 7(3)(b) of the revised Treaty. The Treaty also empowers the Authority to determine or modify the powers and functions of certain Community institutions to the extent that it gives the Authority power to make protocols setting out the functions, powers and organisation of those institutions.⁵⁷⁸ No express power is granted to the Authority in the Treaty to create institutions. However, as previously indicated, under the law of international institutions generally, it is recognised that certain organs or institutions may create subsidiary institutions.⁵⁷⁹ In exercise of such customary powers, the Authority has established new and subsidiary institutions not contemplated in the Treaty. Some of

⁵⁷⁶ See the 2001 ECOWAS Plan of Action for the Fight Against Trafficking in Persons.

⁵⁷⁷ Viljoen (2007) 510.

⁵⁷⁸ Eg see art 13(2) of the revised Treaty on the Authority's power to adopt a protocol on the Community Parliament and art 15(2) on similar powers in relation to the ECCJ.

⁵⁷⁹ Schermers & Blokker (2003) 153.

these institutions have human rights related powers that further institutional link with human rights in the Community.

Acting on its powers to make protocols for the establishment of certain Community institutions, the Authority, in making the 1991 Protocol on the ECOWAS Community Parliament, listed human rights as one of the issues over which the Community Parliament may exercise limited legislative competence.⁵⁸⁰ The Authority has also used a protocol to include competence over human rights in the expanded mandate granted to the ECCJ.⁵⁸¹ In using its legislative competence to empower these institutions to act in the field of human rights, the Authority removes the potential of forcing these institutions to imply power to act in this area. As these institutions are some of the Community institutions with which ordinary people come in contact regularly, this approach is likely to enhance popular participation in an otherwise technical integration process.

However, in making protocols, the Authority in certain cases appear not to have sufficiently considered the need to delineate Community competence from national competence of member states on the one hand and the competence of other international organisations on the other hand. Added to the fact that the boundaries of the human rights mandate of Community institutions are sometimes not well defined, room is created for tension arising from over-involvement of ECOWAS in fields well outside of its specific objectives. As would be subsequently demonstrated, in some cases this could result in issues of overlapping and conflicting jurisdictions arising. Such situations are best addressed by the exercise of care in making protocols. In view of the fact that an ECOWAS human rights regime is not a free-standing one, but operates within national territories over which national and continental also claim (prior) competence, greater sensitivity would have been necessary to maintain symmetry. This is more so, as ECOWAS would eventually become part of the wider African system under the AU/AEC framework.

The transformation of the ECOWAS Executive Secretariat into a Commission is also an example of the Authority's involvement in the promotion and protection of human

⁵⁸⁰ Art 6 of Protocol A/P2/8/94 Relating to the ECOWAS Parliament.

⁵⁸¹ See arts 3 and 4 of Supplementary Protocol of the ECCJ.

rights.⁵⁸² In approving the transformation, the Authority permitted the establishment of departments within the ECOWAS Commission with functions within the field of human rights. The Authority has also created subsidiary institutions such as the West Africa Health Organisation, the Council of Elders under the Conflict Management Protocol and ad hoc offices of Special Representatives of ECOWAS in certain member states emerging from conflict.⁵⁸³ All of these subsidiary institutions have been endowed with some level of competence in the field of human rights. As the ECOWAS Treaty only allows Community institutions to perform functions and act within the limits of powers conferred the Treaty and protocols of the Community, the relevance of the Authority's grant of such powers in the field of human rights cannot be overemphasised. The functions performed by these subregional institutions are very often in very specific areas where national mechanisms are non-existent or ineffective. Usually, they are also areas where continental reach is relatively limited. Thus, these institutions cannot be seen as general human rights supervisory bodies with potential to compete with continental institutions for priority of jurisdiction.

4.2.3 Responsibility to implement and enforce Community obligations of member states

Another important aspect of the work of the Authority in the field of human rights relates to implementation and enforcement of member states obligations to the ECOWAS Community. In order to enhance effective integration, each ECOWAS member state, by ratifying the revised Treaty made an undertaking to honour its obligations to the Community and abide by the decisions and regulations of the Community.⁵⁸⁴ This undertaking is reinforced by Treaty power conferred on the Authority to impose sanctions on a member state that fails to fulfil its obligations to the Community.⁵⁸⁵ In exercising the power to impose sanction, the Authority may involve the ECCJ in the sense that it may refer a question to the Court to determine

⁵⁸² The 29th Ordinary Summit of the ECOWAS Authority which held on 12 January 2005 approved the transformation of the ECOWAS Secretariat into a Commission. <http://www/news.ecowas.int/presseshow.php?nb=13&lang=en&annee=2006> (accessed 24 August 2008).

⁵⁸³ The office of Special Representative operates basically as representative of the President of the ECOWAS Commission in member states where ECOWAS Peacekeeping operations are on-going.

⁵⁸⁴ Art 5(3) of the revised Treaty.

⁵⁸⁵ Art 77 of the revised Treaty grants the power to sanction and lays out possible sanctions that may be imposed by the Authority in the event of such a failure by a member state to fulfil Community obligation.

and confirm whether a member state has failed to fulfil or honour its Community obligation.⁵⁸⁶

Arguably, the obligations that a member state owes to ECOWAS includes a duty to adhere to the principle of ‘recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’.⁵⁸⁷ Community obligation would also include a duty to comply with the decisions of institutions of the Community (including those of the ECCJ) relating to human rights. In this regard, the system potentially addresses the concern of absence of enforcement mechanisms that trails international human rights supervisory mechanisms. It would be noted that this implies that the Authority retains both legislative and executive powers in relation to the Community. However, this is not inconsistent with practice in international institutional law.⁵⁸⁸ In the context of ECOWAS, the Authority’s power of implementation has been relied upon to exert pressure on some member states in situations of humanitarian concern⁵⁸⁹ and in order to restore constitutional government in situations of unconstitutional overthrow of government.⁵⁹⁰ The ease with which West African Heads of State and Government are willing to intervene in favour of human rights on the platform of ECOWAS contrasts with the reluctance that is displayed when action is needed in the AU framework. Such interventions by ECOWAS Heads of State and Government gives the impression of a subtle recognition and acceptance of the right to protect at a regional level on the basis of considerations such as proximity and the risk of ripple-effect in the event of conflict or crises.

While the implementation powers of the Authority have been successfully applied in favour of human rights in the situations described above, there is still a lack of clarity with regards to how this function can be exercised to implement or enforce decisions

⁵⁸⁶ Art 7(g) of the revised Treaty.

⁵⁸⁷ See art 4(g) of the revised Treaty.

⁵⁸⁸ The AU adopts a similar approach. In organisations like the EU, legislative and executive powers are conferred on the Council of Ministers.

⁵⁸⁹ For instance, the Authority piled pressure on former President Charles Taylor during the Liberian conflict.

⁵⁹⁰ In Togo, the Authority successfully prevailed on the Togolese authorities to conduct democratic elections after the death of former President Gnassingbé Eyadéma in 2005. Similarly, Guinea’s membership of ECOWAS was suspended by the Authority in 2009 following a military coup in that country.

of the ECCJ especially in human rights cases. The implementation role of the Authority is not mentioned in any of the Protocols of the ECCJ. However, article 77 of the revised Treaty should apply to require the Authority to act in the event of a member state's failure to comply with a decision against it. The case of *Manneh v the Gambia*⁵⁹¹ has presented the best opportunity so far to allow for the exercise of the Authority's implementation and enforcement powers. Refusal of the Gambia to release Mr Manneh from custody as ordered by the ECCJ arguably amounts to a failure on the part of that state to comply with Community obligation arising from a decision of a Community institution. However, as at July 2009, the Authority had neither acted nor made any pronouncement on the issue of non-compliance by the Gambia.⁵⁹² Perhaps, the fact that there are no guidelines how individuals may kick-start the processes of the Authority has contributed to the difficulty experienced in this respect. If that is the case, it may be beneficial for the Authority to set out the procedure by which its power of implementation and enforcement may be invoked by ECOWAS citizens. A more important question is whether by refraining to act, the Authority is tacitly acknowledging the right of member states to opt out of the emerging ECOWAS regime on the grounds that integration was for economic rather than human rights purposes. While this may be a tempting possibility, the continued use of the system for human rights realisation defeats such a possibility.

4.2.4 Human rights responsibilities in Community Protocols

Apart from its Treaty related functions, the ECOWAS Authority also takes on certain other specific roles in relation to human rights. These other roles are located in some of the protocols adopted by the Community. The responsibilities under the protocols are essentially of an executive nature. For instance, under the Protocol on Free Movement, Right of Residence and Establishment, the Authority is empowered, through its Chairperson, to direct the ECOWAS Commission to dispatch a fact finding mission to investigate allegations of 'systematic or serious violations' of the provisions of the Protocol. This process which only becomes operational if member states are unable to reach amicable settlement of the dispute touches on the enjoyment

⁵⁹¹ *Manneh v the Gambia*, Unreported Suit No ECW/CCJ/APP/04/07, Judgment No: ECW/CCJ/JUD/03/08. In reaction to the *Manneh* case, the government of the Gambia has indicated an intention to prompt for a review of the requirements for individual access to the ECCJ, especially in relation to exhaustion of local remedies.

⁵⁹² The judgment of the ECCJ in the *Manneh* case was delivered in June 2008.

of economic freedoms by citizens.⁵⁹³ Intervention in this regard coincides with the authority of the African Commission, the AU Peace and Security Council (AUPSC) and by extension, the AU Assembly to intervene in situations of serious or massive violations of human rights.⁵⁹⁴

By article 6 of the Conflict Prevention Protocol, the ECOWAS Authority is the highest decision-making body of the mechanism established under that protocol. Thus, the power to take crucial decisions and to act on rights related matters such as conflict prevention, management and resolution, peacekeeping, humanitarian support and peace-building resides in the Authority. Although the Conflict Prevention Protocol allows the Authority to delegate these powers to a smaller unit of heads of state and government operating as the Mediation and Security Council,⁵⁹⁵ ultimate decision-making powers remain in the Authority. Consequently, the Authority is one of the institutions of the mechanism that has to determine whether violation of human rights and the rule of law in a member state is serious and massive enough to warrant application of the mechanism.⁵⁹⁶

In line with its powers under the Conflict Prevention Protocol, the Authority approved the inauguration of the Council of Elders as an organ of the mechanism in 2000.⁵⁹⁷ The Authority also approved the dispatch of a high-level ECOWAS mission to Guinea Bissau in May 2004 following a perceived threat of deterioration of the pre-election conflict in that country.⁵⁹⁸ In adopting these measures and executing its functions under these protocols, the Authority may be taking a much needed proactive

⁵⁹³ See Amended art 7 in 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.

⁵⁹⁴ By art 4(h) of the AU Constitutive Act, the AU can intervene in AU member states pursuant to a decision of the Assembly in respect of grave circumstances such as war crimes, genocide, crimes against humanity and threat to legitimate order (added by the Protocol on Amendments to the Constitutive Act 2003). The AUPSC claims a similar right by virtue of art 6 of the Protocol on the Peace and Security Council (2002). The African Commission's competence derives from art 58 of the African Charter.

⁵⁹⁵ Art 7 of the Conflict Prevention Protocol.

⁵⁹⁶ See arts 25 and 26 of the Conflict Prevention Mechanism. By art 25, the mechanism can be applied in any circumstance actual or threat of aggression or conflict in any member state, conflict between member states, internal conflict that threatens humanitarian disaster or threat to subregional peace and security, serious and massive violation of human rights and the rule of law and overthrow or attempted overthrow of a democratically elected government.

⁵⁹⁷ See 'Council of Elders approved' available at <http://news.ecowas.int/presseshow.php?nb=13&lang=en&annee=2003> (accessed 27 November 2008).

⁵⁹⁸ ECOWAS Annual Report (2005) 90.

approach to human rights protection. Such proactive actions are clearly commendable options to human rights protection as they are more likely to benefit ordinary people who suffer the most violations in the occurrence of violence.⁵⁹⁹ Although corresponding mechanisms exist in the AU, proximity and the threat of ripple-effect weighs in favour of ECOWAS interventions. In this regard, interventions have been positive and effective. The level of coordination and cooperation before intervention is not clear even though the need for such coordination is recognised and required by applicable instruments.⁶⁰⁰

4.3 A mandate without a method? the Community Parliament

Similar to governmental configuration in municipal systems, most international organisations have some form of parliamentary organ that is supposed to represent popular involvement in the functioning of such organisations. However, while one of the justifications for the existence of national parliaments is that it is undesirable to allow policy-making organs to supervise themselves without input from those most affected by decisions taken by these organs, justification for international parliamentary organs is not obvious. In fact it was previously thought that parliamentary control of the business of international organisations was unnecessary as no immediate link was seen to exist between the functions of these organisations and the citizens of their member states.⁶⁰¹ Moreover national parliaments were able to act as a bulwark against direct impact on their citizens in the sense that national constitutions often required national parliamentary involvement for the ratification of international agreements to take effect.⁶⁰²

With increasing sophistication of the processes of international organisations and greater evolution towards supranationality that allows the policies and acts of these organisations to by-pass national parliaments yet have direct effect in the national

⁵⁹⁹ See H Thoolen, 'Early warning and prevention' in G Alfredsson, J Grimheden, BG Ramcharan & A de Zayas (eds) *International Human Rights Monitoring Mechanisms* (2001) 311 – 328. Thoolen argues that even though preventive measures are often focused on conflict resolution and mitigation, there is link to human rights since human rights violations arising from conflict provoke refugee outflows and similar human rights concerns. For him therefore, prevention is better than the present regimes of human rights that are designed for suppression and cure after violation.

⁶⁰⁰ See art 16 of the AU Protocol on the Peace and Security Council. Also see art 52 of the ECOWAS Conflict Prevention Protocol. This article also obligates ECOWAS to inform the UN of military interventions but contains no such obligation towards the AU.

⁶⁰¹ Schermers & Blokker (2003) 398.

⁶⁰² Schermers & Blokker (2003) 399.

systems, the need for popular involvement in the processes has become more evident. On the whole, this involvement still falls short of parliamentary functioning as it is known in national systems. Thus, international parliamentary organs are bodies with varying forms of parliamentary powers.

Established for the first time under the revised Treaty, the idea of an ECOWAS Parliament was conceived under a treaty regime that envisaged greater popular participation on the part of ECOWAS citizens in the integration process.⁶⁰³ In this regard, the Parliament is an expression of the democratic intentions of the Community.⁶⁰⁴ Its relevance from a human rights perspective however goes beyond mere democratic expression. As already demonstrated, article 4(g) of the revised Treaty also contemplates integration in an environment of recognition, promotion and protection of human rights. As a treaty institution created under this new treaty regime, the question of human rights is prominent in the mandate of the Parliament. The method by which this mandate is to be fulfilled is however, unclear from the documents of the Parliament. It would be noted for example, that the Parliament is a ‘forum for dialogue, consultation and consensus for representative’ and its powers are essentially of an advisory nature.⁶⁰⁵ In the course of its short existence, the Parliament has by its procedures, statements and actions indicated an intention not to be unduly restricted in the exercise of its treaty competence. While some of these procedures are merely proposed, some have been put into practice and together they form the actual and potential human rights methods the ECOWAS Parliament.

4.3.1 Recommendations and other advisory inputs to decision-making

By article 6(1) of Protocol A/P2/8/94 the ECOWAS Parliament is allowed to ‘consider any matter concerning the Community’ especially on issues relating to human rights and fundamental rights. On its own, article 6(1) is not very enlightening but the provision is best appreciated when it is read in context with article 6(2). Since article 6(2) of the Protocol enumerates matters on which the Parliament may be consulted for its opinion, it can be argued that the allowance to ‘consider any matter’

⁶⁰³ The principle of popular participation is set out in art 4(h) of the revised Treaty. The 1975 ECOWAS Treaty did not provide for any parliamentary organ. Arts 6 and 13 of the revised Treaty establish the Community Parliament but leaves out details for the Authority to flesh out in a protocol.

⁶⁰⁴ The ECOWAS Community views the inauguration of the parliament as the fulfillment of ‘one of the requirements of democracy’. See the Annual Report of the Executive Secretary (2006) ix.

⁶⁰⁵ Para 4 of the preamble to Protocol A/P2/8/94 Relating to the Community Parliament.

relates to matters over which the Parliament may initiate enquiry. As matters for which the Parliament may be consulted under article 6(2) also include ‘respect for human rights and fundamental freedom’⁶⁰⁶ the difference between matters that the Parliament may consider and those on which it may be consulted for its opinion is almost non-existent. An understanding that the requirement to consult Parliament is imposed on the institutions saddled with decision-making in the Community should support the argument that the allowance to ‘consider’ rests on parliamentary initiative.⁶⁰⁷ Under Protocol A/P2/8/94, notwithstanding whether human rights and related matters are considered by the Parliament on its initiative or are presented by reason of consultation by other institutions, competence is advisory and may only lead to a non-binding recommendation.⁶⁰⁸

Following a 2006 amendment of Protocol A/P2/8/94, it is now intended that the competence of the ECOWAS Parliament will progressively move from advisory through co-decision to lawmaking in areas to be defined by the Authority.⁶⁰⁹ This progression is dependent on the Community’s successful transition from appointment or selection of parliamentarians from national parliaments to election by direct universal suffrage.⁶¹⁰ Apart from these envisaged competences by progression, Supplementary Protocol A/SP.3/06/06 retains the advisory competences under the earlier Protocol. To facilitate its work, the ECOWAS Parliament operates through standing and ad hoc committees which are granted responsibilities for the different aspects of its mandates. Those relevant to human rights include: Health and Social Affairs Committee, Education, Training, Employment, Youth and Sports Committee, Women and Children’s rights Committee and the Committee on Laws, regulations, legal and judicial affairs, human rights and free movement of persons.⁶¹¹ The recommendations from ECOWAS Parliamentary Committees are generally advisory though expectation is that human rights should get more detailed attention at the level

⁶⁰⁶ See art 6(2)(m) of Protocol A/P2/8/94.

⁶⁰⁷ See also JU Hettmann and FK Mohammed, ‘Opportunities and Challenges of Parliamentary Oversight of the Security Sector in West Africa: The Regional Level’ (November 2005) Freidrich Ebert Stiftung 20

⁶⁰⁸ During the initial stage of the Parliament’s existence, very little was done by the Parliament.

⁶⁰⁹ Art 4(1) of Supplementary Protocol A/SP.3/06/06 Amending Protocol A/P.2/8/94 Relating to the Parliament (Supplementary Protocol A/SP.3/06/06).

⁶¹⁰ Art 4(1)(3) of Supplementary Protocol A/SP.3/06/06.

⁶¹¹ A complete list of standing committees of the ECOWAS Parliament is available on <http://news.ecowas.int/presseshow.php?nb=9&lang=en&annee=2001> (accessed 27 November 2008).

of the committees. Theoretically therefore, either as a result of Parliament's own initiative or where Parliament is consulted by the decision-making institutions, the ECOWAS Parliament should play an advisory role in the human rights agenda of the Community.

Law and practice of international organisations seems to tilt towards a regime of limited powers for parliamentary organs of international organisations. Thus, it has been noted that 'as a rule, international parliamentary organs do not play a decisive role in international organisations. They offer an opportunity for mutual consultation and cooperation...'⁶¹² Rather than actual decision-making or law making, 'parliamentary organs have important advisory functions. In performing these functions, they may exert some influence on the governmental organs'.⁶¹³ In essence, the recommendations and other advisory inputs of the ECOWAS Parliament, though not binding on the decision-making organs, should have a strong persuasive effect and be used to the advantage of ECOWAS citizens. The persuasive effect of the Parliament's advisory input should be relevant to influence ECOWAS institutions as much as it should influence national parliaments to put pressure on governments. This is a potentially useful tool for purposes of implementation of human rights decisions of Community institutions made against member states.

In practice, there is hardly any record of ECOWAS Parliamentary initiative towards considering any matter relating to human rights. A study initiated by the ECOWAS Commission in response to a Parliamentary Resolution requesting for greater involvement in the integration process concluded that 'the parliament has never addressed recommendations to the other ECOWAS institutions'.⁶¹⁴ Perhaps the closest to an initiative on the part of the ECOWAS Parliament is the 2002 resolution in which the Parliament sought expansion of its powers. The Parliament specifically requested for an increase in the degree of its involvement in the promotion of human rights, democracy, good governance and peace.⁶¹⁵ The parliament also sought

⁶¹² Schermers & Blokker (2003) 417.

⁶¹³ Schermers & Blokker (2003) 420.

⁶¹⁴ ECOWAS August 2004: Study on the Enhancement of the Powers of the Community Parliament, ECOWAS Secretariat cited by Hettmann and Mohammed (2005).

⁶¹⁵ See the Resolution Relating to Enhancement of the Powers of the Community Parliament, Sept 2002, the ECOWAS Parliament. As a follow up to the study by the ECOWAS Secretariat, the Parliament was restructured at the end of its first legislative year. Since the inauguration of the second

involvement in the mechanisms of the Conflict Prevention Protocol and in election monitoring and observer missions in the region.⁶¹⁶ In failing to initiate consideration of matters of human rights, the ECOWAS Parliament reduces its potentials for contributing to the protection of rights in the Community.

Up until sometime in 2008, the requirement that Parliament be consulted and its opinion sought on certain issues concerning the Community was largely ignored.⁶¹⁷ However, since 2008, supplementary acts of the Community made by the Authority usually include a paragraph stating that the ECOWAS Parliament has been consulted and its opinion taken into account.⁶¹⁸ While the impact of this process may not be much, it provides an opportunity for advocacy and lobbying of the Parliament by civil society in favour of human rights. Considering that the new legal regime of the Community allows supplementary acts of the Authority to apply directly in member states without the need for ratification, Parliament's effective use of its advisory competence represents a window for limited popular approval of the increasing protection of human rights within the framework of the Community. The fact that ECOWAS Parliamentarians are also national parliamentarians in their various states should allow for greater coordination between national human rights policies and legislations and Community human rights initiatives. Thus, the chances of transparency and democracy in the formulation of human rights policies are potentially stronger at this level than at the continental level.

4.3.2 Petitions to Parliament

Despite obstacles to the exercise of legislative powers comparative to the legislative powers of national parliaments, the ECOWAS Parliament has created avenue for engagement with citizens and residents of the ECOWAS Community through the process of petitions to the Parliament. By Rule 85 of the Rules of Procedure of the

legislature on 13 November 2006, the Parliament's role in the Community has been increased, leading to a requirement that its opinion be sought before Community legislation is passed. See the ECOWAS Annual Report (2007) 135.

⁶¹⁶ As above.

⁶¹⁷ This is in spite of the fact that art 13(2) in Supplementary Protocol A/SP.1/06/06 provides that the Community shall ensure the effective involvement of the Parliament in decision making.

⁶¹⁸ The Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS which in its art 21 requires ECOWAS member states to set minimum standards for environmental, labour and human rights protection in accordance with international treaties, was enacted after the Authority had 'considered the opinion of the ECOWAS Parliament'.

ECOWAS Parliament, natural and legal citizens and residents of the Community may bring a petition to the Parliament. Such petition has to deal with a matter within the fields of activity of the Community and should affect the applicant directly. Once such a petition is declared admissible, it may be dealt with by the relevant Parliamentary Committee and could lead to a resolution or an opinion ultimately forwarded to the ECOWAS Commission for action.⁶¹⁹

Although the procedure is potentially restrictive to the extent that it requires a petitioner to be directly affected by the subject-matter of the petition, increasing inclusion of human rights within the ECOWAS fields of activity may mean that human rights issues can be appropriately dealt with by this procedure without the necessity of an adjudicatory process. The link with the ECOWAS Commission could translate to the use of good offices in the resolution of matters of concern in the field of human rights within the region. It is important to note the limitation of petitions to the Community's field of activities as it narrows down the scope for conflict and inconsistency with mechanisms of the member state and the AU.

4.3.3 Fact-finding and other missions

In setting out the functions of the bureau of the Community Parliament, article 16B.1(b) of Supplementary Protocol A/SP.3/06/06 recognises that the Parliament may hold hearings, meetings and fact-finding missions outside of its headquarters. Although this was not originally included in Protocol A/P.2/8/94, the ECOWAS Parliament is recorded to have undertaken fact-finding missions to the Mano River Union as well as reconciliatory visits during the Liberian crisis.⁶²⁰ Such visits were either aimed at preventing conflicts or initiating moves for the resolution of conflicts that have negative impact on the human rights situation in the region.⁶²¹ Recently, members of the ECOWAS Parliament have also been included in ECOWAS observer missions for the purpose of monitoring or observing elections in ECOWAS member

⁶¹⁹ <http://www.parl.ecowas.int/english/petition.htm> (accessed 21 August 2008).

⁶²⁰ Hettmann and Mohammed (2005) 9.

⁶²¹ As above. The outcome of the visit to Liberia was reportedly transmitted to the Authority and became a useful tool for mediation in the Liberian conflict.

states.⁶²² This development may also be connected to the Parliamentary resolution requesting for enhanced powers in Community affairs.

Considering that ECOWAS does not currently have any institution totally dedicated to the promotion and protection of human rights, the missions undertaken by the ECOWAS Parliament come closest to the type of promotional visits undertaken by the African Commission within the context of the continental human rights system. While it may be argued that human rights is not the central objective of the ECOWAS Community and therefore there may be no need for promotional visit, the fact remains that the proactive effect of successful missions of the Parliament can be useful for human rights realisation. As Parliamentarians are currently selected from national parliaments, the chances of positive influence and the use of good offices should be very high under the Community platform. The ECOWAS Parliament may not have control over the decision-making organs of the Community. It may not yet have powers to scrutinise budgets or to make laws. However, the current procedures and practices of the ECOWAS Parliament are potentially viable tools for the promotion of human rights in the ECOWAS Community without undue confrontation with national systems. Since the methods of the Parliament are not adversarial, the goodwill of member states ought to be greater here. Moreover, Parliamentary actions have no potential of disrupting national or continental measures. Instead, the means applied by the Parliament could be instrumental in developing cooperation with national systems.

4.4 A licence to protect: the Community Court of Justice

Traditionally, international judicial and quasi-judicial dispute resolution mechanisms are established for the purpose of resolving disputes between states as subjects of international law. Such international dispute resolution mechanisms exist either as independent international organisations created by treaty or as organs of international organisations with no independent treaty existence.⁶²³ An international dispute resolution mechanism may also exist as an organ or institution of an international organisation yet be established by an independent treaty. Judicial organs of international organisations were commonly concerned with issues relating to how the

⁶²² <http://news.ecowas.int/presseshow.php?nb=13&lang=en&annee=2007> (accessed 27 November 2008).

⁶²³ P Sand (ed) (2001) *Bowett's law of international institution* (5th ed) 337

international organisation operated or with the conduct of states as members of such organisations.⁶²⁴ With the growing involvement of non-state actors in the field of international law and international relations, especially in the area of human rights, international dispute resolution mechanisms have also taken on new roles, entering into the sphere of disputes between states and non-state actors.⁶²⁵ In general, international mechanisms only exercise jurisdiction over disputes involving non-state actors where prior treaty provision grants competence in that regard.

The ECCJ is established by the revised ECOWAS Treaty as an institution of the Community but functions in line with powers and procedures set out in specific treaties.⁶²⁶ The ECCJ is composed of seven independent judges appointed by the Authority from nationals of ECOWAS member states on the recommendation of the Judicial Council of the Community.⁶²⁷ The qualification for appointment as a judge of the ECCJ is ‘high moral character and ... the qualification required in their respective countries for appointment to the highest judicial offices’ or being ‘jurisconsults of recognised competence in international law’ versed ‘particularly in areas of Community law or Regional Integration’.⁶²⁸ Judges are appointed for a non-renewable term of four years and serve full time during their tenure.⁶²⁹

Although it was originally established to exercise traditional competence as a dispute resolution mechanism to mediate between member states on issues relating to the functioning of the Community as well as the conduct of states in the integration process, the ECCJ has since received a licence to entertain human rights disputes involving non-state actors. As a judicial body, the ECCJ’s work is basically adjudicatory but in pursuit of its expanded mandate, the ECCJ has been one of the

⁶²⁴ Schermers & Blokker (2003) 427

⁶²⁵ Sand (2001) 338

⁶²⁶ Arts 6 and 15 of the revised Treaty establish the ECCJ while its composition, powers and procedures are generally provided for in Protocol A/P.1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005 and Supplementary Protocol A/SP.2/06/06 of 14 June 2006. Also see Regulation of 3 June 2002 and Supplementary Regulation C/REG.2/06/06 of 13 June 2006.

⁶²⁷ See art 3(1)(4) in Supplementary Protocol A/SP.2/06/06. The Judicial Council of the Community is made up of the Chief Justices of member states. Only Chief Judges of member states whose nationals are not eligible for a vacant position are involved in the interview of prospective judges of the ECCJ. The Judicial Council makes its recommendation to the Authority through the Council of Ministers.

⁶²⁸ Art 3 in Supplementary Protocol A/PS.2/06/06. It would be noticed that prospective judges are not required to be versed in human rights law.

⁶²⁹ Art 4 in Supplementary Protocol A/PS.2/06/06. Under Protocol A/P.1/7/91, judges were appointed for a term of

most active Community institutions in the area of human rights. With tangible and visible action in the human rights arena, the ECCJ provides sufficient material for evaluation of its processes. Consequently, analysis of the human rights work of the work will be done in greater detail.

4.4.1 From interpretation to protection: the human rights jurisdiction of the ECCJ

At inception, the ECCJ was conferred with a contentious jurisdiction as well as an advisory jurisdiction.⁶³⁰ In relation to its contentious jurisdiction, the ECCJ was empowered to ‘ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty’.⁶³¹ Consistent with its status as a traditional international tribunal, the ECCJ could only exercise competence in cases between member states of ECOWAS or between member states and institutions of the Community. Where the interest of nationals of member states were involved in relation to ‘the interpretation and application of the provisions of the Treaty’, a member state was authorised to bring an action on behalf of its national, after amicable settlement has been unsuccessful.⁶³² In summary, the ECCJ was designed for the purpose of resolving disputes between subjects of international law in the interpretation and application of treaty provisions relating to regional economic integration.

In the first few years of its existence the ECCJ remain dormant as no matter was filed before it.⁶³³ However, the very first case (*Afolabi Olajide v Federal Republic of Nigeria*)⁶³⁴ that came before the Court raised issues around the question of individual access to the Court. The question of individual access related to human rights and fundamental freedoms partly founded on the recognition accorded the African Charter in the 1993 revised Treaty.⁶³⁵ While the ECCJ declined jurisdiction in the *Olajide*

⁶³⁰ See arts 9 and 10 of Protocol A/P.1/7/91.

⁶³¹ Art 9 (1) of Protocol A/P.1/7/91.

⁶³² Art 9(2)(3) of Protocol A/P.1/7/91.

⁶³³ The first set of judges of the ECCJ was appointed in 2001 even though the Protocol establishing the Court was adopted in 1991. The Court was idle from 2001 till 2004 when the case of *Olajide v Federal Republic of Nigeria*, 2004/ECW/CCJ/04 was heard.

⁶³⁴ Unreported Suit no. 2004/ECW/CCJ/04.

⁶³⁵ The *Olajide* case alleged a violation of the right to free movement in art 3(iii) of the revised ECOWAS Treaty and the right to freedom of movement under the African Charter based on the

case, the fallout of the case, linked with the new visibility of human rights in the Community agenda prompted the amendment of the 1991 Protocol on the Community Court of Justice. At the time the *Olajide* case was heard by the ECCJ, there was sufficient human rights content in the treaty and legislative framework of ECOWAS to sustain the exercise of human rights competence by ECOWAS institutions. The case might have been an opportunity for the ECCJ to take a more dynamic role in providing judicial protection of human rights under ECOWAS Community framework.⁶³⁶ A liberal interpretation of the revised Treaty could have resulted in a finding on member states' obligation to recognise, promote and protect human rights. However, the ECCJ shied away from such judicial activism and opted to give room for legislative provision of judicial competence in the field of human rights. The approach adopted by the ECCJ can be justified as it complies with the principle of attributed powers.⁶³⁷ The restraint by the ECCJ has resulted in a clear and unambiguous empowerment of the Court by the lawmaking organ of the Community. Thus, the human rights mandate of the ECCJ is 'a legislature-driven' mandate in the sense that it is expressly conferred by the main decision-making organ of the Community.

The jurisdictional change introduced by the 2005 Supplementary Protocol of the ECOWAS Court is rather expansive because that it affects the material, personal, temporal and territorial aspects of the Court's jurisdiction with respect to human rights. In addition to conferring the ECCJ with jurisdiction over cases of 'violation of human rights that occur in any member state',⁶³⁸ the Supplementary Protocol grants access to the Court to individuals and corporations with respect to different cases of human rights violation.⁶³⁹ This new jurisdiction is added to the original jurisdiction of the ECCJ and does not replace the original jurisdiction. Consequently, ECCJ is

provisions of art 4(g) of the revised ECOWAS Treaty. Interestingly, reliance was placed on the Nigerian domesticated statute of the African Charter.

⁶³⁶ See Viljoen (2007) 507. Viljoen argues that a more activist court would have taken a different position.

⁶³⁷ Also see art 6(2) of the 1993 revised ECOWAS Treaty which requires ECOWAS institutions to act within the limits of the Treaty and the protocols.

⁶³⁸ New art 9 of the Protocol of the ECOWAS Court as introduced by art 3 of the 2005 Supplementary Protocol.

⁶³⁹ New art 10 of the Protocol of the ECOWAS Court as contained in art 4 of the 2005 Supplementary Protocol. Access is available to individuals and corporations for acts and inactions of Community officials which violate rights, and to individuals for violation of human rights (apparently) that occur in member states.

conferred with an increased jurisdiction that comprises competence to interpret and apply the ECOWAS Treaty from a regional integration perspective in disputes involving member states and Community institutions, determination of Community obligation of member states and competence in complaints of human rights violation involving member states, Community institutions, corporations and nationals of member states. The ECCJ, it can be argued, has moved from a strictly regular judicial organ for treaty interpretation to a hybrid court with partially specialised human rights competence. It has to be stressed that the express conferment of competence by the proper authority prevents the employment of judicial activism or general principles of law as a basis for finding human rights jurisdiction. That way, some of the threat of indeterminacy could be averted because, as the product of a considered decision of the Authority, legislative conferment provides opportunity to ensure proper definition of competence.

4.4.2 The ECCJ as a human rights court

Against the backdrop that a Community treaty has been used to confer competence over human rights on it, the ECCJ arguably qualifies as a *sui generis* human rights court. However, the relative vagueness of its human rights mandate coupled with the absence of an ECOWAS human rights catalogue over which the ECCJ can claim ‘ownership’ makes the exercise of the mandate a less than straightforward affair. An examination of the practice and jurisprudence of the Court will therefore be necessary to enhance understanding of the functioning of the ECCJ as a human rights court.

4.4.2.1 Material jurisdiction of the Court

Generally, both the 1991 Protocol and the 2005 Supplementary Protocol empower the ECOWAS Court to adjudicate on disputes relating to the interpretation and application of the Treaty of ECOWAS, the Protocols and Conventions and all other legal instruments of the Community.⁶⁴⁰ The amended article 9 goes further to give the Court jurisdiction on matters relating to the legality of regulations, directives, decisions and other subsidiary legal instruments of the Community,⁶⁴¹ the failure of

⁶⁴⁰ See art 9 of Protocol A/P.1/7/91. Also see the amended art 9(1) in art 3 of the 2005 Supplementary Protocol. The ECOWAS Court interprets art 89 of the revised Treaty to mean that Protocols made pursuant to the Treaty form an integral part of it. See para 21 of the Court’s judgment in *Ukor* case (n 399 above).

⁶⁴¹ Amended art 9(1)(c) of the Court Protocol.

member states to honour their obligations as contained in the Treaty, Protocols, Conventions and other legal instruments of ECOWAS⁶⁴² and on cases of human rights violations that occur in member states.⁶⁴³

Attention has to be paid to the Court's competence to hear cases relating to the 'failure of member states to honour obligations' under the Treaty, Protocols, Conventions and other legal instruments of ECOWAS. In view of the obligations member states take on under ECOWAS instruments, to guarantee human rights at the national level, a human rights adjudication competence may be found in this provision. However, the obstacle in its usage is that only other member states and (unless specifically excluded by a protocol) the Executive Secretary (now President of the ECOWAS Commission) have access to the Court in this regard.⁶⁴⁴ The provision is somewhat comparable to the inter-state communications provisions in the African Charter. It also creates a novel situation where the ECOWAS Commission acquires access to bring human rights case against a member state where the state fails to perform its human rights obligations under the ECOWAS legal regime. Unfortunately, to date, there has not been any attempt to use these possibilities.⁶⁴⁵

From the individual human rights complaints perspective, the jurisdiction of the ECOWAS Court extends without limitations, to all cases of human rights violations that occur in member states. Thus, there is some level of indeterminacy in the provision. As ECOWAS does not have any particular human rights instrument over which the ECCJ can claim exclusive competence, the Court's human rights jurisdiction is not tied to any specific instrument. Instead, reference to human rights promotion and protection under instruments of ECOWAS appears to link to the African Charter and (to a lesser extent) the Universal Declaration of Human Rights

⁶⁴² Amended art 9(1)(d) of the Protocol.

⁶⁴³ Amended art 9(4) of the Protocol. Other areas of competence of the Court include actions against the Community, Community institutions and officials of the Community and its institutions.

⁶⁴⁴ Revised art 10(a) in art 4 of the 2005 Supplementary Protocol is clear on this point.

⁶⁴⁵ In view of the very rare use of the equivalent inter-state communications mechanism under the African Charter, it is doubtful if this provision will be used to the advantage of human rights victims in West Africa. Under the 1991 Protocol, member states had a right to bring actions before the ECOWAS Court on behalf of their nationals, but this never happened. See the *Olajide case* (n 634 above) in this regard.

(UDHR).⁶⁴⁶ This therefore leaves open the question whether only exclusively ECOWAS instruments such as the ECOWAS Treaty, Conventions, Protocols and other subsidiary instruments of the ECOWAS Community are applicable or whether the ECCJ may rely on any other human rights instrument. Considering that there are a plethora of rights scattered across the revised Treaty, Conventions and Protocols of the Community, the rights contained in any of those instrument of ECOWAS could be the basis for an individual action for the violation of rights.⁶⁴⁷ According to the ECCJ,⁶⁴⁸

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

The dictum of the Court in the *Kéïta* case can be read in several ways. It can be read to mean that only those rights relevant for the movement towards economic integration can base complaints of human rights violation. The dicta can also be read to mean that insofar as a right or group of rights are present in any of these instruments adopted for the pursuit of economic integration, they form part of ECOWAS legislation and can be applied. The latter understanding is preferable as the former would be unduly restrictive. The case law of the Court up till now also seems to support the more liberal interpretation. However, since the *Olajide case*, provisions of the revised Treaty or any other legislative instrument of the ECOWAS Community do not seem to have been applied in human rights cases before the ECCJ. Interpretation of the ECOWAS treaty based on human rights would seem to be one of the most uncontroversial sources of rights that the Court can apply.

⁶⁴⁶ Para 4 of the Preamble to the revised Treaty links to the African Charter, as does art 4(g). The latter provision makes ‘recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’ a fundamental principle of ECOWAS. In art 2 of the ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Peace and Security Protocol), one of the basic principles upon which ECOWAS places its Peace and Security Mechanism is a re-affirmation of the commitment of member states to the principles contained in the African Charter and the Universal Declaration Art 1(h) of the ECOWAS Democracy Protocol goes even further as it states that the guarantee by ECOWAS member states, of rights set out in the African Charter and other international instruments is one of the constitutional convergence principles upon which the Protocol is based.

⁶⁴⁷ Eg, arts 59 (right of entry, residence and establishment) and 66(c) (rights of journalists) in the revised Treaty. See also the various conventions and protocols of the Community. In some cases, provisions of certain instruments of the Community are couched as state duties rather than individual rights. Art 22 of the Democracy Protocol.

⁶⁴⁸ *Keita v Mali* (n 373 above).

With respect to human rights catalogues as sources of action before the ECCJ, reference has essentially been made to the African Charter and the UDHR. As the UDHR is not a legally binding instrument, despite the fact that some of its provisions are seen to have acquired the force of customary international law, it is arguable that it can only serve as an interpretative guide rather than the source of human rights demand before the Court.⁶⁴⁹ Nevertheless, the possibility of states legislating provisions of the UDHR into binding obligations cannot be ruled out even though the ECCJ has not suggested that this is the case in the ECOWAS legal framework. The African Charter, on the other hand, is a legally binding human rights instrument to which all member states of ECOWAS are parties.⁶⁵⁰ In addition to the fact that nearly all reference to human rights in the legal instruments of ECOWAS relate to the African Charter, it is the only human rights instrument specifically mentioned in the 1993 revised Treaty.⁶⁵¹

Further, a teleological approach would lead to an interpretation that the statement of agreement in the Treaty, to cooperate for the purpose of realising the objectives of the African Charter implies that human rights in that instrument form part of the human rights provisions of the Treaty.⁶⁵² Taken together, these facts suggest that the African Charter is the most comprehensive material source of rights before the ECCJ. This is made possible because the African Charter does not grant exclusive supervisory competence on any institution.⁶⁵³ In any event, the African Charter is gaining ground as ‘the basis of a common regional human rights standard’, so that most RECs in

⁶⁴⁹ See eg J Dugard *International law* (2005) 314 on this point.

⁶⁵⁰ The ratification status of the African Charter is reproduced in (2009) 9(1) *African Human Rights Law Journal* 364.

⁶⁵¹ By art 19 of the 1991 Protocol, the Court is required to examine dispute in accordance with the provisions of the Treaty and the Court’s Rules of Procedure. Where necessary, the Court may also apply international law as contained in art 38 of the Statute of the International Court of Justice.

⁶⁵² Art 56 of the 1993 revised ECOWAS Treaty.

⁶⁵³ Part II of the African Charter creates the African Commission and sets out its mandate, but does not confer exclusive competence of implementation on the Commission. Similarly, the African Court on Human and Peoples’ Rights does not have exclusive competence over the African Charter as the Protocol establishing the Court is also silent on this point. See F Ouguergouz *The African Charter on Human and Peoples’ Rights* (2003) 710. Ouguergouz notes that ‘there is nothing in the Protocol to limit the freedom of state parties in the choice of methods for monitoring implementation of the African Charter ... There is nothing to prevent them from submitting disputes of this sort to another African body ...’ In what appears to be a contrary opinion, GJ Naldi & K Magliveras ‘Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples’ Rights’ (1998) 16/4 *Netherlands Quarterly of Human Rights* 436 suggest that the African Court of Human and Peoples’ Rights ‘seems to be the only competent judicial authority’ for the interpretation of the African Charter. Seeing that they do not state the basis of this opinion, one can respectfully say that the better opinion may be that expressed by Ouguergouz.

Africa have made reference it as a fundamental principle in their constitutive instrument.⁶⁵⁴

More importantly, the jurisprudence of the ECCJ indicates that the Court itself recognises the African Charter as the material source for the exercise of its human rights competence.⁶⁵⁵ In the *Ugokwe* case, the ECCJ emphasised the relevance of the African Charter in its work when it said:

In articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloguing of various human rights but by the provisions of article 4 paragraph (g) of the Treaty of the Community, the Member States of the Economic Community of West African States (ECOWAS) are enjoined to adhere to the principles including ‘the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter n Human and Peoples’ Rights’.

Even though there is no cataloguing of the rights that the individuals or citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter.⁶⁵⁶

The Court has not been so expressive of the reasons for its use of the UDHR. Yet, the UDHR has appeared frequently in proceedings before the ECCJ, either in the pleadings of litigants or in the decisions of the Court itself. The ECCJ has placed unambiguous reliance on the UDHR in at least three of its decisions.⁶⁵⁷ What is clear however, is that both the African Charter and the UDHR appear in varying frequency in parts of ECOWAS legislative instruments and this strengthens the argument that article 9(4) of the Supplementary Protocol of the Court can be read to accommodate actions based on all such enumerated human rights instrument. This attitude to interpretation benefits litigants before the ECCJ. The application of the African Charter before the ECCJ sets up a situation of possible forum shopping as between national courts, the ECCJ, the African Commission and the African Human Rights

⁶⁵⁴ See Viljoen (2007) 26. Viljoen cites art 4(g) of the ECOWAS Treaty, art 6(d) of the 1999 East African Commission Treaty and art 6A of the IGAD Agreement. He points out that the African Charter is the only international human rights instrument ratified by nearly all African states. Morocco is the only African state that is neither a member of the AU nor a state party to the African Charter.

⁶⁵⁵ See para 29 of the judgment in the *Ugokwe* case (n 382 above). This is significant from the perspective of art 31(3)(b) of the Vienna Convention of the Law of Treaties, which gives subsequent practice a place in the interpretation of treaties. In the *Ugokwe* case, in addition to the Nigerian Constitution, the African Charter and the Universal Declaration formed the basis of the applicant’s case. The African Charter was also one of the bases for the complaint in the case of *Lijadu-Oyemade v Executive Secretary of ECOWAS* (n 423 above).

⁶⁵⁶ *Ugokwe* case (n 382 above) para 29.

⁶⁵⁷ *Keita* case (n 373 above); *Essien v The Gambia*, (n 457 above) and in *Koraou v Niger* (n 71 above).

Court (or its successor). As the same instrument is applicable over the same territorial space, litigants can bring cases before any of these fora. While this may be beneficial for fortifying human rights realisation in West Africa, it also calls for some regulatory mechanisms.

Apart from the African Charter and the UDHR, other human rights instruments upon which actions before the ECCJ have been founded, and which the Court has referred to in judgments include the International Covenant on Economic, Social and Cultural Rights (CESCR),⁶⁵⁸ the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)⁶⁵⁹ and the Slavery Conventions⁶⁶⁰. While CEDAW is mentioned in at least one ECOWAS legislative document,⁶⁶¹ the other two instruments are yet to be specifically mentioned or enumerated in ECOWAS documents. To a lesser extent, provisions of national constitutions of member states have also been relied on in actions before the ECCJ although it is not clear whether the Court sees national constitutions as part of its sources of law. The liberal interpretation that the ECCJ has given to articles 9 and 10 of the Supplementary Protocol of the Court encourages robust human rights litigation. However, it also puts the Court at risk of developing jurisprudence that has the potential of being in conflict with the jurisprudence of the supervisory bodies of these treaties just as much as it raises questions of forum-shopping. In some cases, where it feels a need to go outside specific instruments, the Court has had resort to ‘general principles of law’ as contained in art 38(1)(c) of the ICJ Statute.⁶⁶²

An important point to note about the material jurisdiction of the ECOWAS Court is that it appears to cover economic freedoms as well as rights that fall in the different generations of human rights. Under the revised ECOWAS Treaty, economic freedoms are entrenched as rights of ECOWAS citizens and they carry the weight of fundamental rights under the ECOWAS regime as they are contained in the constitutive document.⁶⁶³ Economic freedoms under ECOWAS Community law are further fleshed out in protocols adopted to promote their implementation and they are

⁶⁵⁸ *Essien* case (n 455 above).

⁶⁵⁹ *Koraou* case (n 71 above).

⁶⁶⁰ As above.

⁶⁶¹ See eg, the Supplementary Protocol on Democracy and Good Governance.

⁶⁶² Para 31 of the *Ugokwe* case (n 382 above).

⁶⁶³ Art 59 of the revised ECOWAS Treaty.

considerably expanded beyond the narrow statements contained in the original Treaty and in the revised Treaty. In fact the first case heard by the ECCJ centred around denial of the right to free movement of persons and goods based on Treaty and Protocol provisions.⁶⁶⁴ It is necessary to question whether the enjoyment of these freedoms is tied to active participation in economic activities within the framework of economic integration. This is especially as some of the rights are granted in connection to certain types of workers or to nationals ‘for the purpose of seeking and carrying out income earning employment’.⁶⁶⁵ The ECCJ is yet to get the opportunity to make this determination.

On the basis that the African Charter is the most applied human rights instrument before the ECCJ and the Charter makes no distinctions between different generations of rights, the Court has not found a reason to make such distinctions. Thus, from the perspective of civil and cultural rights, the ECCJ has received complaints touching on rights such as: fair hearing and political participation,⁶⁶⁶ personal liberty, life, dignity and fair hearing,⁶⁶⁷ the right to property,⁶⁶⁸ and freedom from slavery.⁶⁶⁹ Economic, social and cultural rights (ESCRs) which have been more problematic in terms of justiciability before domestic courts have not featured much before the ECCJ. However, in the *Essien case*, the Court was faced with issues around ESCRs. Considering the status of ESCRs in the legal systems of some member states and the question whether the judiciary (in this case, an international court) has the technical competence and legitimacy necessary to interfere with the allocation of resources by elected officials, the desirability of socio-economic rights litigation before the ECCJ is open to debate. In the *Essien case*, the ECCJ appears to have tilted more to a consideration of the right to satisfactory working conditions from the perspective of non-discrimination rather than an intention to redistribute wealth. Thus, the case represents a ‘safe’ approach to economic and social rights litigation that avoids grounds for interference with allocation of national resources. Solidarity rights have not featured before the ECCJ.

⁶⁶⁴ *Olajide case* (n 634 above).

⁶⁶⁵ See eg, art 2 of the 1986 Supplementary Protocol and art 1 of the 1990 Supplementary Protocol.

⁶⁶⁶ *Ugokwe case* (n 382 above).

⁶⁶⁷ *Manneh case* (n 591 above).

⁶⁶⁸ *Alice Chukwudolue and 7 Others v Senegal*, Unreported Suit No. ECW/CCJ/APP/07/07.

⁶⁶⁹ *Koraou case* (n 71 above).

Overall, the collective approach to protection of rights is significant to the extent that it provides the opportunity for direct application of the African Charter where domestic constitutional principles require domestication before the African Charter becomes applicable within the legal system of a state or where socio-economic rights are constitutionally non-justiceable in a state. While the opportunity is positive to the extent that there is the promise of a forum for human rights litigation across generational barriers, it raises challenges for intra-organisational relations. If matters that are excluded from the horizon of judicial scrutiny by national legal systems are admissible before the ECCJ, there is bound to be some jurisdictional tension and by extension consequences for implementation of the ECCJ's decisions. This is especially as membership of the organisation relates or ought to relate to limitation of sovereignty in specific fields. The wide material jurisdiction of the ECCJ, which is not limited by Community competence could be problematic in the future.

4.4.2.2 Temporal jurisdiction

Determination of the temporal jurisdiction of the ECOWAS Court is important from the procedural and substantive perspectives of both the Court's Protocols and the African Charter. While both the 1991 Protocol and the 2005 Supplementary Protocol contain provisions relating to their entry into force, they are both silent on the temporal competence of the Court.⁶⁷⁰ It is important to note that both Protocols entered into force provisionally as soon as the heads of state and government of member states signed them.⁶⁷¹ For present purposes, the relevant provision is article 11 of the Supplementary Protocol by which the Protocol provisionally came into force on 19 January 2005. In the absence of anything to the contrary, the Court can only entertain cases of violations that occur after that date. The ECCJ has taken this position as it declined jurisdiction on this ground in the *Ukor* case.⁶⁷²

With respect to the substantive temporal competence, where a claim is based on the African Charter, reference has to be made to the position under the African Charter. As noted elsewhere, 'the texts are silent' on the temporal jurisdiction of the African

⁶⁷⁰ See, generally, art 34 of Protocol A/P1/7/91 and art 11 of the 2005 Supplementary Protocol.

⁶⁷¹ As above.

⁶⁷² *Ukor* case (n 399 above). Upon the facts of that case, the Court emphasised that there was nothing in the Supplementary Protocol to suggest that the Protocol could be given a retrospective effect. In this regard, the Court relied copiously on the jurisprudence of the ICJ. See especially paras 13 to 20 of the Court's judgment.

Charter.⁶⁷³ However, it goes without saying that the Charter becomes applicable upon coming into force in respect of the state party concerned. For claims based on the rights contained in the revised ECOWAS Treaty or any of the Community's other instruments, it would appear that the date of entry into force (with respect to the particular state) of the given instrument should be the determining consideration. With regard to 'other international instruments' as contemplated in the ECOWAS Democracy Protocol, should the Court decide to apply them in exercise of its human rights competence, the question of ratification ought to be taken into consideration. The Court needs to first satisfy itself that the instrument in question has been ratified by the state and has come into effect in respect of the state concerned before it can apply the provisions of such a an instrument. Any other approach would result in imposing treaty obligations on a member state before such obligations were accepted by the state itself.

One last point to be noted is that under the ECOWAS system, there is a limitation clause that makes actions against Community institutions and any member of the Community statute barred after three years from the date the right arose.⁶⁷⁴ Applied to human rights, this position imports certainty that is lacking in the African Charter and in the practice of the African Commission.⁶⁷⁵

4.4.2.3 Territorial jurisdiction

The human rights jurisdiction of the ECCJ covers violations of human rights 'that occur in any member state' of the Community.⁶⁷⁶ The choice of 'member state' as against 'state party' suggests that the jurisdiction is not limited even if a member state of ECOWAS is not a party to the Court's Protocol.⁶⁷⁷ However, considering that all member states of ECOWAS are also parties to the Court, there is very little significance in the couching of this provision. Accordingly, the human rights complaints mechanism of the ECCJ is applicable in the territories of the 15 states that

⁶⁷³ See F Ouguergouz, *The African Charter on Human and Peoples' Rights* (2003) 555.

⁶⁷⁴ Art 9(3) in art 3 of the 2005 Supplementary Protocol.

⁶⁷⁵ See generally S Gumede, 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *AHRLJ* 118; ST Ebobrah, 'The admissibility of cases before the African Court on Human and Peoples' Rights: Who should do what?' (2009) 3 *Malawi Law Journal* 87, 97.

⁶⁷⁶ Amended art 9(4) as contained in art 3 of the 2005 Supplementary Protocol. See also para 28 of the Court's judgment in the *Ugokwe* case (n 380 above). The term territory may very well include embassy premises of member states.

⁶⁷⁷ Art 1 of Protocol A/P1/7/91 defines member state to mean a member of the ECOWAS.

are currently parties to the ECOWAS Treaty and the Court Protocol (as amended by the 2005 Supplementary Protocol).⁶⁷⁸ As the amended article 9(4) currently stands in the Supplementary Protocol, there is nothing to restrict the jurisdiction of the Court over a member state of ECOWAS for any rights violation that such a member state allegedly carries out against any community citizen in the territory of any other member state. As national courts (each in their states), the African Commission and the African Court on Human Rights (with respect to all the states) all have jurisdiction over human rights issues, the potential for forum shopping is high. Notwithstanding this, the only provisions available to regulate jurisdictional conflicts and inconsistencies are article 56(7) of the African Charter and article 10 (d)(II) of the 2005 Supplementary Protocol of the ECCJ, both of which apply to international fora but not to national courts. An additional complication is that the ECCJ does not consider itself as bound by the secondary rules in the African Charter and thus, would not apply the provisions of article 56(7) of the African Charter in cases before it.⁶⁷⁹

4.4.2.4 Personal jurisdiction

By virtue of the new article 10 in the Supplementary Protocol, access to the ECCJ is open to member states, the Executive Secretary, the President of the ECOWAS Commission since January 200, the Council of Ministers, individuals, corporate bodies and staff of any Community institution.⁶⁸⁰ In terms of access to bring cases of a human rights nature, on the basis of the earlier argument with respect to actions for failure to fulfil a Community obligation, it may appear that any member state or the President of the ECOWAS Commission is competent to bring a human rights case against a member state.⁶⁸¹ Since the obligation contained in the revised Treaty and the relevant protocols is to guarantee promotion and protection of rights set out in the African Charter in ECOWAS member states, there is nothing to suggest that the obligation is restricted to a guarantee of those rights to citizens of the state concerned. Accordingly, access to the Court against any member state under this provision need

⁶⁷⁸ See the amended art 9 in the Supplementary Protocol.

⁶⁷⁹ See the dictum of the ECCJ in the *Koraou* case (n 71 above) 43.

⁶⁸⁰ See art 4 of the 2005 Supplementary Protocol.

⁶⁸¹ See art 9(3) of Protocol A/P1/7/91 and the new art 10(a) in art 4 of the 2005 Supplementary Protocol. It is important to note that by art 10 of the Supplementary Protocol, only provisions of Protocol A/P1/7/91 that are inconsistent with the Supplementary Protocol are null and void to the extent of the inconsistency. However, art 9 of Protocol A/P1/7/91 is no longer useful as it has been expressly repealed by art 3 of the 2005 Supplementary Protocol.

not be only where the victim of the violation is a citizen of the offending state. Up till now, no action has come before the ECCJ under this heading.

With regard to access to applicants other than member states and the President of the ECOWAS Commission, access is available to individuals and corporate bodies.⁶⁸² By article 10(c), access is for ‘proceedings for the determination of an act or inaction of a Community official which violates the rights of the individual or corporate body’. This is a very limited access as it must only be against ECOWAS (as an institution) for the rights-violating act or inaction of a Community official. In addition, it must be by the individual or corporate body alleging that their right has been violated. Hence, any body, group or institution above can be a plaintiff (or applicant) before the Court so far as the act or omission allegedly violates their right. This is one area where no other court (national or international) can claim jurisdiction. Hence, it is a rare area in which the ECCJ can claim exclusive jurisdiction. Thus, this provision guarantees effective remedy in this area.

One conspicuous omission from the Supplementary Protocol of the Court relates to the competence of non-governmental organisations (NGOs) to bring actions before the Court. It could be argued that the term ‘corporate bodies’ as used in the inserted article 10 (as contained in article 4 of the 2005 Supplementary Protocol) is wide enough to accommodate actions by NGOs. However, the couching of the provision, to the extent that such actions should be in determination of acts or inactions of a Community official which ‘violates the rights of the individual or corporate bodies’, gives the impression that any action brought upon facts that do not allege a violation of the rights of the corporate body may fail.⁶⁸³

While both the 1991 Protocol and the 2005 Supplementary Protocol are silent on the point, it appears from a combined reading of the amended (and inserted) articles 9 and 10 of the Court Protocol that member states, the Community, Community institutions and Community officials can be defendants before the Court.⁶⁸⁴ The most obvious

⁶⁸² Art 10(c) and (d) of the 2005 Supplementary Protocol.

⁶⁸³ See the inserted art 10(c) in art 4 of the 2005 Supplementary Protocol. The Court has not been asked to make a decision on the competence of NGOs to access the Court.

⁶⁸⁴ See arts 3 and 4 of the 2005 Supplementary Protocol.

respondents however, are member states of ECOWAS in actions for failure to fulfil human rights obligations arising from the ECOWAS Treaty, Protocols, Conventions and other legal instruments. Further, as argued above, paragraph (c) in the amended article 10 relates to rights-violating acts or inactions of Community officials. In other words, either ECOWAS itself (as the Community) or an official of ECOWAS in his official capacity may be a respondent.⁶⁸⁵ In relation to paragraph (d), the protocol does not say against whom the individual right of access can be exercised. This leaves room for the exercise of discretion by the Court in its interpretation and application of the Supplementary Protocol. In practice, there is very little discretion as most of the cases already treated by the Court are against member states of ECOWAS.

A curious development in respect of the exercise of the ECCJ's human rights competence is the emergence of individuals as respondents. While the provisions relating to human rights as contained in the ECOWAS instruments point to a state duty, the imprecise couching of articles 9(4) and 10(d) of the 2005 Supplementary Protocol leaves the door open for situations where human rights action can be brought against non-state actors before the Court.⁶⁸⁶ In granting jurisdiction to the Court for the determination of cases of human rights violations that occur in member states and access to individuals for applications for relief for such violations, the Supplementary Protocol seems to have issued a 'blank cheque' for human rights realisation. In the *Ukor* case, all the parties were non-state actors, yet the Court went on to exercise jurisdiction over the matter.⁶⁸⁷ This practice holds a risk for the character of the ECCJ as an international court. There is also provision for intervention by parties who consider that their interest may be affected by proceedings going on before the Court.⁶⁸⁸ While the provision was originally aimed at states, since the Supplementary

⁶⁸⁵ In 2005, the action brought by a dismissed staff member of ECOWAS was against the Executive Secretary of ECOWAS in that capacity and two staff members of the Community in their personal names. Part of the action touched on a violation of the right of fair hearing.

⁶⁸⁶ See Amerasinghe (2005) for a discourse on interpretation of treaties.

⁶⁸⁷ The *Ukor* case (n 399 above) was declared 'inadmissible for lack of merit' on grounds that the Supplementary Protocol did not apply retrospectively.

⁶⁸⁸ Art 21 of the 1991 Protocol (renumbered art 22 by art 5 of the 2005 Supplementary Protocol). Art 89 of the Rules of Procedure deals with the procedure for intervention.

Protocol came into force, individuals have relied on it to apply to join proceedings as co-respondents with a state or an individual.⁶⁸⁹

It is evident from the discourse that the ECCJ has jurisdiction in relation to human rights over the territories, citizens and institutions of ECOWAS member states as much as it has over ECOWAS Community institutions. While this is important for judicial protection of human rights within the ECOWAS Community framework, it evokes concerns on the effectiveness and efficiency of the mandate vis-à-vis member states and their institutions on the one hand and other continental judicial mechanisms for the protection of rights in Africa. The ECOWAS Community may need to make conscious responses to these concerns in the near future. On the positive side, the fact that the African Commission lacks the power to make binding decisions increases the usefulness of the ECCJ as a forum for human rights litigation. This is especially as the African Human Rights Court, though inaugurated, had not received any cases as July 2009 (four years after its inauguration in 2006). Even if the African Human Rights Court begins to function fully, the restriction on individual and NGO access potentially reduces its usefulness. All of these facts favour the continued operation of the ECCJ as a forum for human rights litigation. In fact, the emergence of the ECCJ's human rights competence does not seem to have affected the submission of cases to the African Commission.⁶⁹⁰ However, the reality of the risk of conflicting jurisdiction and conflicting decisions requires some that there should be some form of cooperation and coordination with other fora that is currently lacking in the ECOWAS practice.

4.4.2.5 Procedure before the ECCJ

Procedure before the ECCJ in human rights cases is regulated by the protocols relating to the Court and the rules of procedure of the Court. The rules of procedure were adopted in August 2003 by the Court on the basis of authority granted in article 32 of Protocol A/P1/7/91. At the time the rules were adopted, the ECCJ did not have jurisdiction over human rights and the Court was not competent to receive cases from

⁶⁸⁹ Eg in the *Ugokwe* case (n 382 above), there were interveners who joined as co-respondents with Nigeria and in the *Ukor* case, there was an application to join as intervener which failed (*inter alia*) on grounds of non-observance of the time limit.

⁶⁹⁰ Interview with staff of the African Commission in July 2009 indicates that the Commission continues to receive communications from NGOs and individuals from and against West African States.

individuals. Supplementary Protocol A/SP.1/01/05 contains provisions that are contributory to the human rights procedure before the ECCJ. By its article 10(d), the two conditions to be fulfilled for cases to come before the Court are that the application should not be anonymous and should not have been instituted before another international court. All other admissibility requirements under the African Charter or any other international procedure do not apply in human rights cases before the Court.⁶⁹¹ Perhaps the omission that sticks out the most is the question of exhaustion of local remedies. In its jurisprudence, the ECCJ has consistently maintained that the requirement to exhaust local remedies does not apply to human rights cases brought under Supplementary Protocol A/SP.1/01/05.⁶⁹²

Notwithstanding the ease that such a regime holds for litigants, the absence of the requirement to exhaust local remedies clearly has consequences for the system. On the one hand, it creates difficulty in the relation between the ECCJ and the national courts of ECOWAS member states in relation to priority of jurisdiction. On the other hand, it has the potential of setting the Court on a collusion course with member states as it does not give member states the first opportunity to attempt to resolve cases at the national level before exposing them to international adjudication.⁶⁹³ It also has consequences for the application of *res judicata* as between national courts and the ECCJ.

The requirement that cases should not be brought if they have been instituted before another international jurisdiction is a codification of the principle of *lis pendens*. Considering the possible danger of conflict of jurisdiction between the ECCJ and other international mechanisms exercising competence in West Africa, this is an important provision. One uncertainty that exist however is whether quasi-judicial bodies such as the African Commission and the African Children's Committee fall within the category of international courts mentioned.

Apart from these specific concerns, the current rules of procedure are generally adequate even for the purpose of the human rights competence even though they do

⁶⁹¹ See the *Koraou* case (n 71 above) at para 45 where the ECCJ emphasised that it has no powers to create additional requirements.

⁶⁹² *Essien* case (n 457 above); *Koraou* case (n 71 above).

⁶⁹³ The reaction of the Gambia in the *Manneh* case (n 591 above) is illustrative of this point.

not specifically provide for that purpose. It would only be observed that there is no provision for legal assistance to indigent litigants. Considering that some of the people most commonly at the receiving end of human rights violations are those at the lower end of the economic spectrum, omitting to create room for legal assistance may easily result in disempowerment of people with genuine cases.

4.4.4.6 Human rights judgments of the ECCJ: can the protector protect?

Under article 15(4) of the revised Treaty, judgments of the ECCJ are binding on member states, Community institutions, individuals and corporate bodies. This is reinforced by article 19(2) of Protocol A/P1/7/91 which makes such judgments immediately binding. Article 24 in Supplementary Protocol A/SP.1/01/05 also makes judgments with financial implications binding.⁶⁹⁴ All of these, taken together with article 77 of the revised Treaty which empowers the Authority to sanction member states for failure to fulfil Community obligations, should give some degree of force to judgments of the ECCJ.

However, in practice, the challenges national and international courts face in relation to the enforcement of decisions against states that are unwilling to comply with such decisions also exist with the ECCJ. Despite the provisions of article 77 of the revised Treaty, there is no clear formulation of the procedure to activate the processes of the Authority for the enforcement of the human rights judgments of the Court. The difficulty encountered with enforcing the decision of the ECCJ against the Gambia in the *Manneh* case is an illustration of this difficulty. The willingness of some other states to comply with the Court's decision however demonstrates the strengths of the system and neutralises the frustration that may otherwise have emerged.⁶⁹⁵ There is insufficient data to base analysis of the factors that encouraged compliance by Nigeria and Niger in the cases involving them before the ECCJ. However, it can be ventured

⁶⁹⁴ Art 24 of Supplementary Protocol A/SP.1/01/05 also states that judgments of the ECCJ shall be executed according to the civil procedure rules of the affected member state after verification. In this context, member states are required to identify and notify the Court of the national authority that would be responsible for the implementation of judgments. As at March 2009, no member state had complied with this provision.

⁶⁹⁵ In the *Ugokwe* case (n 382 above), Nigeria had no difficulty complying with the interim order of the ECCJ directing that a national legislator should not be sworn in pending determination of the case filed before the ECCJ. In the *Koraou* case (n 71 above), Niger indicated that it was ready to comply with the judgment of the ECCJ and it went on to pay damages awarded by the ECCJ in favour of the plaintiff.

that it was more as a result of political will and willingness to support the system rather than a question of the existence of a better enforcement mechanism at that level. While proximity of states in the region and the potential for greater effectiveness of peer pressure may have contributed to compliance, it has to be noted that proximity has a negative side. Considering that the development of a regional culture of compliance depends to a large extent on the attitude of regional hegemons, consistent failure by regional hegemons to comply with decisions could lead to development a culture of non-compliance by other states in the region.

Within the context of the ECOWAS Community, the ECCJ certainly ranks as one of the most dynamic and relevant institutions from a human rights perspective. Apart from its activities as a court, the ECCJ has also recently been represented in Community Election Observer Missions.⁶⁹⁶ Nevertheless, it is in its capacity as the judicial arm of the Community that the Court's potential for human rights protection lies. It is also in that mandate the concerns, from an international human rights law perspective arise. The human rights mandate of the court is ambiguous to an extent. In granting competence over all cases of human rights, the member states appear to have granted authority over matters that are not expressly covered in the revised Treaty. The practice of the Court does not indicate any deference to a principle of subsidiarity vis-à-vis member states. Threats of fragmentation of African international human rights law as a result of competing jurisdiction have also begun to emerge. The greatest beneficiaries however, may well be the people of West Africa as the Court provides a functional alternative for human rights protection at a level beyond national borders.

4.5 The Commission: more than a secretariat

Over the years, administration of international organisations has moved from simple secretarial services rendered on ad hoc basis by personnel of host countries to full time secretariats with international staff as it was under the League of Nations and now to the more comprehensive administration carried out by full time and professionally staffed organs.⁶⁹⁷ Commonly known as secretariats, administrative

⁶⁹⁶ <http://news.ecowas.int/presseshow.php?nb=13&lang=en&annee=2007> (accessed 27 November 2008).

⁶⁹⁷ See generally Schermers & Blokker (2003) 314.

organs have become increasingly important to the functioning of international organisations that they have been compared to national ministries in terms of administrative relevance.⁶⁹⁸ Although administrative organs play different roles in different international organisations, some of their main functions include administrative and clerical functions, budget preparation, collection of reports and information, presenting their organisations in legal proceedings and rendering technical assistance to member states.⁶⁹⁹ Administrative organs in some organisations have also engaged in election observation, carrying out executive functions and exercised a right to initiate policies.⁷⁰⁰ Hence, the functions and activities as well as the nomenclature of administrative organs defer from organisation to organisation.

The administrative organ of ECOWAS came into existence as the Executive Secretariat with essentially secretarial functions under the 1979 original Treaty of the Community.⁷⁰¹ Citing a need to enable its administrative organ to adapt to the international environment and to enhance its contribution to the integration process, the Community adopted a protocol to transform the organ from an executive secretariat to the 'Commission of the Economic Community of West African States' (ECOWAS Commission).⁷⁰² The new article 17 of the revised Treaty established the ECOWAS Commission and created the offices of a President, a Vice President and seven Commissioners.⁷⁰³ Supplementary Protocol A/SP.1/06/06 also increased the powers of the ECOWAS Commission, significantly transforming the Commission's role from a strictly secretarial body to an organ with some policy-making competence.⁷⁰⁴ Even the transformation did not confer a human rights mandate on the Commission. However, in compliance with instructions from the policy-making organs and some of its own initiatives, the Commission has become deeply involved in activities for the promotion and protection of human rights. While some of these

⁶⁹⁸ A Loveday, *Reflections on International Administration* (1956) 23 - 30 cited by Schermers & Blokker (2003) 314.

⁶⁹⁹ See Schermers & Blokker (2003) 318 - 324.

⁷⁰⁰ Schermers & Blokker (2003) 325 - 328.

⁷⁰¹ See arts 4(1)(c) and 8 of the 1979 ECOWAS Treaty. Even as a secretariat, the Commission performed functions that went beyond administrative and clerical duties.

⁷⁰² See generally the preamble and art 1 of Supplementary Protocol A/SP.1/06/06 Amending the Revised Treaty.

⁷⁰³ The seven Commissioners are responsible for the departments of the ECOWAS Commission which include:

⁷⁰⁴ Art 19 in Supplementary Protocol A/SP.1/06/06 gives the ECOWAS Commission competence to formulate proposals and make recommendations to the main policy-making organs of the Community.

activities are directed at rights protection, others are incidental but still relevant for the protection of rights in the Community framework.

4.5.1 Facilitator of human rights meetings and conferences

Connected to its role as the main provider of secretarial services yet exceeding the usual merely clerical duties of a secretariat, the ECOWAS Commission has convened, hosted or facilitated meetings and conferences that have shaped the human rights course of the Community and the West African region. In some cases, the Commission has performed this role in compliance with provisions of Community treaties and other documents. In other cases, the Commission has acted in accordance with directives from the Authority or the Council of Ministers. In yet other cases, the action of the Commission has been wholly the result of its own initiative or in collaboration with other actors in the field of human rights. In all situations however, the actions of the Commission has either led, or has the potential to lead to advancement of human rights at the Community level or at the national level of member states.

In article 35(2) of the Protocol on Democracy, ECOWAS member states laid the ground for the ECOWAS Commission (then Executive Secretariat) to provide a framework for independent human rights institutions in the West African region to be organised into a regional network in order to enhance their capacities to protect human rights. Consequently, from 2007, the ECOWAS Commission has begun to facilitate regional meetings of national human rights institutions on a five-year plan. According to the Commission's documents, the aim of the project is to enable the national human rights institutions to 'exchange experiences and best practices, identify deficiencies in capacities and contribute to building the capacities of national human rights institutions in West Africa'.⁷⁰⁵ In relation to democracy and governance, the Commission has also facilitated a meeting of national Electoral Commissions that resulted in the setting up of an ECOWAS Network of Electoral Commissions. The Commission provides coordination services to the network.⁷⁰⁶ It is not clear exactly what role the ECOWAS Commission can play in building the capacity of these

⁷⁰⁵ ECOWAS Annual Report 2007, 86.

⁷⁰⁶ See <http://news.ecowas.int/presseshow.php?nb=008&lang=en&annee=2008> (accessed 19 November 2008).

institutions since human rights and elections are not core objectives of the Community and therefore expertise in the areas may not be much. It is also not clear what the extent of concrete benefits from the Commission's involvement in these areas will be. However, the Commission's approach has been to work with NGOs and donor organisations in the field of human rights to provide a forum for the institutions to compare experiences. In that context, the Commission's role is more of a facilitator than a resource base.

The ECOWAS Commission has also been active in the area of gender and human rights. In 2006, while still the Executive Secretariat, it organised a regional workshop aimed at developing a regional framework to combat violence against women in the region. At this workshop, a framework on the Strategic Plan of Action on Gender-based Violence in the ECOWAS region was concluded.⁷⁰⁷ In the same gender context, the Secretariat hosted a regional workshop on Gender and HIV and AIDS⁷⁰⁸ and subsequently, as the Commission, hosted a meeting of experts on HIV and AIDS preventive education.⁷⁰⁹

Against the backdrop of the infamous conflicts that the West Africa region has become associated with, the ECOWAS Commission has also been involved in hosting or facilitating meetings relating to humanitarian law. In April 2006, a regional meeting on a draft code of conduct for Armed Forces of ECOWAS member states was hosted by the ECOWAS Executive Secretariat.⁷¹⁰ Considering that armed forces of ECOWAS member states are the forces that the Community uses in its peacekeeping and peace enforcing missions, the human rights consciousness of these forces potentially impacts on the protection of rights during these missions. Further, the Secretariat collaborated with the International Committee of the Red Cross to organise a meeting on the implementation of the treaties of International Humanitarian Law. The meeting was apparently aimed at enhancing member states' compliance with treaties in the area of humanitarian law and building Community capacity to meet humanitarian challenges in the region.⁷¹¹ Within the context of

⁷⁰⁷ ECOWAS Annual Report 2006, 96.

⁷⁰⁸ As above.

⁷⁰⁹ ECOWAS Annual Report 2007, 94.

⁷¹⁰ ECOWAS Annual Report 2006, 103.

⁷¹¹ As above.

conflicts and the consequences of conflicts in the region, the Secretariat, working with the United Nations High Commission for Refugees (UNHCR) had earlier organised a meeting of experts to address the needs of internally displaced persons and refugees in the region. One outcome of the meeting was the endorsement of an endorsed an interventionist strategy for achieving a lasting solution to the situation of refugees in West Africa.⁷¹²

The ECOWAS Commission in its previous status as Executive Secretariat has also been involved in hosting expert meetings on trafficking in persons within the West Africa region. These meetings which were originally directed by ECOWAS ministers resulted in the adoption of a regional plan of action on trafficking in persons. They also became platforms for appealing to member states of ECOWAS to ratify and implement relevant treaties at the national levels.⁷¹³ Evidently, these meetings and workshops hosted by the Commission (or Secretariat) may have contributed to improving the level of human rights protection in the region. However, the constitutionality of this function from a treaty perspective cannot be wished away. The link between these activities and the main organisational objective may also not be so evident. Notwithstanding these concerns, hosting human rights related meetings remains a major part of the ECOWAS Commission's human rights work.

Considering that the meetings hosted by the ECOWAS Commission are for the benefit of the member states or member state institutions involved in human rights work, the question of upsetting intra-organisational relations should not arise here. In fact, ECOWAS provides a platform for collective negotiation for donor support in specific areas of human rights. The meetings also provide a forum for member states to jointly address issues that affect all or more than one member state. To that extent, the ECOWAS Commission's action is a positive complement to the national initiatives. However, there is the question whether the work of the ECOWAS Commission in this area unnecessarily duplicates or undermines the work of continental human rights institutions like the African Commission. In view of the many challenges facing the African Commission such as shortage of financial and human resources, complementary work on the part of the ECOWAS Commission

⁷¹² ECOWAS Annual Report 2005, 94.

⁷¹³ 2004 Annual Report of the Executive Secretary, 76.

should not be problematic as it would be assisting the work of the African Commission. From the perspective of efficient use of resources, duplication ought to be avoided. In order to avoid duplication, there may be need for exchange of information between regional and continental institutions working in the same area. This does not currently happen even though ECOWAS cooperates with the AU in other regards.

4.5.2 Human Rights training programmes

Despite the fact that it is not a human rights organisation in the strict sense of the word, the ECOWAS Commission contributes to human rights education through different forms of training programmes. These programmes are either undertaken in collaboration with specialised human rights bodies or by the Commission on its own, with or without external support. The stated aim is often to build capacity of national institutions of member states or to enhance and improve Community intervention in the given area.

Given the importance of a stable political environment for effective integration, the Commission has built on the outcome of expert meetings to organise training for security forces of member states. In this regard, an information manual on human rights for security forces in the region was developed and put to use in the training of security forces.⁷¹⁴ Still on conflict issues and humanitarian law, the ECOWAS Secretariat collaborated with the International Committee of the Red Cross in July 2005, to organise a seminar on the implementation of international humanitarian law treaties by ECOWAS member states.⁷¹⁵ The relevance of such human rights training for security forces cannot be overemphasised especially with the Community's involvement in peacekeeping in member states. However, it is noted with concern that the work of the ECOWAS Commission shows more collaboration with human rights institutions outside the African Continent. While on its own, this should not be a problem, the risk that non-coordination of activities brings forces attention to it.

In relation to children specifically and trafficking of persons in general, the ECOWAS Commission organised a training workshop on the rights and protection of children

⁷¹⁴ This training was carried out in collaboration with the Office of the High Commissioner for Human Rights and the Commonwealth Secretariat. See ECOWAS Annual Report 2007, 79.

⁷¹⁵ ECOWAS Annual Report 2005, 90.

for four of the Franco-phone members of the Community. Pursuant to this, the Executive Secretariat reportedly developed a training manual on child rights and children protection services, on the basis of which the Community has claimed credit for the member states' ratification of treaties on trafficking.⁷¹⁶ The Secretariat further arranged a sensitisation programme to train ECOWAS member states on their reporting duties. The ECOWAS Commission has also arranged a media workshop on trafficking along with an experts meeting on sexual harassment in education institutions.⁷¹⁷ These training programmes arguably enhance the capacity of member states to protect human rights at the national level. Hence, there is little or no risk of upsetting intra-organisational relations. While there is a case to be made on the possibility of duplication with African Commission duties, these actions can be regarded as collective action by ECOWAS member states. Seen from this perspective, it would amount to a fulfilment by these states of their obligations under the African Charter. Alternatively, these actions can be accommodated as part of the role of the AEC building blocks. In any of these senses, there should be no resistance to the continued engagement of the ECOWAS Commission in human rights training.

4.5.3 Hosting of special units and execution of community human rights projects

Although ECOWAS does not have a single unified secretariat to service all its organs and institutions, the Commission (even from its days as the Community Executive Secretariat) serve as the coordinating office for the Community.⁷¹⁸ In that context, the Commission is responsible for the execution of some aspects of the Community's human rights work and hosts certain specialised units that carry out important human rights work within the Community framework. While the link between poverty and human rights may not be direct and obvious, it can not also be denied. Accordingly, it is now common to find governments and other stakeholders applying poverty reduction strategy papers (PRSPs) as a right-based approach to address poverty. In order to achieve the object of improving the standards of living of its citizens, ECOWAS has also developed a regional PRSP. It is within the Executive Secretariat

⁷¹⁶ ECOWAS Annual Report 2005, 95.

⁷¹⁷ ECOWAS Annual Report 2005, 90.

⁷¹⁸ For instance, under the ECOWAS regime, the ECCJ is served by the Registry of the Court and the Parliament is served by its own secretariat.

that a ‘multi-disciplinary technical team’ was formed to manage the implementation of the project.⁷¹⁹

Human rights protection work in the ECOWAS Commission has also included action in the areas of human trafficking and child protection. With respect to human trafficking, the ECOWAS Commission hosts the Community’s Trafficking in Persons Coordinating Unit which is responsible for facilitating the establishment of national task forces on trafficking, sensitisation and training of members of national task forces.⁷²⁰ Through the work of this Unit, the Commission ensures that issues around human trafficking remain paramount in the agenda of member states. The abolition of visas within the region and the consequent removal of obstacles to free movement is arguably a factor that can facilitate human trafficking. Thus, Community interest in addressing the scourge cannot be faulted. As regarding the protection of the right of children, a Child Protection Unit exists at the Commission and was formally incorporated into the organogramme of the then Executive Secretariat in 2005. The functions of the unit include strengthening ties with agencies that work in the field of child protection and evaluation of national programmes for the protection of children, especially children affected by armed conflict.⁷²¹ The Community has also established an Electoral Assistance Unit within the Commission to facilitate the implementation of the Protocol on Democracy.⁷²²

Either by its regular departments or using the special units established for those purposes, the Commission takes responsibility for the implementation of most of the Community’s human rights policies and legislations. Implementation by the Commission usually takes different forms such as participation in meetings with partner bodies, compilation of reports and undertaking monitoring, observation or fact-finding missions. With the development of an ECOWAS Gender Programme, the Commission’s implementation strategies have included participation in meetings such as the United Nations Commission on the Status of Women held in New York in 2006

⁷¹⁹ The regional PRSP was adopted by the ECOWAS Authority in Dec 2006. See the ECOWAS Annual Report 2006, 118.

⁷²⁰ ECOWAS Annual Report 2006, 98.

⁷²¹ ECOWAS Annual Report 2005, 94-95.

⁷²² ECOWAS Annual Report 2006, 104

and the AU Labour and Social Affairs Meeting in Cairo 2006.⁷²³ While participation in meetings with these agencies allows for effective coordination, the risk of duplication arises where agencies of member states also participate in these meetings in the corporate capacity of their various states.

In the area of monitoring and observation, the Commission has been most active in election monitoring and observation in the region. In pursuit of powers granted under the Democracy Protocol, the Commission has sent missions to member states involved in all kinds of elections. The fact that states crave the approval of such missions to validate their democratic projects demonstrates the significance of the process.⁷²⁴ These missions also enable the Commission to feel the pulse of member states and engage proactively to nip budding conflicts. The Commission also uses fact-finding missions and consultants to monitor and coordinate member states policies and actions to implement Community policies such as the Plan of Action on Trafficking in Persons.⁷²⁵ In some cases, the Commission also takes responsibility for collecting and evaluating reports from agencies of member states implementing human rights policies of the Community.⁷²⁶ These activities of the Commission are significant for at least two clear reasons. First, the difficulty of implementation that has been the hallmark of human rights supervision in Africa seems to have been effectively suppressed in the work of the Commission. State resistance to external intervention appears to be lower and this holds positive promise for human rights protection in the region. Second, by involving the Commission in the heart of the Community's human rights work, ECOWAS appears to have avoided the challenges that arise when human rights is relegated to an institution that is detached from the central administration of an international organisation. Notwithstanding these positive aspects, issues of duplication of functions vis-à-vis continental mechanisms and excessive spill-over from the main objectives of integration cannot also be ignored.

⁷²³ ECOWAS Annual Report 2006, 95.

⁷²⁴ In 2004, the Executive Secretariat sent a fact finding mission prior to elections in Guinea Bissau and in 2005, the a team of 162 observers was sent to monitor elections in Togo.

⁷²⁵ 2004 Annual Report of the ECOWAS Executive Secretary 76.

⁷²⁶ ECOWAS Annual Report 2006 77.

4.5.4 Formulation and initiation of human rights policies

Over and above its executive functions, the ECOWAS Commission also contributes to the formulation of human rights policies in the Community. While this may not be a generic function of secretariats of international organisations, it is not an extreme function as policies initiated or formulated by the Commission should generally be proposals subject to approval by the relevant decision-making institutions of the Community. In practice such proposals are adopted with little or no amendments. As some of the proposals emerge from experiences gathered in the course of field work, they are very relevant for the furtherance of the human rights direction of the Community. In 2006, the ECOWAS Executive Secretariat was responsible for the formulation of a Community policy on disaster mitigation and management. In doing this, the Secretariat reportedly consulted with relevant agencies in order to take the special needs of children into account.⁷²⁷ This form of consultation before formulation of policies is an important balancing mechanism that is neglected in the ECOWAS human rights framework.

With increased military action on the auspices of the Community and growing complaints regarding human rights violations by ECOMOG soldiers, the need for mainstreaming human rights in the training of peacekeepers became urgent in the work of the Community. In this context, the Secretariat undertook the task of collaborating with a specialist external body for the formulation of a code of conduct to guide armed forces.⁷²⁸ It would also be observed that the formulation of a regional child right policy for the Community was prioritised by the ECOWAS Commission in its 2007 work plan.⁷²⁹ Apart from such elaborate policy formulation, the Commission also initiate human rights policies for the Community in its implementation of ECOWAS legislations.

While the ECOWAS Commission does not have any specific treaty mandate for the protection of human rights, it is clear that a major part of the promotion and protection of human rights within the ECOWAS framework has been undertaken by this

⁷²⁷ ECOWAS Annual Report 2006, 102.

⁷²⁸ ECOWAS collaborated with the Geneva Armed Forces Democracy Control in this regard. ECOWAS Annual Report 2005, 93.

⁷²⁹ See the ECOWAS Commission Work Plan 2007 available at www.ecowas.int. (accessed 5 July 2009).

institution. Perhaps questions may arise from this reality. Is the Commission and indeed, the Community acting legally in continuing to involve the Commission in all of these activities? What concrete impact has been made by the Commission in the fields of human rights that it has been regularly engaged with? One may also ask whether the main contribution that the Commission should make to realisation of the main objectives of the Community suffer neglect as a result of the dispersal of energy and resources by the Commission. Some of these questions may involve further research. The conclusion that may be drawn here is that the work of the Commission impacts greatly on human rights within the region.

4.6 The Council of Ministers

The Council of Ministers is one of the main decision-making organs of the ECOWAS Community. The Council is a plenary assembly as all member states are represented by two national ministers. Unlike some other international organisations, the ECOWAS Council of Ministers is not the highest organ of the Community.⁷³⁰ As indicated in the previous chapter, the ECOWAS Council of Ministers acted essentially in a supportive role to the Authority. Consequently the human rights responsibilities of the Council of Ministers are basically reflective of the work of the Authority. The most important of these functions include the approval of budgets of all Community institutions, including those particularly engaged in the field of human rights. The Council also reviews and approves draft policies and regulations relating to human rights before they are sent to the Authority. On the rare occasion, the Council of Ministers makes statement on the human rights situation of West African people.⁷³¹ Hence the Council is not directly very active in the human rights work of the Community.

4.7 Other institutions in the system

Promotion and protection of human rights within the ECOWAS Community framework is not exclusive to primary organs or institutions created by the revised Treaty. Certain subsidiary institutions created by the Authority function wholly or partly in the issue area of human rights. While the law of international institutions

⁷³⁰ In the EU before the establishment of the European Council, the Council of Ministers was the plenary decision making organ.

⁷³¹ June 2006 on treatment of immigrant

recognises the right of primary organs in international organisations to create subsidiary organs or institutions, the powers delegated to such subsidiary organs ought not to exceed the powers possessed by the primary organs themselves. Primary organs may not also transfer their responsibilities to such subsidiary organs. Ultimately, creation and delegation of powers to subsidiary organs and institutions should be within the limits set by the prevailing treaty.⁷³² In the context of ECOWAS, subsidiary organs and institutions have been individuals and bodies either created independently or within the framework of certain protocols.

Under the Conflict Prevention Protocol, two main subsidiary organs and two ‘junior’ subsidiary organs having functions that impact on human rights have been created. The Mediation and Security Council (MSC) of the Community is a non-plenary decision making body created as an institution of the conflict prevention mechanism.⁷³³ Its main functions relate to the peace, security and humanitarian law aspect of the ECOWAS human rights project. Under article 26 of the Conflict Prevention Protocol, the MSC is one of the bodies authorised to initiate the mechanism. This makes it relevant for preventive and reactionary purposes where there are threats of humanitarian disasters, threat to peace and security or there is a case of serious and massive violations of human rights and the rule of law.⁷³⁴ The willingness and ability of the MSC to react appropriately in cases of emerging conflict and in situations of massive and serious human rights violations is vital to the prevention of further violation of rights of vulnerable groups such as women and children, refugees and IDPs. The MSC mirrors the AUPSC and should cooperate and coordinate its activities with the continental body.

The Council of the Wise which was originally established as the Council of Elders under the Conflict Prevention Mechanism is also important from a human rights perspective.⁷³⁵ The relevance of the Council of Wise for human rights within the

⁷³² Schermers & Blokker (2003) 168.

⁷³³ See arts 4 and 8 of the Conflict Prevention Protocol. The Mediation and Security Council comprises of nine member states, seven members elected by the Authority and two being the current and immediate past chairpersons of the Community. The Mediation and Security Council operates at the levels of heads of state and government, ministers and at ambassadorial level.

⁷³⁴ By art 26, the other bodies empowered to initiate the mechanism include the Authority, a member state, the President of the ECOWAS Commission or a request by the AU or UN.

⁷³⁵ The Council of Elders is established as an organ of the mechanism by art 17 of the Conflict Prevention Protocol. It comprises of eminent political, traditional, religious and women leaders with

Community is that it is applied as good offices, and its members intervene in conflict situations as mediators, conciliators and facilitators of peace. The Council of Wise also play an important role in the ECOWAS democracy and good governance project as members of observation teams to elections and fact-finding missions.⁷³⁶ The Observation and Monitoring Centre of ECOWAS (OMC), established by article 23 of the Conflict Prevention Protocol also plays a vital part in the peace, security and humanitarian law aspect of the Community's human rights programme. As the agency responsible for early warning in the system, the OMC allows the Community to adopt a proactive approach to human rights protection in the region. The OMC is one of the 'junior' subsidiary institutions in the mechanism. The other 'junior' subsidiary institution is the Special Representative of the President of the ECOWAS Commission. Established by article 32 of the Conflict Prevention Protocol, the main role of the Special Representative also relates to peace, security and humanitarian law. The Special Representative is the coordinator of humanitarian relief and peace-building activities during conflict situations. Being on the ground in conflict situations, the human rights orientation of such an office reflects on the conduct of armed forces and officials of the Community's intervention efforts.⁷³⁷

At least two other subsidiary institutions, existing independently within the Community framework are also relevant for implementation of the human rights agenda of ECOWAS. The West African Health Organisation (WAHO) is a specialised ECOWAS institution created to ensure a regional approach to the major health challenges of West African countries.⁷³⁸ The work of WAHO is important for the implementation of the right to health within the Community framework. WAHO's mandate revolves around developing regional health policies to address matters of concern to the entire Community. In this context, as at December 2005, WAHO had developed a regional programme on the prevention, treatment and care of people living with HIV and AIDS. It also developed a sectoral 3-year plan on HIV and AIDS

respect within the member states. The Council of Elders was approved by the Authority in 2000 and first inaugurated in July 2001.

⁷³⁶ For instance in 2006, members of the Council of Elders have led ECOWAS observation teams in elections in Togo, Liberia, Burkina Faso, Benin and the Gambia. In addition, two members of the Council also went on a fact-finding mission to Guinea and the Gambia. See the ECOWAS Annual Report 2006, 100.

⁷³⁷ ECOWAS Annual Report 2007, 84.

⁷³⁸ ECOWAS Annual Report 2005, 133.

control among the Armed Forces of ECOWAS member states and formulated a regional strategy for the reduction of material and pre-natal mortality.⁷³⁹ These programmes may very well not have been developed as part of a conscious project to implement the right to health at a Community level, yet they are vital for the realisation of the right in the region. This is obviously within the Community objective of ‘raising the standard of living’ of ECOWAS citizens without necessarily interfering with the sovereignty of member states. Fundamentally, as no similar continental agency exists, the threats of duplication are lower in these areas.

The ECOWAS Gender Development Centre (EGDC) based in Dakar, Senegal also exists as an independent subsidiary institution of the Community. The EGDC is the arrow-head for implementation of the Community’s gender development policy and gender management system. With a mandate to promote gender equality in West Africa, the EGDC’s main work has been in the areas of capacity building through training, advocacy and policy development.⁷⁴⁰ In pursuit of this mandate, the EGDC has had to do advocacy among parliamentarians in the region and fact-finding missions to rural areas.⁷⁴¹ The EGDC has also endeavoured to focus on promoting gender equality and equity in the region, advocacy for the involvement of women in key sectors of national economies in the region and developing regional policies on gender and HIV and AIDS.⁷⁴² As with the WAHO, the chances of conflict with regional and national institutions within these areas are very slim, if they exist at all.

4.8 Interim conclusion

The essence of this chapter was to evaluate how the ECOWAS human rights regime functions in practice. This evaluation was for the purposes of determining whether the regime is a valuable addition to the African human rights architecture and whether in its functioning, the regime works towards achieving symmetry with other parts of the architecture. The intention was to identify and highlight issues of jurisdictional conflicts and consistencies as well as situations of duplication of functions between ECOWAS institutions and national and continental human rights institutions. Notwithstanding the supposedly peripheral nature of human rights in the

⁷³⁹ ECOWAS Annual Report 2005, 81.

⁷⁴⁰ ECOWAS Annual Report 2005, 161 -162.

⁷⁴¹ As above.

⁷⁴² ECOWAS Annual Report 2007, 156 – 159.

organisational objectives of ECOWAS, this chapter has demonstrated that human rights features in some form or another in the functioning of most of the Community's institutions. Hence, treaty institutions and subsidiary institutions of the Community have been shown to have human rights or rights-related duties in their work.

This chapter has produced evidence that the human rights work of different ECOWAS institutions covers areas that are traditionally within the jurisdiction of ECOWAS member states and continental human rights institutions. Thus, the ECOWAS human rights regime strengthens national promotion and protection of human rights by assisting national institutions to address individual and common human rights challenges. In this regard, while there is a likelihood of tension between national courts and the ECCJ in relation to judicial protection of human rights, the risk of tension between the national systems and the ECOWAS regime has appeared to be significantly lower in the non-judicial sector. As the reach of the ECOWAS regime extends to areas that continental institutions are yet to cover, the usefulness of the regime cannot be denied. In judicial and non-judicial aspects of human rights realisation, the contributions and potential contributions of the ECOWAS human rights regime have been shown to add value to the African human rights system. However, there has also been evidence that the emerging ECOWAS regime has more potential to result in jurisdictional conflicts and inconsistencies with the continental components of the African human rights system.

The analysis has also shown that no conscious efforts have been made to ensure symmetry between the ECOWAS regime and the continental human rights system. While the approach of utilising the African Charter as the central human rights catalogue of the ECOWAS regime has prevented the creation of competing and conflicting norms, this has also led to some duplication of the functions of continental bodies. The discourse favours the position that in some situations, there is need and justification for the continued involvement of ECOWAS institutions in human rights work that ought to be carried out by national and continental institutions. The relative ease with which ECOWAS institutions address human rights challenges in the region has indicated that subregional intervention is desirable where individual state action would be insufficient and continental effort would be lost in the face of the magnitude

of the challenges. Hence, the need may just be for the development of mechanisms to promote symmetry between the various actors in the African human rights arena.

As the ECOWAS regime does not have any institution dedicated primarily to the promotion and protection of human rights, no direct institutional competition exists. However, it would be seen from the analysis in this chapter that there is some need to find inter- and intra-organisational balance in some aspects of the work of the ECOWAS Commission and the ECCJ. It was further shown that the biggest risk of jurisdictional conflict and inconsistency lies in the work of the ECCJ. Although, the responsibility for providing mechanisms to promote institutional balance and symmetry lies with the Authority as the main driver of integration in ECOWAS, it can be deduced from the discourse that ECOWAS institutions can contribute to balance and symmetry in their practices and procedures.

The overall conclusion from this chapter therefore is that the ECOWAS human rights regime is relevant and adds value to the African human rights system. However, support for the continued use of the regime would depend on the fact that the regime develops mechanisms to enable it complement rather than disrupt the national and continental components of the existing human rights architecture. As currently operational, the regime lacks those balancing mechanisms and faces a risk of resistance from other actors in the field. Thus, while the ECOWAS human rights regime is a model that can be recommended for other subregions in Africa, its export value depends on some modification that provides the balancing mechanisms that are presently lacking.