



Chapter Five

Insights from beyond the continent: human rights in the European Union

5.1 Introduction
5.2 The European Union in context
5.3 The evolution of human rights in the EU Constitutional framework: activism or illegality?
5.3.1 Judicial origins for Community human rights competence
5.3.1.1 Legal consequences of ECJ action in the field of human rights
5.3.2 Treaty foundations for Community human rights competence
5.4 Current human rights practice: addressing issues of overlap and organisational conflicts
5.4.1 Community standard-setting in the field of human rights
5.4.1.1 The ECHR
5.4.1.2 The Workers' Charter
5.4.1.3 The EU Charter of Fundamental Rights
5.4.2 Judicial protection of rights
5.4.2.1 Individual Access to the ECJ
5.4.2.2 Applicable sources of human rights standards
5.4.2.3 Use of ECtHR Case law
5.4.2.4 Nature of human rights protection before the ECJ
5.4.2.5 The scope of the ECJ human rights protection
5.4.3 Non-judicial protection: observation and monitoring
5.4.3.1 The human rights work of the European Parliament
5.4.3.2 The human rights work of the European Commission
5.4.3.3 The Fundamental Rights Agency
5.5 Mechanisms for maintaining intra- and inter-organisational balance in human rights practice
5.5.1 The principle of limited competence
5.5.2 The principle of subsidiarity
5.5.3 Cooperation and coordination
5.6 Similarities, dissimilarities and insights
5.7 Interim conclusion

5.1 Introduction

In the preceding chapters, this study has shown that there is a budding human rights regime within the existing treaty framework of ECOWAS. Although it has been argued that the regime finds legitimacy in a contextualised interpretation of the ECOWAS Treaty, the point has also been made that human rights realisation within the framework of economic integration needs to develop mechanisms to enhance complementary co-existence with traditional human rights structures in Africa. In other words, the ECOWAS human rights regime is peculiar in the African human rights architecture. The peculiarity of human rights realisation in the ECOWAS framework possibly arises because of the common understanding that the organisation was founded to pursue the improvement of living standards through economic integration. Accordingly, some would contend that human rights realisation constitutes a peripheral if not unnecessary part of the agenda of an organisation like ECOWAS. Naturally, the novelty of REC involvement in the field of human rights contributes to amplifying the concerns that emerge. Considering that ECOWAS arguably has the most advanced practice within Africa in the field of human rights, its practice, processes and procedures stand as a model for other RECs in the continent. However, as the ECOWAS practice is also relatively new, the model that it presents is still in a formative stage and still grapples with some challenges.

While the ECOWAS model appears to be the most advanced in Africa, it is certainly not the only model that exists. The European Union (EU), which is a much older economic integration initiative, has in the course of its history also found itself drawn into the field of human rights. Thus, it would be expected that some of the concerns and challenges linked with the ECOWAS practice may have arisen or still exist in relation to the EU practice. Should this be a correct assumption, it might be beneficial to investigate the processes and mechanisms developed by the EU to tackle those challenges. Further, as previously noted, the wealth of experience, the rich jurisprudence and the scope of scholarly attention that has been given to the EU and its human rights practice make the EU an attractive comparator for emerging systems. Thus, this chapter seeks to examine the EU practice in the field of human rights. The aim of the chapter is to find out if there is an EU model in this field to serve as comparator by which the ECOWAS model can be measured for best practices and shortcomings. The chapter does not pretend to be a comprehensive study of the EU

human rights practice and will be restricted to the aspects that are relevant for the purposes identified.

In order to achieve its objective, this chapter is divided into five broad sections. The present section is followed by a brief history of the EU that contextualises the discourse. In the third section, the evolution of human rights in the constitutional framework of the EU is discussed by looking at the judicial origins and the subsequent treaty foundations for human rights in the EU. The legal consequences of these origins are also considered in this section. The current human rights practice of the EU is considered next, with a focus on the issues of overlap and jurisdictional conflict that emerge from the EU's intra-organisational relationship with its member states and its inter-organisational relationship with the Council of Europe.⁷⁴³ The human rights practice of the EU is considered under three broad sub-headings: human rights standard-setting, judicial protection and non-judicial protection of rights. Relationship-regulating mechanisms identified in the human rights practice of the EU are extracted and discussed separately in the section preceding the conclusion of this chapter. Although, the differences between the EU and ECOWAS human rights practices are pointed out in the entire chapter as they emerge, the section preceding the interim conclusion reiterates the main differences between the two models. The chapter concludes that certain mechanisms applied by the EU human rights regime would be useful for shaping the complementary value of the ECOWAS human rights regime if adapted for application in that regime.

5.2 The European Union in context

Following the destruction caused by the World Wars and in view of the role played by European states in those wars, at the end of the Second World War, Europe found a

⁷⁴³ The Council of Europe was the platform upon which the European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 1950. It is thus regarded as the main framework for human rights protection in Europe. In that regard, it compares to the (O) AU and the African Charter in Africa. While the Organisation for Security and Cooperation in Europe (OSCE) is another international organisation operating in Europe that is involved in the field of human rights, the OSCE will not be included in the discussion in this chapter. Although as HJ Steiner, P Alston and R Goodman (2007) *International human rights in context* (3rd ed) 926 note, the OSCE has transformed from an 'East-West debating forum ... into an organisation designed to promote respect for a broadly defined range of human rights', there are three reasons for excluding it in this discourse. First, there is no equivalent institution in Africa vis-à-vis ECOWAS. Secondly, the OSCE does not have a binding human rights instrument and therefore does not pose the kind of threat to the EU that the structures of the Council of Europe would pose. Thirdly, the focus of the OSCE is apparently more in Eastern Europe than in Western Europe.

need to congregate to chart a course for its future. A common conclusion that came out of the different meetings of European leaders of the time was that progress in Europe lay in forging unification by some means or a ‘plurality of complementary ways’ aimed at a reconfiguration of its nation-states ‘to avoid internal repression and external aggression’.⁷⁴⁴ Considering that the needs to rebuild economies and to engage the root causes of repression and aggression were dissimilar to some extent, the choice was to undertake a ‘plurality of complementary ways’ for the purpose of rebuilding Europe. Against this background the Council of Europe (CoE) and the framework for the EU as it is known today were two in a host of organisations that were founded in Europe in the early 20th century. Thus, it is posited by some role-players that the CoE and the EU ‘were products of the same idea, the same spirit and the same ambition’.⁷⁴⁵ With the CoE focusing largely on the protection of human rights and the original organisations that formed the EU concentrating on aspects of economic integration, ‘parallel regimes’ on the basis of the two organisations were created in Europe.⁷⁴⁶

The pursuit of European economic integration began with the adoption in 1952 of the Treaty of Paris for the establishment of the European Coal and Steel Community (ECSC).⁷⁴⁷ Conceived originally to encourage unification of the coal and steel industries of participating countries and to create a common market for coal and steel, the ECSC was scheduled to operate till July 2002.⁷⁴⁸ Through the common market, the ECSC was expected to ‘contribute ... to economic expansion, growth of employment and a rising standard of living in the member states’.⁷⁴⁹ Around 1956, negotiations were concluded for the adoption of two new treaties in Europe for the establishment of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). In 1957, the Treaties of the EEC and Euratom

⁷⁴⁴ G Quinn, ‘The European Union and the Council of Europe on the issue of human rights: Twins separated at birth?’ (2001) 46 *McGill Law Journal* 849, 858

⁷⁴⁵ J Juncker ‘European Union: A sole ambition for the European continent’ Report presented to the attention of the heads of state and government of the member states of the Council of Europe on 11 April 2006, 2. Juncker presented this report in his capacity as Prime Minister of Luxembourg.

⁷⁴⁶ M Brosig, ‘Human rights in Europe: An Introduction’ in M Brosig (ed.) (2006) 18.

⁷⁴⁷ Steiner *et al* (2007) 1014. The founding members of the ECSC were Belgium, Germany, France, Italy, Luxembourg and the Netherlands. The Treaty of the ECSC was concluded on 18 April in Paris, France and entered into force on 23 July 1952.

⁷⁴⁸ AM Arnall, AA Dashwood, MG Ross & DA Wyatt, (2000) *European Union* (4th ed) 3-4.

⁷⁴⁹ Art 2 of the ECSC Treaty. See also K Lenarts & P Van Nuffel, R Bray (ed) (2005) *Constitutional Law of the EU* 80.

were signed in Rome, Italy.⁷⁵⁰ One similarity in the agenda of the ECSC on the one hand and the EEC and Euratom on the other hand was the objective of contributing to raising the standard of living in the member states of these organisations through engaging in economic integration and the promotion of different forms of economic activities.⁷⁵¹ Although the objective of integrating to raise standard of living may be seen as tilting towards some form of social-economic rights, political union and protection of human rights were expressly excluded from these founding treaties.⁷⁵²

Over a series of amendments to the treaties, expansion of activities carried out under the platform of the European organisations and decline of independent activities under Euratom, the EEC and Euratom merged to become the European Community (EC).⁷⁵³ It was on the framework of the ECSC and the EC that the EU was created in 1992 with the adoption of the Treaty of the EU (TEU) in Maastricht, The Netherlands.⁷⁵⁴ Although the TEU modified the original treaties, these treaties remained intact as the EC Treaty. Thus, the TEU is built on three so-called ‘pillars’: the EC, which is the first pillar, the Common Foreign and Security Policy (CFSP), the second pillar and the Police and Judicial Cooperation in Criminal Matters (PJCC), which is the third pillar.⁷⁵⁵ Under this arrangement, the EC or first pillar ‘embodies the Community jurisdiction in its most developed form’ as it represents the supranational aspect of the EU.⁷⁵⁶ With respect to the second and third pillars, supranationality does not apply as member states of the EU retained sovereign powers over the matters under these pillars, opting for intergovernmental cooperation in these areas.⁷⁵⁷

Although the TEU retains the Treaty of the EC and by extension, the economic objectives of the EC, the EU has additional objectives that go beyond those contained

⁷⁵⁰ The two treaties came into force on 1 January 1958. Arnall *et al* (2000) 7.

⁷⁵¹ See art 1 of the Euratom Treaty. Also see Lenarts & Van Nuffel (2005) 80.

⁷⁵² PP Craig & G de Búrca (2003) *EU Law, text, cases and materials* 380 -381.

⁷⁵³ KD Borchardt, (1999) *The ABC of Community law* European Documentation, European Communities, 18 holds the view that changing from the EEC to the EC is a reflection of transformation from a strictly economic community to a political integration scheme.

⁷⁵⁴ The TEU entered into force on 1 November 1993.

⁷⁵⁵ See Mathijsen (2004) 3. Also see A Rosas ‘The EU and International Human Rights Instruments’ in Kronenberger V (ed) (2001)*The European Union and the international legal order: discord or harmony* 60.

⁷⁵⁶ Borchardt (1999) 20. In this supranational character, the EC is the platform for exercising the limited sovereign powers transferred by member states to the organisation. Currently labeled ‘Community law’, the institutions of the organisation creates law that directly applies in member states and takes precedence over national law.

⁷⁵⁷ Mathijsen (2004) 5.

in the EC Treaty. These objectives include promoting economic and social progress, which is balanced and sustainable, asserting identity on the international scene through implementation of the CFSP, strengthening protection of the rights and interests of citizens of the Union, maintaining freedom, security and justice in the Union and maintaining the *acquis communautaire*.⁷⁵⁸ Despite the added objectives, the EC remains distinct from the other two pillars and its main objective remains economic. To achieve this objective, the EC Treaty envisages the employment of instruments such as the creation of a common market and the establishment of a monetary union.⁷⁵⁹ The task of actualising the project of the EC resides in the Community and its institutions as distinct from the member states. Notwithstanding that the institutions of the EC are also the institutions of the EU, the institutions continue to play a supranational role under the EC Treaty. In that regard, the EC exercises competence in a ‘functionality limited’ manner in relation to objectives of the EC.⁷⁶⁰ Considering that there is no plan to merge the EU or its activities with the CoE or any other European international organisation, some dissimilarity exists as between the EU and African RECs like ECOWAS that are recognised as building blocks for the AEC. Notwithstanding this difference, the questions of intra- and inter-organisational relationship in the EU and in ECOWAS are fairly similar and thus justify this inquiry. The EU will be used in this study to represent the EC in relation to the strict processes and procedures of economic integration and the study will not deal with the second and third pillars of the EU. However, where appropriate, the term ‘EC’ would also be employed.

5.3 The evolution of human rights in the EU Constitutional framework: activism or illegality?

Notwithstanding the suggestion that European unification was partly necessitated by the need to put an end to armed conflicts related to abuse of power in the countries of Europe, the promotion and protection of human rights within the framework of the EU did not originate from a preconceived and well thought-out process. Some commentators are in agreement that human rights realisation had no place in the

⁷⁵⁸ See art B in the TEU.

⁷⁵⁹ Lenarts & Van Nuffel (2005) 82.

⁷⁶⁰ Art 5 of the EC Treaty. See also Lenarts and Van Nuffel (2005) 80.

original founding treaties of the EU.⁷⁶¹ Just as no provision was made for human rights in the Treaty frameworks of the original communities, so was no ‘mechanism of system ... defined’ for that purpose.⁷⁶² Some have suggested that the failure to include human rights in the founding treaties can be explained by the fact that ‘at the time of their adoption, the economic integration undertaken by the six founding members of the Communities appeared a matter completely unrelated to that of fundamental rights’.⁷⁶³ Others contend that non-inclusion was understandable since the EC was formed strictly to enable member states to achieve economic integration.⁷⁶⁴ Others argue that non-inclusion was predicated on a conscious decision to avoid the fields of politics.⁷⁶⁵ However it is explained, the unshakable point is that human rights was not included in the founding treaties and the EU was set up for the specific purpose of economic integration. Thus, human rights in the original treaty framework of the EU was not significantly different from the ECOWAS 1975 Treaty regime.

While the views already considered seem to be based on the understanding that human rights realisation was excluded from the founding treaties mainly because it was not thought to be relevant for the pursuit of economic integration, there are other views that tow a slightly different line. Betten and Grief for example seem, to be of the view that exclusion of human rights in the founding treaties can be explained on the basis of the need to separate the focus of the different international organisations that were established in Europe.⁷⁶⁶ Based on the fact that the idea was considered and rejected, they contend that the decision to exclude human rights was not an oversight but the conscious choice of the drafters of the founding treaties.⁷⁶⁷ For them, two main reasons account for the absence of human rights in the original EC treaties. The one reason is the belief that economic integration had no potential to affect the enjoyment

⁷⁶¹ JM Perez de Nanclares ‘The protection of human rights in the European Union’ in Isa GF & de Feyter K (eds) (2009) *International Human Rights Law in a Global Context* 778; A Tizzano ‘The Role of the ECJ in the Protection of Fundamental Rights’ in Arnulf A, Eeckhout P & Tridimas T (eds.) (2008) *Continuity and Change in EU Law* 126.

⁷⁶² Perez de Nanclares (2009) 780.

⁷⁶³ Tizzano (2008) 126.

⁷⁶⁴ R Nuyens ‘The Benefit of the EU Fundamental Rights within Europe’s Human Rights Regime: Are the EU and the Council of Europe clashing on their human rights protection structures?’ (2007) unpublished long essay (available at http://essay.utwente.nl/702/i/scriptie_Nuijens.pdf) 32.

⁷⁶⁵ Quinn (2001) 858.

⁷⁶⁶ L Betten & N Grief (1998) *EU law and human rights* 53.

⁷⁶⁷ As above.

of human rights and the other is that the processes of the CoE could adequately cover the need for international protection of human rights in Europe.⁷⁶⁸ Consequently, the question arises whether there is need for a new human rights regime in the face of a prior, dedicated regional human rights regime. This again, is not different from the complications previously linked to the budding ECOWAS human rights regime. Alston lends indirect support to this view as he holds the opinion that confidence in the sufficiency of human rights protection under the ECHR and the UDHR 'enabled the work of building a European community to proceed without a separate human rights foundation'.⁷⁶⁹

The salient points in the two schools of explanations for the exclusion of human rights from the original treaty documents are fundamental for analysing the subsequent evolution of a human rights regime in the EU framework. First, if it is accepted that irrelevance of human rights realisation in the context of economic integration justified a deliberate decision to exclude human rights, it may be necessary to interrogate the justification and the legality of any subsequent addition of such a regime in the EU framework. Secondly, in the face of the almost overwhelming success of the ECHR human rights protection regime and the laudable developments in the UN human rights regime, confidence in their sufficiency ought to have increased in the latter years of the EC/EU. It therefore leaves open the question as to the need for a regime in the EU framework and whether there are potentials for conflict between the existing regimes and the subsequent EU human rights regime.

In what appears to be a reaction to the perception that economic integration as envisaged under the EU would not have the potential to impact on the rights of citizens of the member states, Perez de Nanclares has argued that there is now some reasons to warrant entry into the field of human rights. He explains that the growth of Community law under the EU and increasing powers exercised by the EU and its institutions resulted in direct impact of EU laws and mechanisms on citizens thereby outlining the risk of rights violation by the EU.⁷⁷⁰ This explanation adds to Alston's earlier argument that 'single market, a single currency and the imminent prospect of a

⁷⁶⁸ As above.

⁷⁶⁹ P Alston (ed) (1999) *The EU and human rights* 3.

⁷⁷⁰ Perez de Nanclares (2009) 781.

greatly enlarged Union, all have major human rights implications'.⁷⁷¹ Perhaps a more detailed explanation is that given by Brosig who identifies at least four reasons to justify the need for an elaborate EU involvement in the field of human rights. For Brosig, the fear that the transfer of governmental powers to the EU institutions by member states and its potential to impact negatively on domestic protection of human rights in the member states provides the first justification for a EU human rights regime.⁷⁷² A second justification relates to the fact that in the third pillar, intergovernmental cooperation on issues of justice and home affairs allows EU laws to affect aspects of human rights.⁷⁷³ Thirdly, Brosig contends that the EU has become an international actor in the mould of a nation-state and therefore requires a human rights protection system within its constitutional order.⁷⁷⁴ Finally, with specific reference to an EU catalogue of rights, Brosig's claim is that such a catalogue becomes a tool for integrating states upon common European values of rights protection.⁷⁷⁵

The first of Brosig's justifications does not differ significantly from the explanations proffered by Perez de Nanclares and Alston respectively. It centres on the need to control the exercise of governmental powers transferred to an international organisation that has the potential to directly affect relations within the domestic sphere. It is therefore a justification that the ECOWAS system can relate to, especially since after the declaration of intent and the execution of expanded supranational competence in favour of ECOWAS. However, it needs to be borne in mind that the justifications for ECOWAS involvement in the field of human rights goes beyond the need to control the exercise of governmental powers and touches on the need to provide a conducive, stable and secure environment for integration.

Against the background of these justifications for the introduction of human rights in the EU framework, it is almost generally acknowledged that a need exists for human rights monitoring in the context of European economic integration. However, the nature of its evolution and its practice have laid the ground for evaluating the legality

⁷⁷¹ See Alston's views as previously cited above, Alston (1999) 4.

⁷⁷² Brosig (2006) 22.

⁷⁷³ As above.

⁷⁷⁴ As above.

⁷⁷⁵ As above

of the process and the constitutional and treaty implications that arose in the face of the principles of limited competence and conferred powers. The evolution of the EU's human rights regime can be split into two important phases with different treaty implications. In relation to the first part, the question arises whether the evolution of human rights in the EU was the result of activism or illegality on the part of the judicial organ of the EU. Each of these phases is relevant for evaluating the legal implications of the emerging subregional human rights regimes in Africa. The next section of the study will set out and analyse these phases.

5.3.1 Judicial origins for Community human rights competence

An outstanding feature of the EU human rights regime is that protection of human rights under the Community framework was not first introduced by member states or the political institutions of the EU but by the slow and tedious work of the European Court of Justice (ECJ). The ECJ's acceptance of the need to protect rights, albeit, strictly in the character of fundamental rights could well be referred to as the first phase of the evolution of an EU regime for human rights protection. In this regard, it is acknowledged that the ECJ 'has shown leadership in the area of protecting human rights',⁷⁷⁶ and thus, 'has done most to create a system for the protection of fundamental rights within the EU'.⁷⁷⁷ Essentially, therefore, 'the whole foundations [of the protection of fundamental rights at the EU level] were the work of the Court'.⁷⁷⁸ Bearing in mind that this was carried out without constitutive treaty or other legislative foundation, the EU human rights regime is practically a judicially- driven regime.

In the early years of the original communities, tension between the domestic legal orders of the member states and the then recently emerging supranational order prompted the ECJ to assert what has become known as the principles of direct effect and primacy of Community law. In the 1963 case of *Van Gend & Loos*,⁷⁷⁹ the ECJ introduced the idea that member states had limited their sovereignty in favour of the

⁷⁷⁶ EF Defies 'Human Rights and the European Union: Who decides? Possible conflicts between the European Court of Justice and the European Court of Human Rights' (2000 – 2001) 19 *Dick International Law Journal* 301, 331.

⁷⁷⁷ Perez de Nanclares (2009) 782.

⁷⁷⁸ Tizzano (2008) 125 citing F Jacobs, 'Human rights in the European Union: the role of the Court of Justice' (2001) 26 *European Law Review* 337.

⁷⁷⁹ Case 26/62 *van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) ECR 1.

organisation in the specific fields covered by Community law. The decision in *Van Gend & Loos* was closely followed by the decision in *Costa v ENEL*,⁷⁸⁰ where the ECJ emphasised that the EEC Treaty had created a new legal order which was an integral part of the domestic legal systems and enjoyed primacy over national laws. The entry of fundamental rights protection into the discourse of Community law was apparently necessitated by the need to protect the efficacy of the principles of direct effect and primacy of Community law as instruments for effective economic integration.⁷⁸¹ This explanation may be relevant in analysing whether there was justification for the ECJ's engagement in a field that had been deliberately excluded from the original treaties and by extension, the agenda of the EU.

The principles of direct effect and primacy of Community law were naturally translated to mean that Community law was supreme within its sphere. To the extent that national laws that guarantee human rights were subordinate to Community law, yet Community law did not provide any guarantees for the protection of rights, an impression existed that the citizens of member states were left vulnerable. This applied essentially with regard to EC legislations and the acts of Community institutions. The resistance of national courts to the usurpation of rights protection guaranteed by national (constitutional) law threatened the supremacy of Community law and constituted the 'initial trigger' for the ECJ's acceptance of a duty to protect fundamental rights.⁷⁸² To fill the void created by the absence of constituent treaty foundation for human rights and preserve the supremacy of Community law, the ECJ had to declare that respect for fundamental rights was an important aspect of the general principles of Community law that was incumbent on the Court to apply.⁷⁸³ Thus, it would be noticed that whereas a rationale for judicial protection of human rights by the ECCJ in the ECOWAS model is the perceived inadequacy of national judicial protection, the ECJ involvement in human rights protection was necessitated by the desire on the part of national courts, especially the German courts, to ensure that the level of protection is not lowered by the integration process.

⁷⁸⁰ Case 6/64 *Costa/ENEL* (1964) ECR 1251.

⁷⁸¹ Tizzano (2008) 126.

⁷⁸² Craig & de Búrca (2007) 381; de Búrca 'Fundamental human rights and the reach of EC Law', (1993) 13 *Oxford Journal of Legal Studies* 283, 306.

⁷⁸³ D Shelton 'The boundaries of human rights jurisdiction in Europe' (2003) 13 *Duke Journal of Comparative and International Law*, 111; L Scheeck 'The Relationship between the European Courts and Integration through Human Rights' (2005) *ZaöRV* 837, 838

It might be necessary to note that the ECJ has not always been eager to ‘read in’ the duty to protect human rights or even fundamental rights as part of its competence. Tizzano for example records that the ECJ previously resisted the view that fundamental rights protection was relevant for applying the original treaties.⁷⁸⁴ Thus, in *Geitling v High Authority*⁷⁸⁵ the ECJ refused to accept arguments hinged on the protection of the right to property under German law on the grounds that its duty was to promote Community law which did not contain such guarantees of rights. Tizzano interprets this decision to represent a perception on the part of the ECJ that it ‘lacked competence to enforce fundamental rights recognised in national systems’.⁷⁸⁶ The ECJ’s line of reasoning is arguably justified from a positivist law point of view and is similar to the approach subsequently adopted by the ECCJ in deciding the *Olajide* case.⁷⁸⁷ However, it raised a gap in the structure of judicial protection for human rights that Europe had erected because in the event that Community law or its application resulted in the violation of rights, individuals lacked avenues for judicial vindication.⁷⁸⁸ It was in *Erich Stauder v City of Ulm Sozialamt (Stauder)*⁷⁸⁹ that the ECJ finally forced a right protection agenda on the EU when it concluded that fundamental rights formed part of the Community law that the Court was bound to apply.

Following the *Stauder* decision, national courts of EU member states apparently relaxed in their threat to challenge the supremacy of Community law. The German Constitutional Court, which was at the forefront of some of the challenges to the supremacy of Community, decided in 1986 that the protection of rights guaranteed by the ECJ’s jurisprudence and practice was equivalent to the protection available under German constitutional law and therefore sufficient to allow the German Court drop its role as guardian of the rights of German citizens against intrusion from Community law.⁷⁹⁰ It can be argued that the response of the German national court is an indication that the ECJ’s intervention was fruitful. It should be emphasised that up till this point,

⁷⁸⁴ Tizzano (2008) 126.

⁷⁸⁵ Joined cases 36-38/59 and 40/59 [1960] ECR 857,889.

⁷⁸⁶ Tizzano (2008) 126.

⁷⁸⁷ (n 634 above) (as discussed in chap 4 of this study).

⁷⁸⁸ Betten and Grief (1998) 55.

⁷⁸⁹ Case 29/69 *Erich Stauder v City of Ulm Sozialamt* [1969] ECR 419.

⁷⁹⁰ Scheeck (2005) 850.

protection of rights was on the basis that rights were part of the general principles of Community law, upon inspiration drawn from ‘constitutional traditions common to member states’ and international instruments on which member states have collaborated as signatories. The concept of rights as applied by the Court was of ‘fundamental rights’ rather than ‘human rights’,⁷⁹¹ and its application was for the purpose of scrutinising Community law and its implementation.⁷⁹² A persuasive conclusion is that although the introduction of the concept of fundamental rights as general principles of Community law provided a bulwark against potential violation arising from Community law, ‘the Court of Justice did not codify human rights as legal rules that formed an inherent part of the Community legal system’.⁷⁹³ Thus, technically, the ECJ did not legislate for the EC but exercised innovation and creativity within its allowable jurisdiction.

At least two sets of issues are discernable from the judicial origins of the human rights in the EU. The first relates to the implications of the evolution for effective and convenient realisation of rights. The second and more fundamental issue touches on the legality of the process of human rights in the EU. With respect to the effectiveness of a judicially-driven human rights regime in the EU, the ECJ practice of applying rights from a variety of sources in the absence of an EU catalogue of rights created a degree of uncertainty as to the exact rights that could be covered under the EU regime.⁷⁹⁴ The ‘judge-made human rights’ regime and its non-formulation of ‘a comprehensive set of rights’, it is argued, resulted in the reduction of transparency in the system and consequently created difficulties for the enjoyment of rights.⁷⁹⁵ These views are based on the fact that, in introducing the concept of ‘fundamental rights as an integral part of Community law’, the ECJ in the *Stauder* case did not indicate the scope of rights that could be protected by Community law. Related to this concern is the question of ascertaining the standard by which rights protection can or should have been pursued under the concept of fundamental law as part of Community law.⁷⁹⁶ A significant difference between this judicial origin of the EU human rights

⁷⁹¹ Rosas (2001) 55.

⁷⁹² Tizzano (2008) 127.

⁷⁹³ Perez de Nnlaclares (2009) 784.

⁷⁹⁴ As above.

⁷⁹⁵ J Kingston (2003) Human Rights and the European Union – An evolving system’ in MC Lucey and C Keville (eds.) *Irish Perspectives on EC Law* 277.

⁷⁹⁶ Perez de Nnlaclares (2009) 784.

protection regime and the ECOWAS model can thus be found in the fact that human rights was introduced into ECOWAS integration discourse by the treaty-making process of ECOWAS member states. The human rights regime in ECOWAS is therefore legislatively-driven. The exercise of human rights mandate by the ECCJ is also the result of legislative or treaty-making processes.

It would appear that some of the concerns raised were addressed to some extent by the ECJ itself through the development of its fundamental rights jurisprudence. In its decision in *Nold v Commission of the European Communities*,⁷⁹⁷ the Court built upon the concept of Community based fundamental rights by adding that relevant international treaties on human rights were as much a source of inspiration for its practice as were the common constitutional traditions of the member states. While this formulation increased the pool of human rights source base from which the ECJ could draw inspiration, it would not have done much for legal certainty in determining what rights are covered by Community law. In a subsequent decision in *Rutili v Minister for the Interior*,⁷⁹⁸ the ECJ clarified that the ECHR specifically formed a source of inspiration for its application of rights. The specific mention of the ECHR improves legal certainty, yet it reinforces the question of centrality of human rights source documents as between the EU internally developed sources and the ECHR. It is also suggested that a further ‘legal-technical’ problem of delimiting the confines of protection is evident from the nature of the regime.⁷⁹⁹

In sum, despite the benefits that come with the pioneering efforts of the ECJ in erecting a human rights regime upon the EU Community framework, the challenges of legal uncertainty and the consequent arbitrariness that surrounds protection of human rights could not be wished away. Some commentators capture it aptly by stating that ‘no matter how carefully it may be attuned to the need to ensure full respect of fundamental rights within the Community legal order, [the ECJ] cannot make up for the absence of the necessary legal and policy commitments on the part of other institutions’.⁸⁰⁰ However, it is this work of the ECJ that laid the foundation for

⁷⁹⁷ Case 4/73 *Nold v Commission of the European Communities* [1974] ECR 491.

⁷⁹⁸ Case 36/75 *Rutili v Minister for the Interior* (1975) ECR 1219.

⁷⁹⁹ Perez de Nanclares (2009) 787.

⁸⁰⁰ Alston and Weiler ‘An “ever closer union” in need of a human rights policy: The European Union and human rights’ in Alston (ed) (1999) 12.

subsequent EU engagement in the field of human right. As the discourse in chapter four of this study has shown, lack of certainty in relation to human rights source document can also be raised in the ECOWAS legislatively-driven rights regime. However, there is no question that the ECOWAS regime should not suffer a challenge of legality. Against the fact of ECJ foundation for the EU human rights regime, it needs to be determined whether such a level of judicial activism is justifiable at international law.

5.3.1.1 Legal consequences of ECJ action in the field of human rights

From the perspective of the law of international institutions, the question is whether there was legality in the ECJ's judicial introduction of rights protection into the EU framework at a time when treaty foundation in that regard was completely non-existent. There appears to be some view that even though the duty assumed unilaterally by the ECJ did not appear to be predicated upon any clear objective in the treaties, that line of action was 'necessary to enable the Community to carry out its functions'.⁸⁰¹ Hence, 'respect for and protection of human rights were ... conceived as an integral, inherent transverse principle forming part of all objectives, functions and powers of the Community'.⁸⁰² Put differently, where the protection of human rights is a vital condition for building an environment upon which economic integration can be pursued, institutions of the relevant organisation may engage in those activities even in the absence of treaty foundation. Such a view fits with some of the justification for ECOWAS involvement in the field of human rights. Bearing in mind that such a position, on face value, contradicts the principles of attributed competence and conferred powers, it needs to be interrogated whether theory and practice in the field of the law of international institutions supports this position.

An important manifestation of the concept of sovereignty in relation to international organisation is that drafters of constitutive documents of international organisations generally refrain from granting wide powers to organs and institutions of these organisations to expand objectives of the organisation. Thus, the power to expand objectives of organisations remains with the authorities of the converging states to

⁸⁰¹ JHH Weiler & SC Fries 'A human rights policy for the European Community and Union: The question of competences' in Alston (ed) (1999)156 – 157.

⁸⁰² As above.

exercise through the process of treaty amendment. Similarly, the functions, competences and instruments to be employed for the purpose of achieving organisational objectives are often laid out in the constitutive documents. However, in certain cases, constitutive documents permit institutions and organs of international organisations to employ ‘*all* reasonably available means’ towards achieving the objectives agreed upon. In the absence of such *omnibus* provisions, it is contended, ‘it is presumed according to traditional conceptions that they must restrict themselves to the use of those operative mechanisms specified in the instrument even though other and more effective mechanisms become available after the organisation’s establishment’.⁸⁰³

Where the means authorised for the realisation of organisational objectives are restrictively set out or there is very little room for manoeuvre on the basis of an omnibus provision, the option left for the expansion of functions, competence and powers should be by way of treaty amendment at the discretion of the member states of the organisation. Short of treaty amendment, the other seemingly accepted means of adapting an international organisation is by liberal interpretation of the constitutive documents of the organisation. In this regard, the Vienna Convention on the Law of Treaties (VCLT) provides statutory basis for contextual interpretation of treaties.⁸⁰⁴ Admittedly, this gives room for the organs saddled with the responsibility of interpretation to exercise wide discretion in attempt to adapt an organisation to current realities. Normally, the task of interpretation is borne by the judicial or quasi-judicial organs engaging in judicial interpretation. Judicial interpretation, it is argued, can take either of two forms. In the one sense, interpretation is done in the context of locating the meaning of a text ‘so that interpretative statements can be true or false depending on whether or not they reflect that meaning’. In the other sense, interpretation is stretched to the extent of creating an otherwise absent meaning in the text.⁸⁰⁵ Thus, as Hexner had noted, ‘any normative text is ...open to more than one interpretation. It

⁸⁰³ EP Hexner ‘Teleological interpretation of basic instruments of public international organizations’ in Engel S (ed), (1964) *Law, state and international legal order* 122.

⁸⁰⁴ Art 31 of the VCLT.

⁸⁰⁵ IL Vidal ‘Interpretation and judicial discretion’ in Beltran JF & MN Mora (eds) (2006) *Law, politics and morality: European perspectives II* 90.

belongs, however, to the essence of a normative text that its interpretative radius, the range of the possible meanings attributable to it, be limited'.⁸⁰⁶

The sense that emerges from the views on judicial interpretation appears to be that while it is conceded that interpreting organs do have some discretion, such discretion needs to be cautiously exercised. Yet Hexner acknowledges that there may be a need to expand 'the interpretative range of a provision ... in the process of time in conformity with changing circumstances'.⁸⁰⁷ He finds support in Kelsen who stressed 'that the law is open to more than one interpretation is certainly detrimental to legal security; but it has the advantage of making the law adaptable to changing circumstances, without the requirement of formal alteration'.⁸⁰⁸ For Hexner, such an extension of meaning outside of the 'interpretative range ... (of) an instrument involves a *modification* of the instrument in contrast to its interpretation'.⁸⁰⁹ Accordingly, it has to be accepted, albeit cautiously, that it is not unusual for interpretation of constitutive documents of international organisations to be stretched to the boundaries of modification of such documents. The question that is thrown up at this point is whether such practices are lawful.

Available opinion appears to be that expansive interpretation of constitutive documents tilting towards treaty modification is not totally unlawful under certain circumstances. Kelsen's position in this regard is to deny overwhelming constitutionality while acknowledging that treaty amendment need not always be done in strict compliance with pre-determined procedures laid out in the treaties. Basing his analysis on the Charter of the United Nations, Kelsen concludes that treaty modification may occur through interpretative application, which though not completely inconsistent with the law, tends to exceed the 'ascertainable intention' of treaty authors. By this means law can be dynamic in the face of difficulty or impossibility of treaty amendment.⁸¹⁰ In these cases, the operational position which may be loosely called a 'new law' comes into being riding on the back of violation of the 'old law' or legal position.

⁸⁰⁶ Hexner (1964) 123.

⁸⁰⁷ As above.

⁸⁰⁸ H Kelsen, (1950) *The Law of the United Nations* London, xiv - xv (as cited by Hexner (1964) 124.

⁸⁰⁹ Hexner (1964) 124.

⁸¹⁰ Kelsen (1950) xv.

Clearly, interpretative actions that ‘violate’ old laws ignite the principle of ‘*ex injuria jus non oritur* – law cannot originate in an illegal act’ but are accepted as an exception by which ‘a new law originates in the violation of old law’.⁸¹¹ Hexner contends that this is ‘an evolutionary method ... that is now in the process of being accepted by the community of nations as a subsidiary source of international law’.⁸¹² The justification seems to be that treaties sometimes need to be interpreted on a teleological basis to conform to what Sir Gerald Fitzmaurice terms ‘the theory of emergent purpose’.⁸¹³ A final word on this point would be to reiterate Hexner’s argument that a distinction has to be drawn between ‘(authorised) interpretative actions of an organ and its (unauthorised) modifying actions ... even in case the (unauthorised) modifying action is being “legitimised” by an approving attitude of the member states’.⁸¹⁴ This is because the ‘effect of a modification even if informally consented to by an “appropriate number” of member states cannot be regarded as equivalent to that of a formal amendment’ as such modification ‘will have to be regarded as temporary’.⁸¹⁵

It can be deduced from the views expressed above that subsequent ‘ratifying action’ by member states of an international organisation may legitimise modifying interpretation by a judicial arm. In this regard, subsequent action by the political institutions of the EU and acquiescence by member states may have served to legitimise the actions of the ECJ. A 1977 joint declaration by the political institutions of the EU suffices as ratifying action on the introduction of ‘fundamental rights as part of Community law’.⁸¹⁶ This has also been supported by further political declarations some of which were made by member states.⁸¹⁷ However, as already canvassed, such judicial modification has to be temporary. Hence, the first phase of the EU human rights protection project which was judicially driven developed in an uncoordinated manner and was saddled with uncertainties around its legality, scope and future. However, although it is the product of judicial activism, there is some grounds to argue that such activism was not unlawful and may be contemplated by international law. While it may have succeeded in the context of Europe, its

⁸¹¹ Kelsen (1950) 911 - 912.

⁸¹² Hexner (1964) 129.

⁸¹³ Hexner (1964) 129 -130.

⁸¹⁴ Hexner (1964) 124.

⁸¹⁵ Hexner (1964) 131.

⁸¹⁶ Nuyens (2007) 34; Alston and Weiler (1999)10.

⁸¹⁷ Perez de Nanclares (2007) 788.

qualification as an inspirational model in the African context is not so certain since there is a stronger likelihood of resistance to international judicial encroachment on state sovereignty by African states. Thus, its suitability as a model for African RECs would require further interrogation.

5.3.2 Treaty foundations for Community human rights competence

Despite the advancement in rights protection that was prompted by the ECJ's pioneering work in the EU legal framework, it was almost inevitable that the human rights regime had to find space within the EU constitutional framework in order to enhance legal certainty and transparency. While there did not appear to be any resistance from member states to the ECJ engineered human rights regime of the EU, several years of 'reading in' human rights set the stage for treaty amendments that finally put human rights protection within the EU treaty framework.

As already demonstrated, the original treaties of the EU did not mainstream human rights in the organisation's agenda. However, the treaties were not completely bereft of rights-related provisions. Although they were not couched as human rights provisions per se and were not used as such, certain articles in these early treaties contained provisions that had clear links to human rights protection.⁸¹⁸ As these isolated human rights-related provisions were not sufficient to base any viable human rights regime, especially in the face of the work of the ECJ, other EU institutions themselves found a need to call for some form of action to properly position human rights in the agenda of the organisation.⁸¹⁹ However, it was not until the 1980s that the first clear Treaty recognition for human rights appeared in the preamble to the Single European Act (SEA).⁸²⁰ In the preamble to the SEA, EU member states merely recorded their determination to 'work to promote democracy on the basis of the fundamental rights recognised in the ECHR', yet this was widely regarded as the starting point for grounding the EU's human rights regime on treaty foundation.⁸²¹

⁸¹⁸ See eg the old art 119 in the 1957 Treaty of the EEC. The rights mainly provided guarantee against discrimination. See also Quinn (2001) 860; R Rack and S Lausegger 'The Role of the European Parliament: Past and Future' in Alston (ed) (1999) 802.

⁸¹⁹ As Alston & Weiler (1999) 4 note, the EU Parliament and the EU Commission were involved in this regard.

⁸²⁰ See the preamble to the Single European Act [1986] OJ L 169/1. See Rack & Lausegger (1999) 802.

⁸²¹ Betten & Grief (1998) 62; Alston & Weiler (1999) 10.

The prominence given to such preambular provisions in the literature can perhaps be seen as an indication of the peripheral place that human rights had in the EU treaty framework.

Following the adoption of the Treaty of the European Union (TEU) at Maastricht in 1992, the EU began the process of actual consolidation of the work of the ECJ by giving clearer treaty foundation for human rights protection.⁸²² In the TEU, human rights were included in main body of a Community Treaty for the first time.⁸²³ In its article F(2) (renumbered article 6(2) in latter treaties), the TEU proclaimed that the EU shall respect fundamental rights as guaranteed by the ECHR and ‘as they result from the constitutional traditions common to the member states, as general principles of Community law’. Clearly, this was a codification of the position already popularised by the ECJ yet it was heralded as being ‘not only of great symbolic significance, but also clearly imposed a legal obligation upon the EU institutions’.⁸²⁴ It would be noted that article F(2) TEU is not included as an objective of the EU. Thus, the understanding that its inclusion translated into a legal obligation on the EU institutions could possibly be justified on the grounds that protecting rights was a necessary condition for the realisation of the objectives of the EU.

The progression of human rights within the EU treaty framework continued in a positive direction in the treaties of Amsterdam and Nice both of which amended the TEU to some extent.⁸²⁵ The Treaty of Amsterdam amended article F of the TEU by first replacing sub-article 1 which related to respect of national identities of member states with governments based on democratic principles. In the new provision which was renumbered article 6(1), EU member states affirmed that their Union ‘is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law’. It would be observed that in this provision, the EU moved from the concept of ‘fundamental rights’ as was consistently used by the ECJ to recognition of human rights as it is more commonly used. Further, the provision

⁸²² The Treaty of the European Union [1992] OJ C191/1 was signed on 7 February 1992 and entered into force on 1 November 1993.

⁸²³ Rack & Lausegger (1999) 803.

⁸²⁴ Tazzano (2008) 131. See also Shelton (2003) 113; Perez de Nanclares (2009) 789.

⁸²⁵ The Treaty of Amsterdam [1997] OJ C 340/1 was signed on 2 October 1997 and entered into force on 1 May 1999. The Treaty of Nice which was signed on 26 February 2001 and dealt essentially with institutional reforms only entered into force on 1 February 2003.

states in unequivocal terms that these are principles upon which the EU project is founded rather than objectives of the Union. Perhaps it is significant that at this point in its history, the EU has moved from a purely and strictly economic integration initiative to involve some form of political integration. The Treaty of Amsterdam retained article F(2) TEU as article 6(2) but made it justiciable by extending the jurisdiction of the ECJ to apply to that provision with regard to actions of the EU institutions.⁸²⁶ If the provisions are justiciable, it cannot be easily denied that the EU attaches legal weight to them even though they are not stated objectives of the Union. To the extent of providing for human rights protection as a principle for integration rather than an objective, the EU regime is no different from the ECOWAS regime. Arguably therefore, there is consistency in giving some legal status to statements of principles in treaties of international organisations.

The Treaty of Amsterdam takes the EU course of human rights further with the addition of a new article 7 which allows the EU to guarantee certain rights attached to EU membership in the event of a finding that ‘serious and persistent’ breaches of human rights occur in a member state. Whereas the protection of rights under the ECJ engineered regime was restricted to a negative protection of rights as against EU institutions and Community law, the new article 7 TEU arguably extends the horizon for human rights in the EU. As one commentator notes, the jurisdiction conferred on the Union by article 7 TEU is potentially expansive ‘as it could cover human rights violations ... committed by member states even in fields normally regarded as coming within their exclusive jurisdiction’.⁸²⁷ A significant aspect of article 7 TEU, as Rosas correctly points out, is that the standard by which potential violation is to be measured under the provision is article 6(1) which codifies respect for ‘human rights’ rather than the arguably narrower concept of ‘fundamental rights as general principles of community law’.⁸²⁸ This approach suggests an intention to take human rights protection beyond the narrow conceptualisation promoted by the ECJ both in terms of definition of the human rights as to be understood in the context of the EU and in terms of the coverage that is possible within the EU framework. In essence, it creates a regime that is comparable to the CoE and national regimes and that is not confined

⁸²⁶ Art K 7(7), Treaty of Amsterdam. See also Tizzano (2008) 131; Besson (2006) 344.

⁸²⁷ Kingston (2003) 280.

⁸²⁸ Rosas (2001) 60.

to rights necessarily protected only by economic concerns. The Treaty of Nice does not add much to the regime introduced by the Treaty of Amsterdam beyond amending the procedures for making the determination required in article 7 TEU.

In the Treaty of Lisbon, which aims at making the EU more democratic, human rights mainstreaming in EU constitutive documents went even further.⁸²⁹ The Treaty of Lisbon inserts a new preambular paragraph which refers to the EU drawing inspiration from concepts which have developed from ‘universal values of the inviolable and inalienable rights of the human person’. It then goes on to insert a new article 1a that affirms that the ‘Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’. However, in article 2 which follows and lays out the objectives of the Union, the only mention of human rights relates to a declaration to combat social exclusion and discrimination, promote social justice and protection, gender equality and protection of the rights of the child. The conclusion that can be drawn is that in as much as human rights protection has climbed in the treaty framework of the EU, it falls short of being a clear objective of the Union. However, all of these provisions cannot mean nothing and in this regard, the contention that legal obligations to protect rights arise from these treaty provisions cannot be ignored.

Apart from the apparently highly influential general provisions that have been used to demonstrate an obvious regime change in the field of human rights, some of these treaties contain other human rights-related provisions with actual and potential implication for human rights in the EU. Some of these include article 13 of the Consolidated Treaty establishing the European Community⁸³⁰ and article 181a of the Treaty of Nice. However, despite these general and specific provisions, some analysts seem to be in agreement that human rights remains outside the list of objectives of the EU and no general human rights competence can be found in the mandate of the EU and its institutions.⁸³¹ In fact, while some translate these treaty developments to mean encouragement for the ECJ to slightly extend its fundamental rights protection

⁸²⁹ The Treaty of Lisbon was signed on 13 December 2007 and had not entered into force as at June 2009.

⁸³⁰ [2002] OJ C 325/33.

⁸³¹ Brosig (2006) 19; Alston & Weiler (1999) 22.

jurisdiction,⁸³² others contend that the reference to fundamental rights in article 6(2) TEU does not provide European citizens with any practical right to invoke the provisions against states and provides no penalties for default.⁸³³ Others are convinced that the treaty developments notwithstanding, the fact that human rights protection did not make its way into the objectives enumerated in the treaties should mean that ‘national laws as they affect human rights remain outside Community reach so long as they do not impact Community laws or policies’.⁸³⁴ Considering the similarity between the EU Treaty regime in the field of human rights and the corresponding ECOWAS regime, these arguments can also be made against the ECOWAS regime. It has to be noted however, that these analysis were based on the treaties up to the Treaty of Nice.

Probably in response to critics who had argued that human rights protection under the EU could be greatly improved if the EU as an organisation acceded to the ECHR, calls for EU accession to the ECHR began to emerge within the EU institutions themselves.⁸³⁵ Prompted by these calls, the European Council referred the question of accession to the ECJ for its judicial opinion. In its opinion, the ECJ declared that such an accession would be of ‘constitutional significance’ and no existing provisions in the then EU Treaties could be provide sufficient legal basis for accession.⁸³⁶ The ECJ specifically considered article 308 TEC which is the Treaty’s ‘necessary and proper’ clause⁸³⁷ and concluded that it did not confer any general powers on institutions of the Community to enact rules or enter into treaty agreements in the field of human rights.⁸³⁸ Thus, it indicated that treaty amendment was required for such a far-reaching project. Debates have raged over the actual implication of this decision with the prevailing view being that the decision did not prohibit EU action in the area of human rights.⁸³⁹

⁸³² As above.

⁸³³ TC Stever ‘Protecting human rights in the European Union: An argument for treaty reform’ (1996 - 1997) 20 *Fordham International Law Journal* 919.

⁸³⁴ See eg Shelton (2003) 113.

⁸³⁵ The European Commission and the European Council were active in this regard.

⁸³⁶ See generally, Opinion 2/94 of March 1996.

⁸³⁷ Shelton (2003) 115.

⁸³⁸ As above.

⁸³⁹ See eg Rosas (2001) 64; Alston and Weiler (1999) 24.

In the face of the ECJ Opinion and the debate it sparked, article 6 of the Treaty of Lisbon is a clear statement by EU member states that human rights counts in the Union. In article 6, EU member states gave treaty status to the EU's Charter of Fundamental Rights,⁸⁴⁰ then went on to state that the 'Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'. This effectively removes any outstanding legal obstacles to EU adoption of the ECHR as a standard for human rights in the Union but does so setting out the condition that accession would not affect EU competences as already agreed upon. Clearly, human rights protection has travelled far in the EU and the improved developments in successive treaties are indications that member states of the EU have made a conscious transition from treaty regimes with no place for rights to a highly compliant regime. In such a legal environment there would be little room for second guessing the intentions of the EU member states in the field of rights protection. While the judicial origin of human rights in the EU sets it apart from the ECOWAS experience, the treaty bases for human rights in both models have been largely similar. The advancement made in the Treaty of Lisbon which is expected to enter into force sooner than later, takes the EU model farther than what obtains in the ECOWAS regime. However, the overall position would be that in so far as the realisation of human rights is recognised by member states of both organisations as principles that guide the integration process, such statement of principles carry some legal value and is sufficient for mainstreaming human rights in their activities.

5.4 Current human rights practice: addressing issues of overlap and organisational conflicts

Despite the debate on whether human rights protection in the EU falls short of being recognised as an objective of the Union and whether the EU lacks general competence to enact primary rules in the field of human rights, the EU has had a fairly long history in the field. In fact, it is not unusual to find allusions to a 'Community human rights system' in relation to EU human rights practice.⁸⁴¹ Isolated treaty provisions touching on aspects of human rights have been identified as 'basis for protection of

⁸⁴⁰ The EU Charter of Fundamental Rights is a non-binding instrument adopted in 2000.

⁸⁴¹ Eg Shelton (2003) 115.

certain rights'.⁸⁴² There is also belief that EU legislation in certain areas 'coincide with ... classic fundamental right' and such provisions should be applicable in favour of rights protection.⁸⁴³ All of these added to the progressive increment of general treaty provisions that mainstream human rights in the EU framework reinforce the assertion that there is a robust human rights practice in the EU. As such, some are not even convinced that the ECJ suggested at any point in its Opinion that human rights protection contradicted the objectives of the EU or that the Community lacked competence to legislate in the area of human rights.⁸⁴⁴ Perhaps the challenge that emerges then is to determine the scope and boundaries of the EU human rights practice vis-à-vis the member states and the CoE.⁸⁴⁵ Although it is possible to separate discussion on EU human rights practice vis-à-vis its member states from its practice in relation to the CoE, the EU itself does not appear to consciously make this distinction. Further, there is not enough separate inter- and intra-organisation human rights practice to warrant such an approach. Thus, just as the ECOWAS practice was considered as a single practice, the EU practice would be considered together.

An important aspect of the EU human rights regime is that the duty to protect rights is not confined to any single institution or body.⁸⁴⁶ Recognising that rights protection need not be confined to the judicial sphere even at the international level,⁸⁴⁷ the EU's practice in this field seems to spread across the work of its main institutions. In terms of policy monitoring, a duty to ensure compliance with human rights obligations has been attributed to the EU Parliament.⁸⁴⁸ Developments in the treaties have also been interpreted to mean an expansion of the ECJ's adjudicatory role in the field of human rights.⁸⁴⁹ In addition to these and the work of the other EU institutions, a Fundamental Rights Agency was established in 2007 to perform certain roles in the protection of rights in the EU.

⁸⁴² Nuyens (2007) 39 identifies arts 12 and 13 of the EC Treaty as grounds for the EU to address issues of discrimination.

⁸⁴³ Weiler & Fries (1999) 168.

⁸⁴⁴ Alston & Weiler (1999) 24.

⁸⁴⁵ See Brosig (2006) 23.

⁸⁴⁶ Alston & Weiler (1999) 11 – 12.

⁸⁴⁷ Besson (2006) 356.

⁸⁴⁸ KSTC Bradley 'Reflections on the human rights role of the European Parliament' in Alston (ed) (1999) 840.

⁸⁴⁹ de Búrca (1993) 306.

With all of these developments, issues of overlap and conflicts of mandate in the field of rights protection are bound to emerge. Some argue that ‘the demarcation between the Community and the member states has not always been respected in practice’ hence ‘institutions are frequently accused of usurping the powers of the member states ... without regard to the rights and interests of which the member states are still the ultimate defenders’.⁸⁵⁰ These concerns also exist in relation to other international organisations. As Besson notes, ‘the EU’s intervention in the human rights field might threaten the work of other human rights organisations like the UN or the Council of Europe’.⁸⁵¹ These are some of the concerns that have been identified in relation to the ECOWAS human rights practice. The approach to addressing these concerns may very well not be the same in both organisations. It is therefore relevant to examine the actual human rights practice of the EU in standard setting, adjudication and non-judicial monitoring of rights in order to enhance an understanding of how it relates to member states and other international institutions.

5.4.1 Community standard-setting in the field of human rights

Since the various generations of EU treaties did not confer the task of setting human rights standard within the Union on any particular institution or organ, virtually all the main organs of the EU have been involved in setting standards in one form or another within the field of human rights. Consequently, the body of norms that can be loosely termed the EU human rights law can be found in different forms with varying legal status.⁸⁵² In terms of setting the overall policy direction of the Union, the European Council clearly plays a vital role.⁸⁵³ Some of the more conspicuous human rights policies set by the European Council are in the area of anti-discrimination in furtherance of article 13 of the EC Treaty.⁸⁵⁴

While the European Council plays the major role in the policy direction of the Union, there are some who argue that the European Parliament has contributed in no small

⁸⁵⁰ Bradley (1999) 841.

⁸⁵¹ Besson (2006) 358.

⁸⁵² P Filipek ‘Protection of human rights in the EU – Meeting the standards of a European human rights system?’ in Adam Bodnar, Michal Kowalski, Karen Raible & Frank Schorkopf (eds) (2003), *The emerging constitutional law of the European Union; German and Polish Perspectives* 58.

⁸⁵³ The European Council comprises of the heads of state and government of the member states.

⁸⁵⁴ Craig & de Búrca (2007) 379.

measure to shaping the human rights policies of the Union.⁸⁵⁵ In this context, the EU adopts policies that coincide with the mainstream views in the field of human rights. For instance, the EU is presented as an adherent of the principle of the indivisibility of human rights to the extent that it recognises rights in all the so-called three generations of human rights.⁸⁵⁶ However, in terms of concrete norm creation, the EU has three major documents that will be focused upon in this study.

5.4.1.1 The ECHR

The ECHR is not an instrument adopted under the platform of the EU and should ordinarily not come under a discussion of human rights instruments of the Union. However, the history of the EU human rights protection regime is replete with indications of intent in the EU to ‘own’ or at least ‘co-own’ the ECHR as a source of rights within the framework of the Union. As already shown, this has led to the preparation of the ground for accession of the EU to the ECHR by way of treaty amendment. Thus, there is a possibility to claim some justification for considering the ECHR as a document setting human rights standards in the EU. The use of the African Charter in the ECOWAS regime is almost a mirror of this EU practice.

As with the entire human rights project of the EU, the ECJ can claim a pioneering role in steering the Union towards adoption of the ECHR as a source of rights within the framework of the Union.⁸⁵⁷ Early in its human rights jurisprudence, the ECJ opted to give the ECHR ‘a special and central role as a source for identifying fundamental rights’ and thus ‘came to de facto integrate the Convention ... in the Community legal order through its general principles’.⁸⁵⁸ As a tool in the hands of the ECJ, the ECHR fell short of being incorporated either in whole or in part as a part of Community law since its use was restricted to application as an interpretative aid.⁸⁵⁹ In this character, the ECHR was used merely to flesh out the ‘general principles of Community law’ and was not binding on the Union or its institutions per say. The ECJ’s approach to the use of the ECHR also meant that there was some level of uncertainty in relation to identification of what rights in the ECHR could be claimed before the Court under

⁸⁵⁵ Rack & Lausegger (1999) 804 .

⁸⁵⁶ Alston & Weiler (1999) 31.

⁸⁵⁷ The process leading to the ECJ’s adoption of the ECHR will be discussed and analysed in the next section.

⁸⁵⁸ Tizzano (2008) 128.

⁸⁵⁹ Betten & Grief (1998) 62.

Community law. However it set the stage for subsequent agitations for formal adoption of the ECHR as part of Community law.

Between 1979 and 1982, the European Commission and the European Parliament had severally called for the EC to formally adopt the ECHR by way of accession.⁸⁶⁰ Critics argue that apart from its symbolic value, accession to the ECHR by the EU would do much to ensure accountability of the EU institutions in their work.⁸⁶¹ Accession was bound to enhance legal certainty in the human rights practice of the Union as well. The pressure piled by the European Commission and the European Parliament in the 1990s resulted in the European Council requesting for the ECJ's opinion on the legal issues that arise in relation to accession. In Opinion 2/94, the ECJ was unequivocal in its finding that accession to the ECHR by the EU raised constitutional issues as it would alter the structure of the Union to the extent that it subjected it to another international organisation. Thus, the ECJ concluded that for such accession to occur, there would be need to amend the Treaty of the Union.⁸⁶² Despite initial resistance from certain quarters, EU member states have effected the required amendment in the Treaty of Lisbon.⁸⁶³ Hence, as soon as that Treaty comes into force the EU would be ready to accede to the ECHR. In the meantime, the ECHR remains 'a point of reference' for the ECJ and the other institutions of the Union in the definition of fundamental rights even though it does not enjoy exclusivity in that regard.⁸⁶⁴

While accession would address some of the concerns raised in relation to the fragmented and haphazard use of the ECHR in the EU framework as is presently the case, accession is not without its own challenges. For one, the nature of the relation between the ECJ and the ECtHR which is the treaty supervisory organ of the ECHR has to be ironed out.⁸⁶⁵ It may also raise the question whether accession to the ECHR precludes the adoption of other human rights norms by the EU or whether any

⁸⁶⁰ Nuyens (2007) 39.

⁸⁶¹ Alston & Weiler (1999) 11.

⁸⁶² There were other obstacles to accession, one of the most of which was that the CoE had to also undertake an amendment that would allow an international organisation become a party to the ECHR which contemplates only states parties.

⁸⁶³ See art 6(2) of the Treaty of Lisbon.

⁸⁶⁴ Rosas (2001) 54.

⁸⁶⁵ There are those who hold the view that no hierarchical relation need exist between the two judicial bodies. See Scheeck (2005) 854.

existing or potential instruments adopted by the EU would be subordinate to the ECHR within the structure of the Union. There also might be need to explain the relation of the ECHR to Treaty provisions in the event of accession.

Whatever the answers to these concerns may be, there is informed opinion that it is not unusual for an organisation to adopt normative standards of another organisation and thereby give it legal force within the adopting organisation. Hence John Finnis states:⁸⁶⁶

... it is characteristic of legal systems that ... they ... purport to adopt rules and normative arrangements ... from other associations within and without the complete community, thereby 'giving them legal force' for that community; they thus maintain the notion of completeness and supremacy without pretending to be either the only association to which their members may reasonable belong or the only complete community with whom their members may have dealings, and without striving to foresee and provide substantially for every activity and arrangement in which their members may wish to engage.

Considering how the ECHR has been used in the EU organisational framework and the chance that the Union might become a party to the ECHR, this instrument constitutes an important standard-setting document in the stables of the Union. The use of the African Charter by the ECCJ in the ECOWAS regime is slightly different in the sense that the primary rules of the African Charter are appropriated in whole even though the ECCJ does not see itself bound to apply the secondary rules in the Charter.⁸⁶⁷ However, the two models are similar in their adoption of the central human rights instruments in their respective regions.

5.4.1.2 The Workers' Charter

One of the lesser known human rights instruments of the EU is the Community Charter of Fundamental Social Rights for Workers (1989 Charter).⁸⁶⁸ Said to be the initiative of the European Parliament, the 1989 Charter did not receive complete and enthusiastic support from all member states.⁸⁶⁹ The 1989 Charter seemingly provides for a procedure by which the EU Commission was empowered to publish annual

⁸⁶⁶ J Finnis (1980) *Natural law and natural rights* 148.

⁸⁶⁷ See the *Koraou* case (n 71 above) as discussed in chapter 4 of this study.

⁸⁶⁸ This instrument was adopted in 1989. Some writers refer to it as the Community Charter on Fundamental Rights and Freedoms. See Nuyens (2007) 37. But see Betten & Grief (1998) 70 and J Kingston (2003)282.

⁸⁶⁹ Nuyens (2007) notes that at least one member state failed to sign the 1989 Charter.

reports on its implementation. For some, the effectiveness of the 1989 Charter was curtailed by certain principles upon which the Charter was hinged. These were respect for the principle of subsidiarity, respect for the diversity of national systems and preservation of business competitiveness.⁸⁷⁰ To the extent that provisions in this Charter were enacted into the more popular EU Charter of Fundamental Rights, the 1989 Charter was not completely irrelevant.⁸⁷¹ However, this Charter was not very widely known and it is doubtful if the people it was meant to benefit were familiar with the rights contained in it. Apart from the fact that the 1989 Charter failed to receive total support from member states, the risk of creating confusion and conflicting standards vis-à-vis global instruments, the ECHR and the bills of rights of member states cannot be ignored.

5.4.1.3 The EU Charter of Fundamental Rights

Although treaty intervention reinforcing the practice of the ECJ had strengthened the protection of human rights within the EU to appreciable levels, the lack of a generally accepted Union-specific rights catalogue remained a sore point in the EU's human rights regime for a long time. Critics contended that the absence of a catalogue resulted in undesirable legal uncertainty.⁸⁷² In response, institutions like the European Parliament reiterated the need for the adoption of a catalogue specific to the Union.⁸⁷³ While it was thought that accession to the ECHR could rectify the deficit, the ECJ's Opinion 2/94 apparently fast-tracked the movement towards adoption of comprehensive rights catalogue. Consequently, at the initiative of the European Council of Cologne in 1999, representatives of different stakeholders took part in the drafting of the EU Charter of Fundamental Rights (CFR) leading to its adoption in 2000.⁸⁷⁴ At adoption, the CFR was neither made as a binding treaty nor was it not attached to the EU treaty framework. It was classified as a solemn proclamation by the European Council, the European Commission and the European Parliament.⁸⁷⁵

⁸⁷⁰ Betten & Grief (1998) 71.

⁸⁷¹ Kingston (2003) 282.

⁸⁷² Perez de Nanclares (2009) 784.

⁸⁷³ Rack & Lausegger (1999) 806.

⁸⁷⁴ See Nuyens (2007); J Polakiewicz 'The relationship between the ECHR and the EU Charter of Fundamental Rights' in Kronenberger (ed) (2001) 70.

⁸⁷⁵ Perez de Nanclares (2009) 791.

Being an ‘inter-institutional declaration’, the legal value of the CFR at its adopted was not very high.⁸⁷⁶

Despite being a new catalogue of rights, it appears that care was taken to ensure that the CFR was not used to create new rights or new categories of rights. As such the CFR was not a platform for the invention of new rights but a means to codify ‘a set of core values which all EU countries have approved’ previously in the ECHR albeit in a slightly different form.⁸⁷⁷ Hence, the CFR was conceived as ‘an instrument of consolidation’ that ‘brings together in one single coherent text rights already guaranteed in the Community legal order’.⁸⁷⁸ While the CFR is claimed to be merely a codification of ECHR based rights in slightly different wording, its scope is recognised to be wider than previous instruments to which the EU member states are party.⁸⁷⁹ Thus, the CFR combines rights present in diverse instruments and spreads across the so-called three generations of rights.⁸⁸⁰

Considering that the CFR is currently not a binding instrument and lacks the legal force of a treaty, the EU institutions have found innovative ways of putting it to use. Based on internal communication of the EU Commission, legislative and regulatory acts in the Union which impact on rights covered by the CFR are required to be subjected to compatibility with the instrument.⁸⁸¹ Accordingly, institutions such as the EU Commission and the European Parliament are known to have developed a practice of referring to the CFR in recitals to Community legislative documents while the ECJ employs the CFR as interpretative aid similar to the ECHR.⁸⁸² The CFR has also been the main instrument applied by the EU Network of Independent Experts and the newly created EU Fundamental Rights Agency. Clearly, even though it has not yet acquired a binding legal status, the influence of the CFR in the human rights work of the EU and its institutions is considerable.

⁸⁷⁶ Perez de Nanclares (2009) 792. This is bound to change when the Treaty of Lisbon enters into force.

⁸⁷⁷ Brosig (2006) 20.

⁸⁷⁸ Tizzano (2008) 132.

⁸⁷⁹ RCA White (2008) 147.

⁸⁸⁰ Kingston (2003) 282.

⁸⁸¹ Tizzano (2008) 133.

⁸⁸² Perez de Nanclares (2009) 793.

Perhaps the adoption of the CFR may have reduced the challenge of legal uncertainty that has trailed the human rights regime of the EU. However, there are evidently other issues that arise in relation to the CFR. From the perspective of legitimacy, the argument has been made that ‘norm-setting in the human rights area should be the result of societal choices at the end of a democratic, participatory and deliberative process’.⁸⁸³ It is argued further that the EU cannot claim as much legitimacy in this regard as national systems would claim, thereby calling into question its credentials as a forum for the development of such norms.⁸⁸⁴ Persuasive as this line of argument may be, it fails to account for the legitimacy of other international platforms upon which existing international human rights standard-setting instruments have been adopted. It is also important to note that the process leading to the adoption of the CFR was said to have included representatives of national governments, national parliaments, EU institutions and other stakeholders.⁸⁸⁵ Consequently, the strength of the legitimacy challenge would greatly be watered down.

Fear that the adoption of the CFR could lead to conflict between different norm regimes constitutes another challenge that surrounds the instrument. Some hold the view that instead of initiating another catalogue of rights, efforts should have been concentrated on improving coherence and raising awareness on existing instruments and procedures.⁸⁸⁶ The concern is that the establishment of ‘a second autonomous human rights regime outside the Council of Europe system would start a competition between the ECJ and the Human Rights Court’.⁸⁸⁷ This potential for conflict is believed to exist because the CFR is aimed at EU institutions as well as member states in their implementation of EU law.⁸⁸⁸ While such concerns are not unfounded, there is belief that as the ECHR merely sets minimum standards, the risk of conflict is reduced because the CFR is wider in scope and would hardly fall below the minimum standards set by the ECHR.⁸⁸⁹ This view finds support in the argument that ‘the mere

⁸⁸³ Brosig (2006) 23.

⁸⁸⁴ As above.

⁸⁸⁵ Polakiewicz (2001) 73.

⁸⁸⁶ Polakiewicz (2001) 91.

⁸⁸⁷ Brosig (2006) 20.

⁸⁸⁸ Polakiewicz (2001) 74.

⁸⁸⁹ Nuyens (2007) 43.

fact that the EU Charter is broader in scope than any one of existing human rights treaties takes it beyond the approach of duplicating the ... human rights treaties'.⁸⁹⁰

Assuming that the argument of lesser risk of duplication and conflict on the basis of a wider scope is correct, the wider scope of the CFR is readily accepted.⁸⁹¹ However, some of those who suggest the possibility of a reduction of the risk still admit that there is a chance of ambiguity in the interpretation of human rights in Europe on the basis that the CFR and the ECHR are different instruments applicable within the same territorial space.⁸⁹² It is further contended that the expanding influence of the EU and its laws is likely to create difficulty in finding a dividing line in terms of *ratione materiae* as between the CFR and national constitutions on the one hand and between the CFR and the ECHR on the other hand.⁸⁹³

Notwithstanding the concerns that have emerged, the adoption of the CFR has some support. There is at least some argument that the lack of a catalogue of rights in the EU prompted the direct application of the ECHR in EU member states that have elected not to incorporate that instrument into their national laws.⁸⁹⁴ Thus, the adoption of the CFR and its use in place of the ECHR would prevent the mandatory and indirect incorporation that the application of the ECHR is thought to result in. The various concerns raised in relation to the adoption of the CFR have demonstrated that the mere adoption of a Union-specific catalogue of rights has not resulted in the anticipated legal certainty in the EU's human rights regime. Instead, it sparks further challenges of conflicting standards, conflicting interpretations and general confusion. However, it has to be admitted that most of these concerns have remained more apparent than real. What is evident however is that the EU has come a long way in setting standards for the protection of human rights within its organisational framework. Yet, as Craig and Búrca have noted, these developments have not extinguished the debates around the human rights regime of the EU.⁸⁹⁵ In terms of

⁸⁹⁰ M Scheinin 'The Relationship between the Agency and the Network of Independent Experts' in Alston P & de Schutter O (eds) (2005) *Monitoring fundamental rights in the EU: The contribution of the Fundamental Rights Agency* 81.

⁸⁹¹ Besson (2006) 347.

⁸⁹² Nuyens (2007) 42.

⁸⁹³ Polakiewicz (2001) 74.

⁸⁹⁴ Stever (1996-1997) 958.

⁸⁹⁵ Craig & de Búrca (2007) 380.

own norm creation, the EU stands out as only mostly consequential norm creation in the field of human rights can be found in the ECOWAS practice. In other words, even though some of its Protocols have human rights implication, ECOWAS is yet to engage in full scale standard-setting beyond the formulation of policy documents.

5.4.2 Judicial protection of rights

As the judicial organ of the EU, the main responsibility of the ECJ is to ensure that the law is observed in the interpretation and application of the law.⁸⁹⁶ In execution of this function, the ECJ has had to interpret the treaties in a manner that has had far reaching consequences. Hence, the very important doctrines of direct effect and supremacy of the Community law were introduced through the decisions of the ECJ.⁸⁹⁷ As already shown, in reaction to the threat of resistance to the principle of supremacy of the Community posed by some national courts of EU member states, the ECJ embarked on an ‘an exercise of bold judicial activism’,⁸⁹⁸ and introduced the concept of fundamental rights as part of the general principles of Community law that it was obliged to enforce. Since then, the ECJ has continued to play a major role in the protection of rights within the EU with little distinction between the original concept of fundamental rights and the concept of human rights. As it is the avenue by which claims of rights violation are judicially vindicated,⁸⁹⁹ the practice and procedures of the ECJ is one of the most visible aspects of the EU human rights system. It therefore carries some of the bigger risks of conflict with institutions of member states and other international organisations. This practice is the focus in this part of the study.

5.4.2.1 Individual access to the ECJ

Generally, human rights litigation occurs in two main forms: inter-state cases in which only state parties take part and the individual complaints where individuals

⁸⁹⁶ Art 220 of the Consolidated Treaty establishing the European Communities. Although by art 220, the ECJ is made up of the Court of Justice and the Court of First Instance, the term ECJ is used here to represent both courts.

⁸⁹⁷ EF Defeis, ‘Human rights and the European Court of Justice: An appraisal’ (2007- 2008) 31 *Fordham International Law Journal* 1104, 1108.

⁸⁹⁸ JHH Weiler, ‘Eurocracy and distrust: Some questions concerning the role of the European Court of Justice in the protection of fundamental rights within the legal order of the European Communities’ (1986) 61 *Washington Law Review* 1103, 1105.

⁸⁹⁹ This assertion is being made with caution in view of the opinion held by some writers that judicial authority in the EU is divided between the community courts and the courts of member states. See eg P Craig, ‘The jurisdiction of the Community Courts reconsidered’ (2001) *Texas International Law Journal* 555, 556.

bring actions against member states of an organisation or state parties to a treaty alleging violation of rights. While the relevance of inter-state cases cannot be ignored, practice indicates that human rights litigation occurs more in the realm of individual complaints systems. Thus, it is in that area that the challenges around human rights protection mechanisms are more prominent. The position is not different in the EU human rights system and this justifies an examination of the nature of individual access to the ECJ in cases claiming the violation of rights.

Direct individual access to the ECJ is basically provided for in articles 230, 232, and 288 of the Consolidated Treaty of the European Community (CT). Article 230 CT grants access to individuals and legal persons seeking a review of the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, acts and decisions of the Commission on the condition that the decision is ‘addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former’. In article 232, access is granted to individuals and legal persons alleging a failure on the part of Community institutions to act in breach of the Treaty. Article 288 on the other hand relates to claims around the contractual obligations of the Community. In essence, direct individual access to the ECJ on claims for violation of human rights is almost non-existent.

While direct access is restricted, article 234 CT empowers the ECJ to give preliminary rulings concerning the interpretation of the treaties and other community legislation. Requests for preliminary rulings generally come to the ECJ through national courts before which questions on EU law and treaty interpretation may have arisen. The decision to request preliminary rulings is optional for national courts although the highest national courts are under obligation to request such preliminary rulings in cases that come before them.⁹⁰⁰ In this context, some commentators have contended that since the discretion to request for a preliminary ruling resides in the national courts, individuals have no impact on that decision and therefore cannot compel a national court to make the request.⁹⁰¹ This would mean that except a national court before which an individual brings a claim seeking to enforce rights under Union law

⁹⁰⁰ Art 234 CT.

⁹⁰¹ Filipek (2003) 61.

makes the decision, there is no chance of such a matter coming before the ECJ. However the article 234 procedure has been the avenue by which the ECJ has had opportunity to advance the human rights content of the Union. Thus, the ECJ's jurisdiction under article 234 CT has been described as the 'jewel in the crown of the existing regime'.⁹⁰² Although the observation was made in the wider context of the ECJ's jurisdiction, it applies aptly to the human rights practice of the Court. Hence, it has been noted that the preliminary rulings procedure is the most widely used procedure for bringing human rights claims against Community acts.⁹⁰³ This procedure, it is argued, enhances coherence in the interpretation and application of EU law while at the same time providing 'shelter to national courts' in political sensitive cases.⁹⁰⁴ While the preliminary ruling option exists under the ECOWAS regime, it has never been put into use. From a human rights perspective, it is doubtful whether the preliminary ruling option in the ECCJ's 2005 Supplementary Protocol would be relevant, given that cases commonly relate to allegations of violations far removed from the strict confines of Community treaty interpretation.

In the face of such limited individual access before the ECJ, the point has been made that no effective system of remedies exists in favour of natural and legal persons in the field of EU Law.⁹⁰⁵ This is especially so since only certain categories of statutes can be the subject of review by direct application before the ECJ.⁹⁰⁶ While conceding that the existing system does not grant broad access for individual claims, Shelton has argued that the doctrines of direct effect and state liability as developed by the ECJ creates avenues for individuals 'to rely on sufficiently precise Community legislation in national courts notwithstanding non-incorporation or implementation of the Community law'.⁹⁰⁷ Thus the individual may not be completely deprived of remedies. However, the point has to be made that this practice reduces the risk of jurisdictional conflicts between national courts and the ECJ as much as it prevents the possibility of forum shopping between the two levels of adjudication. Further, the procedure of optional request for preliminary ruling encourages a coordinated rather than a

⁹⁰² Craig (2001) 559.

⁹⁰³ Stever (1996 -1997) 962.

⁹⁰⁴ Scheeck (2005) 845.

⁹⁰⁵ Filipek (2003) 59.

⁹⁰⁶ As above.

⁹⁰⁷ Shelton (2003)124.

hierarchical relation between the ECJ and the national courts since the national courts are involved in direct application of EU law in their own right.⁹⁰⁸

5.4.2.2 Applicable sources of human rights standards

As already noted, despite the inclusion of human rights within the treaty framework of the EU, the Union has failed to adopt a binding catalogue of rights to be applied in its human rights system. Consequently, the ECJ has had to apply different human rights instruments in the course of protecting rights within the EU. In this regard, the ECHR has apparently enjoyed a pride of place as a treaty of choice in the jurisprudence of the ECJ. As the early fundamental rights jurisprudence of the ECJ indicates, when it recognised a need to search far for standards to flesh out its claim to a fundamental rights competence, the original approach of the ECJ was to refer to ‘international treaties for the protection of human rights on which the Member states have collaborated or of which they are signatories’ to find guidelines.⁹⁰⁹ Subsequently, after the ratification of the ECHR by all the then member states of the Community, the ECJ mentioned the ECHR in the *Rutili* case as a source of inspiration for its fundamental rights practice.⁹¹⁰ By the late 1980s, specifically in the *Hoechst* case, the ECJ decided that the ECHR has a ‘particular significance’ in its fundamental rights system.⁹¹¹

Having established a strong jurisprudence in which the ECHR is held out as a significant source of inspiration for the EU’s human rights agenda and prompting treaty recognition of this fact, the ECJ has been consistent in its use of the provisions of the ECHR without necessarily suggesting that the instrument is part of Union law. In its use of the ECHR, the ECJ has from time to time triggered a fear of conflicting interpretation to the extent that it exercises autonomy in interpreting the instrument. Thus, it has been observed that the ECJ has occasionally used the ECHR ‘in a manner which is more expansive than the Convention’s ‘mother’ institutions in Strasbourg’.⁹¹² While this development is seen as sign of ‘a growing confidence of the

⁹⁰⁸ Scheeck (2005) 844 – 845.

⁹⁰⁹ See the *Nold* judgment. Also see Tizzano (2008)128; Shelton (2003) 112.

⁹¹⁰ See *Rutili v Minister for the Interior* (1975) ECR 1219. See Scheeck (2005) 850.

⁹¹¹ See Cases 46/87 and 227/88, *Hoechst A.G. v Commission*, [1989] E.C.R. 2859.

⁹¹² See C Lyons ‘Human rights case law of the European Court of Justice, January 2003 to October 2003’ (2003)3(2) *Human Rights Law Review* 323, 330 commenting on Case C-109/01, *Secretary of State for the Home Department v Hacene Akrich*, Judgment of the ECJ, 23 September 2003.

EU judiciary to formulate their own fundamental rights principles which pay heed to the ECHR but are not bound by their Strasbourg colleagues'⁹¹³ others find 'the potential ... of conflicting rulings becomes increasingly apparent'.⁹¹⁴ In contrast, the use of the African Charter by the ECCJ has been in a form that suggests that the African Charter is claimed as part of the body of ECOWAS Community law without a corresponding obligation to be bound by the secondary rules for applying the African Charter. Hence, the risk of conflicting interpretations becomes even bigger.

The analysis demonstrates that the ECJ's unilateral adoption of the ECHR without agreements to guide its usage raises questions around fragmentation of human rights law in Europe. However, it has been emphasised that the use of instruments like the ECHR is only for guidance purposes and is thus a positive rather than a negative step.⁹¹⁵ It is also argued that the approach of the ECJ respects the position of the ECHR in the constitutional orders of EU member states and therefore, is a positive development.⁹¹⁶ Evidently, there are compelling arguments on either side of the divide on the desirability of the use of the ECHR by the ECJ in its case law. However, the ECHR remains a vital instrument in the hands of the ECJ.

As the ECHR is merely employed as an interpretative aid rather than an exclusive or exhaustive catalogue of rights under the EU, the ECJ refers to other instruments in its protection of human rights.⁹¹⁷ Thus, the ECJ makes some reference to other CoE and UN human rights instruments some of which may not necessarily have been ratified by all member states of the Union.⁹¹⁸ Similarly, the Advocates General in the framework of the ECJ (though not the Court itself) have also referred to the EU's own CFR even though this instrument is a non-binding political declaration of the Union's institutions.⁹¹⁹ In the maze of instruments and documents applied by the ECJ, the

⁹¹³ Lyons (2003) 338.

⁹¹⁴ de Búrca (1993)306.

⁹¹⁵ T Ahmed & I de Jesus Burtler 'The European Union and Human Rights: An international perspective' (2006) 4 *European Journal of International Law* 771, 773 -774.

⁹¹⁶ White (2008) 150.

⁹¹⁷ Rosas (2001) 60.

⁹¹⁸ Rosas (2001) 57.

⁹¹⁹ See for instance Advocate General FG Jacobs, Opinion of 14 June 2001, (Case C-377/98) *Netherlands v European Parliament and Council* where arts 3(2) of the CFR was cited; Advocate General Stix-Hackl, Opinion of 32 May 2001(Case C-49/00) *Commission v Italy* where art 31(1)of the CFR was cited. Both of these cases are cited by Scheeck (2005). See generally Perez de Nanclares (2009) 793.

challenge of legal certainty cannot be ignored. The risk of conflicting interpretations vis-à-vis treaty supervisory bodies established under these ‘borrowed’ instruments cannot also be ignored. There is also the further question whether by its later practice, the ECJ does not indirectly impose international treaties upon EU member states that are not parties to such treaties under the guise of common constitutional traditions. Thus, it is left to debate whether adoption of a binding EU specific rights catalogue is the better option.

5.4.2.3 Use of ECtHR Case law

Considering that the ECJ’s use of the ECHR has been the subject of much debate tilting towards the claim, amongst others, that such usage had the potential to result increasingly in situations of conflicting interpretations, it is important that the Court refers to the case law of the ECtHR as this limits the potential for conflicting interpretation. The use of ECtHR case law is a relative recent practice as reference was first made in the 1990s in the *P v S and Cornwall County Council* case.⁹²⁰ Prior to this period, as shown by the *Hoechst* decision,⁹²¹ the ECJ was not unwilling to go contrary to the decisions of the ECtHR even though it is claimed that this is never done deliberately.⁹²² However, in its decision in the *Roquette Freres* case, the ECJ made a turn-about and stated categorically that in deciding cases in which provisions of the ECHR came into question, the Court would have regard to existing case law of the ECtHR.⁹²³

The danger averted by the ECJ’s decision to refer to the case law of the ECtHR can be illustrated by at least two examples. In the *Hoechst* case, the ECJ interpreted article 8 of the ECHR relating to the right to privacy as excluding protection for business activities and premises whereas the ECtHR subsequently held in *Niemietz v Germany*⁹²⁴ that search of business premises without a warrant constitutes a violation

⁹²⁰ CC Case C-13/94 [1996] ECR I-2143. In this case, the ECJ referred to the ECtHR case of *Rees v United Kingdom*, (2/1985/88/135), Series A, No.106 ECHR. Also see the *Baustahlgewebe GmbH* case (17.12.1998) where the ECJ also referred to the ECtHR’s case law on the right to fair trial enshrined in article 6 of the ECHR –LS 851.

⁹²¹ *Hoechst* (1989).

⁹²² *Kingston* (2003) 285.

⁹²³ See Case 138/79 SA *Roquette Freres v Council of the European Communities* [1980] ECR 3333. Also see *Tizzano* (2008) 129.

⁹²⁴ *Niemietz v Germany*, 16 Eur. H.R. Rep. 97 (1993).

of article 8. In relation to article 6 of the ECHR, there have also been conflicting decisions from the ECJ and the supervisory organs of the ECHR. While the ECJ came to a conclusion in *Orkem v Commission*⁹²⁵ that the guarantee against self-incrimination in article 6 did not extend to administrative investigations, the ECHR monitoring institutions held differently. Firstly, the defunct European Commission of Human Rights decided in *Saunders v United Kingdom*⁹²⁶ and then the ECtHR in *Funke v France*⁹²⁷ as well as in *Murray v United Kingdom*,⁹²⁸ took opposing views by holding that the guarantee against self incrimination in article 6 applied to all situations where the threat of sanctions exist.⁹²⁹

As it appears that the conflicting decisions of the ECJ usually came before the ECtHR developed jurisprudence on the issues in question, it might be accepted that the ECJ does not deliberately seek to make conflicting findings. However, Scheeck argues that ‘whereas the ECJ now *de facto* applies ECHR case law, it has not specified whether this is a binding endeavour’.⁹³⁰ What is obvious is that conflicts are unlikely to erroneously occur for as long as the ECJ refers to the case law of the ECtHR in the development of its own jurisprudence in cases involving application of the ECHR. In the ECOWAS regime, the ECCJ has not yet referred to the jurisprudence of the African Commission and this leaves room for conflicting interpretation of the African Charter. However, the African Commission is a quasi-judicial body and it remains to be seen whether the same attitude would be adopted towards the decisions of the African Human Rights Court.

5.4.2.4 Nature of human rights protection before the ECJ

Traditionally, the idea that human rights originated as a tool to check excessive and abusive exercise of governmental powers results in the characterisation of the duty to protect rights as a negative duty. In this sense, the duty to protect rights is understood to mean refraining from violating the rights of people. However, it is now commonly accepted that the idea of human rights envisages a set of duties to respect, protect and

⁹²⁵ Case 375/87 *Orkem v Commission* (1989) ECR 3343.

⁹²⁶ (1996) (1997) 23 EHRR 313.

⁹²⁷ *Funke v France*, 256-A Eur. Ct. H.R. (Ser A) (1993).

⁹²⁸ (1996) 22 EHRR 29.

⁹²⁹ See generally Shelton (2003) 144; Scheeck (2005) 854.

⁹³⁰ Scheeck (2005) 856.

fulfil rights.⁹³¹ Perhaps as a result of the fact that the EU is not primarily a human rights organisation, it is believed that the entry of human rights in the agenda of the Union is basically to bond the institutions and restrain national actors involved in implementation of Union laws.⁹³² Thus, some commentators are convinced that ‘the nature of human rights protection within the EU is essentially “negative”’.⁹³³ Consequently, as the arrow-head of the evolution of the EU’s human rights system, ‘the ECJ’s emphasis on human rights was implemented through ‘negative integration’ in which Community institutions were prohibited from acting in any way that could lead to a violation of the fundamental principles of human rights’.⁹³⁴ In adopting a negative approach, the ECJ would probably not be demanding an imposition of positive human rights obligations. This may appear more acceptable than the adoption of a positive approach to rights realisation which would require the ECJ to specify a duty to act rather than a duty to refrain from acting.

While the negative approach to human rights protection might have been a ‘safer’ terrain for the ECJ in the era of strict judicial origins for the Union’s human rights system, such an approach may not be justifiable in the face of generous treaty provisions supporting Union action in the field of human rights. In this regard, some commentators have argued that a critical constitutional principle the ECJ has articulated in its rights jurisprudence is affirmation of a positive duty on EU institutions to ‘ensure the observance of fundamental rights’. This is interpreted to mean that EU institutions are not merely under an obligation to refrain from rights violation but are required to ensure that rights are ‘observed within the respective constitutional role played by each institution’.⁹³⁵ This formulation may not be too different from the negative approach yet it goes further than that approach. It is still early to identify how the ECCJ would go in its protection of rights. However, as the case law of the ECCJ shows, that Court has no difficulty in ensuring negative protection of rights. Challenges to relations with national legal systems in general and national courts in particular, could probably arise if the ECCJ undertakes positive protection of rights.

⁹³¹ See eg, the African Commission’s decision in *SERAC v Nigeria* (2001) *AHRLR* 60 (ACHRP 2001).

⁹³² Besson (2006) 344 holds one such view.

⁹³³ Ahmed & de Jesus Burtler (2006) 794.

⁹³⁴ Defeis (2000 – 2001) 313.

⁹³⁵ Alston & Weiler (1999) 25.

5.4.2.5 The scope of the ECJ human rights protection

A fundamental feature of international courts and judicial organs of international organisations is that, unlike some national courts, these international institutions cannot generally claim inherent jurisdiction as their competence is usually clearly defined and often links to the overall competence of the parent organisation. Despite its activism in relation to fundamental rights protection, the ECJ appears to have been somewhat cautious in the scope of protection that it provides in the area of fundamental rights. Thus, it has been contended that another ‘critical constitutional principle’ that informs the ECJ’s practice is the limitation of its ‘human rights jurisdiction’ to the ‘field of Community law’.⁹³⁶ The term ‘Community law’ in this respect may be understood to apply to the personal, material and the territorial jurisdiction of the Court in the area of human rights.

Naturally, the ECJ’s exercise of judicial authority would be in relation to treaty interpretation from the perspective of determining whether treaty provisions impose obligations to protect human rights. It has to be noted that this aspect of the Court’s mandate does not involve assessment of the validity of treaty provisions since the ECJ does not have a competence to review primary law of the EU. Since primary law would be viewed strictly as the product of the law-making powers of member state in their capacity as sovereign states rather than as products of the law-making functions of Union institutions, primary law cannot be reviewed by the ECJ for conformity with human rights standards.⁹³⁷ However, in addition to determining whether primary law raises duties to protect rights, the ECJ’s competence to give preliminary rulings extends to interpretation of the secondary laws of the EU to determine the existence of duties to protect rights and assessment of such laws for compliance with human rights standards.⁹³⁸ Thus, acts of the EU institutions are examinable by the ECJ with the aim of annulment in the event of a failure to respect human rights standards.⁹³⁹ While this examination was originally applied in the economic field where the exclusive competence of the Community lay, it has now been expanded to the terrain of all

⁹³⁶ As above.

⁹³⁷ See Filipek (2003) 59. Primary law of the EU includes the treaties and all protocols annexed to the treaties.

⁹³⁸ Stever (1996 – 1997) 941.

⁹³⁹ de Búrca (1993) 296.

other genre of rights.⁹⁴⁰ The practice of subjecting secondary Community laws and acts of the institutions to scrutiny is particularly important as these are not subject to assessment either before national courts of member states or any other international treaty body with jurisdiction over the EU member states. The jurisdiction of the ECJ has not developed well enough to sustain analysis of this point.

Following the introduction of the doctrine of direct effect and implementation of EU laws and measures by institutions and governmental departments of member states, the ECJ was faced with the challenge of determining whether and to what extent the implementing acts of member states could be scrutinised by Union human rights standards.⁹⁴¹ In the *Booker* case, it was submitted that member states should be bound by the fundamental rights standards of the EU in situations where they implement measures on behalf of the Union.⁹⁴² It is now fairly well settled that both Community institutions and member states, when acting on behalf of the EU, are bound to ensure protection of rights. Thus, although in the *Cinetheque* case,⁹⁴³ the ECJ was reported to have stated that it lacked jurisdiction to assess national laws which were not within the of Community law for conformity with the ECHR, in the *Wachauf* case,⁹⁴⁴ the Court was emphatic that member states acts implementing Community law were subject to such assessment.⁹⁴⁵

In view of the direction the ECJ has taken in its fundamental rights jurisprudence, the overwhelming opinion amongst commentators is that national laws falling outside the scope of Community law is not subject to ECJ scrutiny for conformity with rights standards. However, national measures and acts of member states adopted for the implementation of Community law are open to ECJ scrutiny as much as the acts of EU institutions are.⁹⁴⁶ In these situations, the member states fall within the judicial net of the ECJ in the states' capacity as agents of the EU. The further question that arose was whether the ECJ could assess 'national laws which restrict ... Community's aims

⁹⁴⁰ Shelton (2003) 112.

⁹⁴¹ See Joined Cases C-20/00 and C-64/00, *Booker Aquaculture and Hydro Seafood v The Scottish Ministers*, Opinion of the AG, 20 September 2001 and Judgment of the ECJ, 10 July 2003[2003] ECR I-7411 cited by Lyons (2003) 333

⁹⁴² Advocate General Mischo in the *Booker* case as cited by Lyons above.

⁹⁴³ *Cinéthèque SA and Others v Fédération Nationale des Cinémas Français* [1986] 1 CMLR 365.

⁹⁴⁴ Case 5/88, *Wachauf v Germany* [1989] ECR 2609

⁹⁴⁵ See de Búrca (1998) 297; Kingston (2003) 275.

⁹⁴⁶ Betten & Grief (1998) 77.

and ... freedoms guaranteed under its law, when those national laws are enacted primarily to further national non-economic goals of a specific social, cultural or moral nature'.⁹⁴⁷ The answer does not appear clear cut but the view seems to be that even outside of the agency situations, acts of member states are examinable for rights compliance insofar as member states apply exceptions allowed by Community law.⁹⁴⁸ It is therefore the Court's position that 'that national measures either implementing Community acts or derogating from the Treaty's provisions must also comply with Community standards of fundamental rights protection'.⁹⁴⁹

It should be added further that there is a sense that the ECJ requires a link with some EU related activity for it to exercise jurisdiction in a case brought before it. Thus, in one case, the failure to find a commercial link between students distributing information leaflets on abortion and the service providers proved fatal for the claim of violation of rights before the ECJ.⁹⁵⁰ In fact, in the *Kremzow* case,⁹⁵¹ the ECJ declined to give preliminary ruling of an interpretative nature on the grounds that the issues and legislation in question had no link with Community law or activity.⁹⁵² Notwithstanding this line of cases, Lyons analyses subsequent cases and comes to a conclusion that the ECJ's definition of economic actors as potential beneficiaries of its rights regime to 'embrace those often outside the scope of Community law'.⁹⁵³

A conclusion that can be drawn from the analysis of the scope of the ECJ's human rights work is that the Court has endeavoured to restrict its exercise of jurisdiction to the territory of the EU and member states, issues related to the laws, measures and implementing acts of the EU and its member states and to persons acting in relation to EU law or benefiting from EU law. In this context, the ECJ does not appear to delve into matters that are not contemplated by the EU treaties. However, in at least two fairly recent cases, the ECJ is known to have ventured into previously unknown terrain by subjecting UN Security Council resolutions to human rights scrutiny, albeit scrutiny for conformity with customary international law based rights rather than EU

⁹⁴⁷ de Búrca (1993)289.

⁹⁴⁸ Kingston (2003) 275.

⁹⁴⁹ Tizzano (2008) 129.

⁹⁵⁰ *SPUC v Grogan* (1991) 3 *CMLR* 849 cited by Búrca (1998) 289.

⁹⁵¹ Case C-299/95 *Kremzow v Austria* (29 May 1997).

⁹⁵² See Betten & Grief (1998) 76.

⁹⁵³ Lyons (2003) 336 – 337.

fundamental rights standards.⁹⁵⁴ For its part, the case-law of the ECCJ indicates that although it limits its jurisdiction to the territories of ECOWAS member states, the ECCJ has been less conservative in the scope of matters over which it exercises its competence. This is due to the vagueness of the enabling provision in the 2005 Supplementary Protocol on the Court. The ECCJ is thus more likely to fall into competition with national and continental judicial and quasi-judicial fora with jurisdiction over human rights.

5.4.3 Non-judicial protection: observation and monitoring

It is incontestable that judicial and quasi-judicial protection of human rights have contributed in no small measure to the advancement of the human rights cause all over the world. This is especially so in the EU framework considering the very important role that the ECJ has played in the formation of an EU human rights system. However, as some commentators have noted, judicial protection of human rights is necessary but not sufficient or exhaustive for meeting the growing challenges of protecting rights.⁹⁵⁵ Negative intervening forces such as ‘ignorance, lack of resources, ineffective representation, inadequate legal standing and deficient remedies all have the capacity to render judicially enforceable rights illusory’.⁹⁵⁶ This would mean that total reliance on judicial protection to the exclusion of other options for the protection of rights pose the risk of shutting out some of the most vulnerable from the safety net of rights protecting mechanisms.

While the argument has been put forward that the EU’s human rights policy appears faulty to the extent that it places too much emphasis on ‘equipping individuals to pursue existing Community legal remedies’⁹⁵⁷ the ECJ’s jurisprudence has been interpreted to suggest that the duty to protect rights within the Union’s framework rests on all EU institutions.⁹⁵⁸ Although the ECJ actually dominated the EU’s human rights landscape in its formative years, this has changed considerably since then. In addition to greater involvement of EU institutions in the protection of rights, new

⁹⁵⁴ See *Kadi v Council and Commission* (2005) E.C.R. II-3649 and *Yusuf and Al Barakaat International Foundation v Council and Commission* (2005) E.C.R. II-3533. Also see Besson (2006) 347.

⁹⁵⁵ Alston & Weiler (1999) 13.

⁹⁵⁶ As above.

⁹⁵⁷ Alston & Weiler (1999) 12.

⁹⁵⁸ Weiler & Fries (1999) 157.

bodies have also been created to push the Union's rights rhetoric. All of these institutions and their work form the non-judicial aspect of human rights protection in the EU. The non-judicial aspects of the EU extend very much into the Union's foreign policy thrusts. However, the study will focus on the internal aspect of the work.

5.4.3.1 The human rights work of the European Parliament

As is the case with all other institutions of the EU, the European Parliament has never had and still does not have any actual competence or mandate in the field of human rights. Yet, its involvement in human rights issues dates back to the early days of the EC. It is suggested that the European Parliament took advantage of the dearth of human rights in the Communities' agenda to expand its own then limited sphere of influence. By acknowledging the relevance of rights to the work of the Communities and incorporating human rights rhetoric into its own activities, the European Parliament engaged in human rights work.⁹⁵⁹ With the incremental inclusion of human rights in the treaty framework of the EU and the expanded scope of the Parliament's influence, it is now contended that article 6 of the CT imposes an obligation on the European Parliament to factor human rights into all aspects of its competence and functions in the EU.⁹⁶⁰ Thus, from the early days of its existence, the European Parliament is acknowledged to have been involved in the promotion of rights through diverse means such as production of annual reports, making resolutions and a host of other activities.⁹⁶¹

When the European Parliament introduced its human rights report series in 1983, the reports were aimed at monitoring global human rights issues rather than the human rights situation within the EU or its member states. However since the late 1980s, in response to opinion that global human rights scrutiny could only be justified if the Parliament could first monitor the human rights situation within the EU, the European Parliament introduced the 'Human Rights in the European Union' reports with focus on the situation of human rights in EU member states.⁹⁶² While monitoring and reporting in this context was aimed at providing the Parliament with reliable

⁹⁵⁹ Rack & Lausegger (1999) 801.

⁹⁶⁰ Bradley (1999) 845.

⁹⁶¹ Alston & Weiler (1999) 42.

⁹⁶² Rack & Lausegger (1999) 807 – 808.

information upon which to take policy decisions, it apparently occurred without a clear legal basis and probably encroached on areas that fall outside of EU law.

Another means by which the European Parliament got involved with human rights work was through the adoption of ad hoc resolutions on issues including human rights concerns. Between 1973 and 1988, the number of resolutions adopted by Parliament rose significantly but these resolutions were essentially aimed at human rights situations in third countries. Hence out of 117 resolutions passed by the European Parliament in 1988, only one was targeted at internal EU issues.⁹⁶³ Not too different from the practice of issuing resolutions, the Parliament is known to also employ its parliamentary question procedures to raise fundamental issues concerning human rights. However, most of the questions raised are also aimed at human rights issues in countries other than the EU member states. While the approach of the European Parliament ensures that it avoids challenges to the legality of its actions from within the EU and its member states, the focus on external countries may have contributed to the difficulty of measuring the impact of its work which has been described as extensive in volume yet difficult to evaluate.⁹⁶⁴

Certain other procedures of the European Parliament actually or potentially create room for the Parliament to focus its attention on human rights issues within the EU and its member states. For instance, it is emphasised that all standing committees in the Parliament deal with some form of human rights issues even though only two appear to have clear mandates in the field.⁹⁶⁵ Even more obviously directed at internal human rights issues is the petitions procedure of Parliament which grants a right of access to EU citizens and residents to bring petitions before the European Parliament. Between 1987 when a Committee on Petitions was established and 1998, over 10,000 petitions were submitted to the Parliament. Some of these petitions involved human rights issues relating to minority rights, prisoners rights and allegations of discrimination.⁹⁶⁶ The Parliamentary procedure that allows Parliamentary Committees to hold public hearings has also been used to focus on human rights issues. In some of these hearings, the European Parliament or members of Parliament have expressed

⁹⁶³ Rack & Lausegger (1999) 810. Effort made to get more recent statistics was unsuccessful.

⁹⁶⁴ See Bradley (1999) 839.

⁹⁶⁵ Rack & Lausegger (1999) 812.

⁹⁶⁶ Rack & Lausegger (1999) 813.

strong views on human rights issues in EU member states.⁹⁶⁷ It can be seen that these procedures of the European Parliament deals with human rights issues that should be the concern of member states rather than a concern of the EU.

Under the more recent treaty instruments of the EU, the European Parliament has been given bigger roles in the human rights work of the EU. Hence it has been noted that even though no particular treaty provision empowers the Parliament to investigate human rights issues or adopt resolutions in this area, the Parliament can find legal backing in different articles in the treaties.⁹⁶⁸ The role given to the Parliament in the determination whether there has been serious and persistent breach of rights under article 6(1) TEU should stand out as one such provision. However, there is nothing to show that the Parliament placed reliance in these provisions to embark on its various activities in the field of human rights. A conclusion that can be drawn is that the European Parliament has also exercised some form of legislative activism in positioning itself as a role player in the EU's human rights system. But it has done so with caution and has so far successfully avoided any complaint of acting *ultra vires* its treaty mandate. Even though it has a clear human rights mandate, the ECOWAS Parliament has not been very enthusiastic in applying that mandate. There is therefore very little comparative material from the ECOWAS Parliament.

5.4.3.2 The human rights work of the European Commission

Although the European Commission performs functions that are more executive than administrative in nature, its involvement in the field of human rights is more in relation to the foreign policy engagements of the EU than in the internal human rights system. The rare occasions that could possibly be the Commission's unambiguous involvement in internal human rights issues within the EU would be the Commission's call for the EC to accede to the ECHR and the declarations jointly made with other institutions affirming the ECJ's fundamental rights jurisprudence.⁹⁶⁹ With the entry into force of the Treaty of Amsterdam, the European Commission has been empowered to initiate the process for determining whether there has been serious and persistent breach of the principles of liberty, democracy, respect for human rights

⁹⁶⁷ Rack & Lausegger (1999) 815.

⁹⁶⁸ Bradley (1999) 845.

⁹⁶⁹ See Nuyens (2007) 39; Betten & Grief (1998) 69.

and fundamental freedoms and the rule of law as contained in articles 6(1) and 7 of the Treaty. Although this provision has not yet been put into practice, the Commission's action would necessarily be predicated on reliable information on the human rights situation in an affected member state. In this regard, the Commission would either monitor the internal human rights situation in member states or rely on monitoring done by another body. In effect, the Treaty of Amsterdam creates room for the European Commission to take more than a passing interest in human rights within member states. The European Commission has also introduced a process of Impact Assessment by which human rights commitments are incorporated into EU policies and activities.⁹⁷⁰ For this purpose, the Commission uses provisions in the CFR and to some extent, the ECHR to mainstream human rights.⁹⁷¹ The Impact Assessment process relates to Union policies, legislations and activities and therefore does not affect relations with member states. Thus, it would be seen that the European Commission plays a marginal role in the internal workings of human rights in the EU. As the main executive organ of ECOWAS, the ECOWAS Commission is more involved in executing the non-judicial aspect of human rights protection in the ECOWAS framework. Arguably, the realities and needs of ECOWAS member states and their citizens are different from the human rights needs of European citizens. Thus, the challenge of duplication of efforts is almost non-existent in the EU model.

5.4.3.3 The Fundamental Rights Agency

Much of the criticism on the human rights system of the EU was focused on the lack of a concrete human rights policy, the uncertainty created by the lack of a Union specific rights catalogue and the absence of a dedicated EU institution with primary responsibility for pushing the Union's human rights agenda. Hence, it was argued that gaps and lacunae that existed in the EU human rights system could be traced to the fact that there was no Union agency to coordinate information relating to human rights in a systematic and comprehensive manner.⁹⁷² These observations were made at a time there were at least two bodies involved some form of human rights work within the Union.⁹⁷³ It was probably in response to the observations of such critics and the

⁹⁷⁰ Nuyens (2007) 44.

⁹⁷¹ As above.

⁹⁷² Alston & Weiler (1999) 13.

⁹⁷³ The one body was the Network of Independent Experts established by the European Commission in 2002 pursuant to a recommendation by the European Parliament in 2000. The other was the European

report of a Comité de Sages that the EU Fundamental Rights Agency (FRA) was conceived. At least one commentator has interpreted the idea to create the FRA as an indication of a more internal human rights focus.⁹⁷⁴

Following the conclusion by representatives of EU member states, at the Brussels European Council in 2003, that there was a need for human rights data collection and analysis aimed at defining policies in that area, the EU set the processes in motion for the establishment of the FRA.⁹⁷⁵ As part of the process, the European Commission carried out impact assessment, issued a public consultation paper and convened a public hearing on the establishment of the Agency. At the end of these activities, the formal process for the establishment of the FRA began in June 2005 with the issuance by the European Commission of a regulation for that purpose.⁹⁷⁶ The FRA was finally established in February 2007 and inaugurated on 1 March 2007.⁹⁷⁷ According to the memorandum for the establishment of the FRA, the mandate of the Agency would be to ‘collect and access data on the practical impact of Union measures on fundamental rights and on good practices in respecting and promoting such rights’.⁹⁷⁸ The mandate of the FRA is linked strongly to the CFR so that the mandate of collecting and analysing data on human rights is done with reference to rights contained in the CFR. The FRA carries out its responsibilities with a thematic focus on areas within the scope of the EU.⁹⁷⁹

From inception, following the model of national human rights agencies of EU member states, the FRA was not conferred with complaint resolution powers. Thus, the mandate of the FRA does not include the monitoring of human rights compliance by the member states.⁹⁸⁰ Consequently, the FRA operates as a body to advise policy making institutions of the EU and member states, upon request by these states, on the best approaches to guarantee human rights protection. Hence the tools employed by

Monitoring Centre on Racism and Xenophobia. Both institutions are not discussed in this study since they are both defunct.

⁹⁷⁴ Scheinin (2005) 82.

⁹⁷⁵ E Howard ‘The EU Agency for Fundamental Rights’ (2006) 4 *European HR Law Review*, 445 - 446.

⁹⁷⁶ As above.

⁹⁷⁷ The FRA is established by Council Regulation (EC) No 168/2007 of 15 February 2007.

⁹⁷⁸ Howard (2006) 447.

⁹⁷⁹ ‘European Fundamental Rights Agency’ available at http://en.wikipedia.org/wiki/European_Fundamental_Rights_Agency (accessed 1 January 2009).

⁹⁸⁰ Howard (2006) 446.

the FRA include the preparation of annual and periodic reports on human rights along thematic lines rather than on territorial or country basis. The FRA is supposed to be ‘a centre of expertise on fundamental rights issues at the EU level’ and its establishment is expected to enhance the EU human rights system.⁹⁸¹ Some hold the view that the FRA would be a useful mechanism for identifying possible breaches of article 6(1) TEU and thereby prepare the grounds for triggering of the article 7 TEU procedure.⁹⁸² The fact that the FRA’s mandate takes a thematic rather than a territorial focus may create difficulty for the Agency’s effectiveness in furthering the article 7 TEU procedure. However, the nature of the mandate would allow the FRA to function without the tension that accompanies human rights supervision by international bodies. No dedicated human rights monitoring agency exists in the ECOWAS framework.

5.5 Mechanisms for maintaining intra- and inter-organisational balance in human rights practice

The discourse on the practice and processes of the EU’s human right’s system has shown that actual tension or potential for tension and even rivalry exists between the EU and the CoE system that is now recognised as the main framework for human rights protection in Europe. Arguably, there is also some evidence of tension as between the Union and member states with regard to the expanding scope of the EU human rights protection regime. Such tension and rivalry may well have been anticipated as Winston Churchill is quoted to have insisted, in the formative years of post World War Europe that no room exists for rivalry between the EU and the CoE.⁹⁸³ The potential for rivalry might have been avoided had the two European organisation stuck to their main areas of operation. Yet, if there were any plans to maintain such functional delineation in order to avoid duplication of functions and hence rivalry, such plans did not succeed.⁹⁸⁴ The EU human rights regime has therefore previously manifested the threats and risks of inter- and intra-organisational conflicts as associated in this study with the ECOWAS human rights regime.

⁹⁸¹ As above.

⁹⁸² Nuyens (2007).

⁹⁸³ Quoted by Juncker (2006) 3.

⁹⁸⁴ Scheeck (2005) 844.

In the face of failure to restrict the EU to the originally narrow idea of providing a platform for economic integration, and as a result of the entry of the EU into the terrain of human rights protection, the ground was laid for intra- and inter-organisational tension. Hence, it has been observed that introducing human rights into the agenda of the Union puts the system in a state of constant tension between the ECJ and the national courts of member states on the one hand and as between the EU and the CoE on the other hand.⁹⁸⁵ Some commentators even attribute resistance to expansion of the EU's human rights policies and activities from stakeholders to a fear that such an exercise would distort the division of competence and allow the EU encroach on areas reserved for member states.⁹⁸⁶ This fear has played itself out already in different forms, including in member states' dissatisfaction with the practice of the European Parliament in the field of human rights.⁹⁸⁷ Thus, even though there have been expectations that borrowing from each other would allow for complementary relation of a permanent kind between the EU and the CoE, this has not happened.⁹⁸⁸

Tension and the potential for rivalry apparently exist in nearly all aspects of the EU's relatively limited human rights system. In terms of the ECJ and its involvement in judicial protection of human rights, the use of the ECHR raises issues in relation to member states and the CoE mechanisms. The first of these relates to concerns about conflicting decisions, the resulting fragmentation of the system and the confusion that it sets in the member states.⁹⁸⁹ This is exacerbated by the fact that national courts, lawyers and litigants are faced with the possibility of divergent standards from the ECJ and the ECtHR, both of which are of equal standing in international law and binding on the national systems.⁹⁹⁰ Then there is the fear that the ECJ threatens the continued primacy of the ECtHR.⁹⁹¹ Concerning the EU's adoption of the CFR, there is also concern that ambiguity would arise in standard setting resulting in duplication and legal uncertainty that could lead to a weakening of the existing regime.⁹⁹² The

⁹⁸⁵ Perez de Nanclares (2009) 779.

⁹⁸⁶ Alston & Weiler (1999) 22.

⁹⁸⁷ Bradley (1999) 840.

⁹⁸⁸ Juncker (2006) 3.

⁹⁸⁹ Scheek (2005) 854.

⁹⁹⁰ Scheek (2005) 854; White (2008) 150.

⁹⁹¹ Scheek (2005) 848.

⁹⁹² Polakiewicz (2001) 74 quoting the President of the ECtHR; Defeis (2000 -2001) 330; Nuyens (2007) 42.

creation of the FRA also raised concerns in some member states as it did in the CoE. While the Dutch Senate viewed it as a waste of public resources, the CoE was more worried about rivalry with its own mechanisms, creation of double standards leading to forum shopping and general confusion amongst citizens of Europe.⁹⁹³

In the context of the concerns, there is some element of disagreement as to what organisation should ordinarily prime in the field of human rights. While one commentator argues that human rights is not an exclusive concern of any of the European organisations,⁹⁹⁴ others take the view that human rights, especially its monitoring, is a 'classical task of the Council of Europe and the OSCE but not of the EU'.⁹⁹⁵ However, the CoE appears to fancy itself as the traditional protector of human rights in Europe.⁹⁹⁶ With regards to member states, it seems it is generally accepted that the primary duty of protection of rights resides in the domestic systems and the EU can only complement the national mechanisms.⁹⁹⁷ Hence, the fear that EU involvement 'would be an invitation to a wholesale destruction of the jurisdictional boundaries between the Community and its member states'.⁹⁹⁸ Notwithstanding these contentions, the argument has been put forward that existing regional and global mechanisms need not be seen as sufficient for rights protection.⁹⁹⁹ Specific to the CoE mechanisms, it is acknowledged that the existing 'monitoring machinery cannot answer every question',¹⁰⁰⁰ so that matters that fall out of the CoE safety net could still be addressed by the EU system.¹⁰⁰¹ Thus, rather than expend energies on maintaining strict demarcation of functions, it might have become more beneficial for Europe to develop mechanisms to achieve some form of balance in the field of rights protection.

There are least three identifiable mechanisms by which tension and rivalry arising from the EU involvement in human rights protection are addressed. They are the principle of limited competence and the principle of subsidiarity (both treaty-based principles) and the practice of coordination and cooperation between the EU and the

⁹⁹³ Nuyens (2007) 64.

⁹⁹⁴ Shelton (2003) 96.

⁹⁹⁵ Brosig (2006) 16.

⁹⁹⁶ Nuyens (2007) 62 records that the Summit of the CoE held in 2005 decided that the protection of human rights and the promotion of democracy and the rule of law were its core tasks and it should therefore continue to focus on those.

⁹⁹⁷ Besson (2006) 346.

⁹⁹⁸ Alston and Weiler (1999) 23.

⁹⁹⁹ Besson (2006) 358.

¹⁰⁰⁰ Juncker (2006) 5.

¹⁰⁰¹ Shelton (2003) 95.

CoE. These mechanisms arguably explain the survival of the EU system in the midst of the various concerns discussed in this work. As already seen, no clear mechanisms exist under the ECOWAS framework to address the risks associated with the involvement of its organs and institutions in human rights protection. Thus, a proper understanding of the EU mechanisms would enhance the possibility of developing ECOWAS mechanisms to address similar concerns.

5.5.1 The principle of limited competence

Hinged on the doctrine of attributed competences,¹⁰⁰² the principle of limited competence operates to the effect that the EU and its institutions only have powers in those areas that are connected with the objectives that member states agreed to pursue jointly. In the framework of the EU, the principle of limited competence is a constitutional principle and is contained in article 5 of the CT which provides that:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The effect of the principle is that internal and international action of the EU needs to have a treaty foundation. Article 5 CT therefore presupposes that the Union has clear competences vis-à-vis member states and matters not listed fall to the residue of the states.¹⁰⁰³ Union competence, it is contended, is not enumerated on the basis of subject matter but in terms of functional correlation to the organisational objectives.¹⁰⁰⁴ The summation therefore is that even though EU law is held to supersede national law, this is only in the context of the limited competence.¹⁰⁰⁵ Consequently, the EU human rights regime has to comply with the constitutional limits associated with the treaty competences of the Union.¹⁰⁰⁶

¹⁰⁰² See Schermers & Blokker (2003) 155 -157. These authors explain that the by this doctrine, international organisations are only competent to act in accordance with powers granted by member states. Hence, international organisations are precluded from generating their own powers and they may not exercise unlimited power that is not necessary for the objectives set out in the founding instrument.

¹⁰⁰³ Lenarts & Van Nuffel (2005) 86 -87.

¹⁰⁰⁴ Lenarts & Van Nuffel (2005) 80.

¹⁰⁰⁵ Stever (1996 -1997) 943 - 944.

¹⁰⁰⁶ Alston & Weiler (1999) 22.

Based on the principle of limited competence, it has been argued that EU influence on the human rights situation in member states does not extend to areas that fall outside the Union's competence.¹⁰⁰⁷ Probably linked to the operation of this principle, initial member states support or acquiescence in relation to the ECJ's introduction of human rights into the EU is explained to have resulted from the perception that it would act as a limitation on the institutions of the Union rather than a restraint on the states themselves.¹⁰⁰⁸ The simplicity of the doctrine as deductible from the practice of the ECJ is in the fact that Union institutions are only required to refrain from acting once it is established that a given field of activity is not within the competence of the Union and is not likely to affect the realisation of the goals of the Union.

Deference to the principle of limited competence on the part of the ECJ can be found in the scholarly analyses of the work of the Court. The overwhelming conclusion in the literature is that the ECJ does not scrutinise domestic laws, policies and practices for conformity with human rights standards where such domestic laws and practices do not fall within the scope of Union law.¹⁰⁰⁹ The initial practice of the ECJ was to focus its rights scrutiny on the secondary legislations and the acts of the Union's institutions.¹⁰¹⁰ The focus on secondary rather than primary legislation is explained by the fact that primary legislation of the EU proceeds from the exercise of sovereignty by member states. Following the expansion of the scope of Union law and the increased involvement of member states in the implementation process, stretching the ECJ's scrutiny to cover member states became inevitable. However, such scrutiny on the part of the ECJ has remained restricted to the so-called agency situations where a member state implements Union legislation or policy on behalf of the Union or where a state relies on EU permitted derogations.¹⁰¹¹ It would be noticed that in abiding by the principle of limited competence, the ECJ stands very little chance of having its jurisdiction in relation to rights scrutiny challenged by EU member states. It would therefore avoid tension in that regard with ease. In the same vein, there is reduced

¹⁰⁰⁷ Besson (2006) 344; Bradley (1999) 844.

¹⁰⁰⁸ Craig & de Búrca (2007) 381.

¹⁰⁰⁹ Shelton (2003) 113; Stever (1996-1997) 964; Quinn (2001) 863; Betten & Grief (1998) 75.

¹⁰¹⁰ Tizzano (2008) 129.

¹⁰¹¹ Weiler & Fries (1999) 161; de Búrca (1993) 297; Kingston (2003) 276. The *Cinéthèque v Fédération Nationale des Cinémas Français* case, (Cases 60 and 61/84 [1985] ECR 2605) provides excellent example of the ECJ's position in this regard. In that case, the Court emphasised that it had no powers to assess the compatibility with the ECHR of national legislation falling 'within the jurisdiction of the national legislator'.

possibility of the ECJ's jurisdiction conflicting with the jurisdiction of the ECtHR even though this is not completely ruled out as the cases have shown.¹⁰¹²

The principle of limited competence is not restricted to judicial practice and thus, impacts on the legislative powers of the Union. The ECJ's position in its Opinion 2/94 demonstrates the point that the Union lacks unlimited legislative powers and it can only legislate on the basis of powers expressly or implied granted by the treaties. Consequently, Besson for example, argues that if the CFR operates to impose a positive duty on Union institutions to promote rights that would amount to extending the legislative powers of the Union.¹⁰¹³ In recognition of its limits, the Union denies that the CFR, even in the light of its annexation to the treaty, is intended to create new competences for the Union in the field of human rights.¹⁰¹⁴ As such, article 51(2) of the CFR emphasises that 'this Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'. The idea being that the CFR is merely a codification of rights previously guaranteed by EU member states in different forms.¹⁰¹⁵ While there are some who doubt the claim of the CFR in this regard,¹⁰¹⁶ there is a sense that the Union makes a deliberate effort to keep within its treaty competences in line with the principle of limited competence. Successfully doing so potentially prevents hoisting extra obligations on member states, avoids conflict with the constitutional bills of rights of the states and ultimately remains within the standards of the ECHR.

Another area where the principle of limited competence is evident is in the establishment of the FRA. As previously noted, the Explanatory Memorandum on the Agency states that the essence of the FRA is to 'establish a centre of expertise on fundamental rights issues at the EU level'.¹⁰¹⁷ This can be interpreted to mean that the focus should be on issues at the EU level. But more significant is the decision not to confer monitoring duties in the form of a complaint resolution mechanism and to grant a thematic rather than a territorial mandate. Arguably, these approaches allow for focus on those themes that fall within the Union's competence and reduce the

¹⁰¹² See eg the *Hoechst* case.

¹⁰¹³ Besson (2006) 347.

¹⁰¹⁴ Besson (2006) 346.

¹⁰¹⁵ Perez de Naclares (2009) 975; Besson (2006) 347.

¹⁰¹⁶ See eg Besson (2007) 346 -347.

¹⁰¹⁷ Howard (2006) 446.

temptation to cover every conceivable human rights issue that emerges from a member state.

As a mechanism for limiting conflict in the field of human rights protection, the principle of limited competence is definitely not a fool proof process. In fact there is record of continued belief among scholars that the EU has not succeeded in preventing itself from usurping the competences of other actors. However, it remains an instrument that is viable if properly applied. It would be recalled that the ECOWAS treaty does not contain a general statement of the principle of limited competence. However, some statement of the principle can be found in article 5(2) of the 1993 revised ECOWAS Treaty, relating to the powers of the ECOWAS organs. The limitation of powers in the ECOWAS Treaty is such that, while it acts as a restraint on ECOWAS Community organs, it has little effect on the organisation as an entity. The overall effect is that the ECOWAS authority, acting on behalf of the organisation as whole, can expand organisational powers and functions with little or no restriction. This arguably creates a bigger room for inter- and intra-organisational conflicts.

5.5.2 The principle of subsidiarity

Another general constitutional principle of the EU that operates within the Union's human rights system to regulate its relation with member states and their human rights systems is the principle of subsidiarity.¹⁰¹⁸ It is contended that the principle of subsidiarity is a model of cooperative sovereignty that applies to exercise of EU competence.¹⁰¹⁹ The principle is codified in article 5(2) CT and fleshed out in a protocol.¹⁰²⁰ By a commonsense understanding, subsidiarity under the EU requires that Union institutions should only exercise powers where the objective aimed at cannot be adequately realised if action is taken at the national level.¹⁰²¹ Thus, the essence of subsidiarity is avoidance of 'hierarchical governance' and restraint in the

¹⁰¹⁸ The principle is commonly associated with the principle of proportionality in the EU treaty framework. However, the principle of proportionality is not very relevant for the present purposes and will not be considered.

¹⁰¹⁹ Besson (2006) 357.

¹⁰²⁰ See Craig & de Búrca (2007) 155 who state that the current guidelines on the operation of the principle of subsidiarity were originally developed in 1992 at the European Council at Edinburgh before being adopted as primary law by way annexation to the Amsterdam Treaty.

¹⁰²¹ Shelton (2003) 135.

exercise of organisational powers in areas where the Union does not have exclusive competence.¹⁰²² Applied to the EU human rights system, it would be expected that action for the protection of rights should be attempted at national levels where such layers of protection exist. Thus, it has been noted that some stakeholders in the EU perceive that an application of subsidiarity demands that member states retain the task of protecting human rights.¹⁰²³ This is believed to be an erroneous understanding as it is contended that the principle also applies in favour of action by the Union where the given circumstances favour a more communal action.¹⁰²⁴

Although it has been explained in a simplified manner and linked with aspects of the EU's human rights work, subsidiarity does not lend itself to quick and easy appreciation. Thus, writers have described it as 'cloudy and ambiguous'¹⁰²⁵ and 'characterised by internal tensions and inherent paradoxes'.¹⁰²⁶ In relation to its application in the EU, ambiguity and uncertainty is exacerbated by the fact that it is possible to extract different interpretations to the provisions that set it out in the treaties.¹⁰²⁷ In the one interpretation, there is a broad political determination concerning the appropriate level of decision making. In the other interpretation which is narrower, a more legalistic determination of 'comparative efficiency' is proclaimed to apply.¹⁰²⁸ The cumulative interpretation resulting would then require an EU institution to make a determination of comparative efficiency in order to decide whether the action to be taken should occur at the Union level.¹⁰²⁹

Adopting a doctrinal rather than a technical approach to analysing subsidiarity in the EU, Carozza submits that as a general principle of the EU constitutional system, it 'functions as a conceptual and rhetorical mediator between supranational harmonisation and unity, on the one hand and local pluralism and difference, on the other hand'.¹⁰³⁰ Thus, subsidiarity becomes a tool for maintaining balance between the EU system and the legal systems of the member states by nipping unnecessary

¹⁰²² Craig & de Búrca (2007) 156.

¹⁰²³ Alston & Weiler (1999) 27.

¹⁰²⁴ As above.

¹⁰²⁵ de Búrca (1998) 218.

¹⁰²⁶ PG Carozza (2003) 39.

¹⁰²⁷ de Búrca (1998) 219.

¹⁰²⁸ As above.

¹⁰²⁹ As above.

¹⁰³⁰ Carozza (2003) 39-40.

jurisdictional conflict. In this context, Carozza pictures subsidiarity as an alternative to a rigid and overbearing application of sovereignty.¹⁰³¹ In the field of human rights protection in the EU, subsidiarity as a mechanism for maintaining balance seeks a middle course between preserving the sovereign rights of the member states to determine the scope of human rights protection that each state can offer and ensuring a uniform level of protection under the framework of the Union.¹⁰³²

Carozza's analysis develops out of the prior presentation of subsidiarity by John Finnis. For Finnis, the principle of subsidiarity is applicable to all forms of human community and should be understood as not signifying 'secondariness' or 'insubordination'. Instead of seeing subsidiarity as meaning a hierarchical relation between systems in which the subordinate system acts as a rule, Finnis paints a picture of support which he hinges on 'assistance' since the root of the subsidiarity is the Latin word '*subsidium*' which he translates as help or assistance.¹⁰³³ Using the imagery of associations, Finnis insists that the principle of subsidiarity requires support and assistance from a larger and more efficient level of an organisation to enable a smaller level to achieve desired goals. Thus, he concludes that a proper application of subsidiarity entails 'that larger associations should not assume functions which can be performed efficiently by smaller associations'.¹⁰³⁴ Carozza reads this to mean that 'there is an emphasis on leaving room for 'lower' levels of governing to have as much scope for action as possible'.¹⁰³⁵ However, he also identifies what he terms 'positive subsidiarity' that allows for intervention by 'higher' levels in situations where the 'lower' level is unable to meet the desired goals. Carozza asserts 'an inherent right' of intervention which he sees as the *subsidium* that Finnis talked about. Thus, the *subsidium* in the principle of subsidiary is not to destroy but to complement a lower level of operation in order to enhance functioning and 'contribute to the common good of all'.¹⁰³⁶

Within the EU human rights system, the impact of the principle of subsidiarity can be noticed in various aspects and tasks performed by the different institutions. In the

¹⁰³¹ Carozza (2003) 52.

¹⁰³² Carozza (2003) 52 -53.

¹⁰³³ J Finnis (1980) 146.

¹⁰³⁴ Finnis (1980) 146 -147.

¹⁰³⁵ Carozza (2003) 56. At p 44, Carozza describes this as 'negative subsidiarity'.

¹⁰³⁶ Carozza (2003) 44.

debate concerning the accession of the EU to the ECHR, Stever records that subsidiarity was one of the legal bases upon which certain member states mounted opposition.¹⁰³⁷ While the adoption of the Treaty of Lisbon has rendered this issue mute, it might be possible to explain this position on the grounds that member states being parties to the ECHR instead of the EU and thereby remaining the fora for rights protection complies with the principle of subsidiarity. In other words, the argument would be that adopting the ECHR as a standard for protection of rights within the EU framework is better achieved at the national level and should therefore exclude action at the EU level. The creation of the FRA may also have taken cognisance of the principle of subsidiarity. Alston and de Schutter have argued that the role assigned to the FRA is compatible with the principle as the Agency can only deal with issues that are best achieved by collective action.¹⁰³⁸ Initial resistance to the adoption of a binding rights catalogue can also be explained in terms of the principle of subsidiarity. But it is the adoption of the CFR that is held out as the first formal application of the principle to the EU human rights work.¹⁰³⁹ However, subsidiarity is not so obvious in the rights jurisprudence of the ECJ.

As the principle of subsidiarity impacts on the exercise of power rather than the existence of power at the level of the EU, some commentators doubt whether the principle actually applies or should apply in the ECJ's human rights practice.¹⁰⁴⁰ Equating the ECJ's interpretative functions as a form of law making, de Búrca questions how the principle would apply to the Court but observes that at least in relation to review of the acts of other institutions, the ECJ in applying the principle should require qualitative and quantitative indicators to justify action at the Union level.¹⁰⁴¹ Using this standard, de Búrca concludes that the ECJ applies the principle of subsidiarity as 'an instrument of low intervention and minimal scrutiny' in its review of legislative action by the EU.¹⁰⁴² However, Carozza finds at least two situations of

¹⁰³⁷ Stever (1996 - 1997) 989. According to de Búrca (1998) 225 the Finnish government's submission before the ECJ in the Opinion 2/94 proceedings contained the argument that the introduction of the principle of subsidiarity restricts the scope of the omnibus provisions in art 235 EC (now art 308 CT).

¹⁰³⁸ Alston and de Schutter (2005) 37 - 38. The views were projective as the FRA only came into being after the text by these authors had been published.

¹⁰³⁹ Carozza (2003) 39.

¹⁰⁴⁰ de Búrca (1998) 219; Carozza (2003) 39.

¹⁰⁴¹ de Búrca (1998) 222.

¹⁰⁴² de Búrca (1998) 225.

tacit application of subsidiarity in the fundamental rights case law of the ECJ while acknowledging that the ECJ has never applied the principle expressly.¹⁰⁴³

Firstly, Carozza argues that by basing its source of fundamental rights on the constitutional traditions of member states, the ECJ could be said to be deferring to the principle of subsidiarity. This process, it is argued further encourages judicial dialogue between the ECJ and the highest courts of the member states.¹⁰⁴⁴ The second evidence of the application of the principle that Carozza finds is in relation to the Court's review of acts of member states against fundamental rights standards. Carozza contends that the principle is tacitly applied when the ECJ defers to national courts where the action under review is not of Union institutions but of member states in any of the agency situations, often leading to the ECJ 'presenting its own role merely as one of providing information and criteria needed for the national court alone to decide on the application of Community fundamental rights law to the act at issue'.¹⁰⁴⁵ To Carozza's observations may be added the ECJ's approach to the award of remedies upon a finding of violation of Union law. In *Brasserie de Pecheur v Germany*,¹⁰⁴⁶ the ECJ emphasised that as Community law had no provisions on reparations, upon a finding of violation, it was up to the domestic legal systems of the member states to set out criteria for reparation of a victim on the condition that the criteria should be comparable to similar claims in the given legal system. Such an approach allows the ECJ to defer to the expertise and institutional legitimacy of national courts while creating and enhancing coordination. By contrast, the ECCJ finds violations and makes orders on compensation without reference to the national courts of member states.

It would appear then that the procedure of preliminary ruling itself is a variation of the application of the principle of subsidiarity as it allows action to commence at the national level rather than at the Union level. Thus, in the context of judicial and non-judicial interventions in the field of human rights, the principle of subsidiarity can be applied as a negative restraint as much as it can apply as a positive duty to act. In its negative character, the principle of subsidiarity enables the EU institutions to avoid

¹⁰⁴³ Carozza (2003) 39.

¹⁰⁴⁴ Carozza (2003) 54.

¹⁰⁴⁵ Carozza (2003) 55.

¹⁰⁴⁶ Joined cases C-46/93 and C-48/93 [1996] ECR I-1029. See also Besson (2006) 141.

unnecessary conflicts with national systems of member states. As a positive duty, the principle allows Union intervention in situations where national action would be insufficient. It has to be noted that the relative strong culture of rights protection in the constitutional frameworks of EU member states would generally favour a negative application of subsidiarity while it does not exclude occasional interventions. Perhaps, the most obvious evidence of the need for subsidiarity in the ECOWAS human rights regime is in the area of judicial protection. As already established, the current practice of the ECCJ does not even require exhaustion of local remedies, which is the most common expressions of subsidiarity. The ECOWAS Commission's involvement in human rights also demonstrates very little deference to the principle of subsidiarity. All of these contribute to making the risk of jurisdictional tension and conflict appear bigger in the ECOWAS context.

5.5.3 Cooperation and coordination

While the constitutional principles of limited competence and subsidiarity developed to regulate the relation between the EU and its member states also impact on the EU's relation with other international human rights systems, especially the CoE system, it is by cooperation and coordination that the Union is best able to maintain equilibrium in this area. Unlike the two other principles already considered, cooperation, which includes dialogue, and coordination are not constitutional principles of the EU but they remain important in the work of the EU institutions. The need for cooperation and coordination is more evident in relation to the CoE mechanisms as a result of the fact that all the member states of the EU are also members of the CoE and are bound by the CoE's mechanisms. Moreover, although the EU considers other international human rights instruments in its human rights work, it is the ECHR that the ECJ has adopted as a significant source of rights through a process that 'has evolved ...from a situation of borrowing to appropriation'.¹⁰⁴⁷

By pioneering the adoption of the ECHR as a central feature of its rights jurisprudence and prompting treaty recognition of this position, the ECJ is said to have 'helped considerably in putting an end to the debate on the clash between the "Europe of human rights" and the "Europe of trade", yet it also evoked worries of

¹⁰⁴⁷ Besson (2003) 358; Scheeck (2005) 853.

fragmentation and conflict.¹⁰⁴⁸ The situation is further complicated by the fact that the EU treaties fail to provide directions to regulate the relation between the Union's institutions, particularly the ECJ, and the mechanisms of the CoE.¹⁰⁴⁹ In the face of the very persuasive contentions that the CoE is the prime protector of human rights in Europe,¹⁰⁵⁰ cooperation and coordination had to be developed as innovative means to address the expectations of doom.

Cooperation and coordination between the institutions of the EU and the CoE in the field of human rights take different forms. Although it is generally admitted that the ECJ and the ECtHR are distinct international courts operating in different organisational settings and employing different methods in pursuit of fairly distinct goals, both courts have managed to engage in some form of judicial dialogue that allows the one to make reference to the jurisprudence of the other in cases with related issues.¹⁰⁵¹ It has to be noted however that the relationship between the ECJ and the ECtHR developed over time. As Kingston notes, originally, there was simply 'comity' between the courts such that the ECJ strove to ensure that its protection did not fall below ECHR standards while the ECtHR refrained from interfering with the ECJ's practice.¹⁰⁵² Gradually, the inter-court relation developed to a level of mutual respect.¹⁰⁵³ At the level of mutual respect, each court began to seek guidance from the jurisprudence of the other in a manner that did not amount to binding precedence but demonstrated deference.¹⁰⁵⁴ Apart from 'cross-referencing' case law, judges of both courts also hold informal yet regular consultative meetings.¹⁰⁵⁵ Thus, in addition to judicial dialogue through cross-referencing, there is the practice of 'judicial diplomacy' in the relation between the courts. Consequently, the relation between

¹⁰⁴⁸ Scheeck (2005)848, 853.

¹⁰⁴⁹ Defeis (2000 – 2001) 329.

¹⁰⁵⁰ See eg Juncker (2006) 5.

¹⁰⁵¹ Scheeck (2005) 843; White (2008) 155.

¹⁰⁵² Kingston (2003) 284.

¹⁰⁵³ Lyons (2003) 343.

¹⁰⁵⁴ Defeis (2000 – 2001) 331; Tizzano (2008) 128; White (2008) 154. As already canvassed, the ECJ's use of ECtHR case law became formalised in the *Roquette Freres* case [1980] ECR 3333. While the use of ECJ rights case law by the ECtHR is not very common, in *Bosphorus Hava Yollari Turizm Ve Ticaret Sirketi v Ireland* App No 45036/98 (2006) 42 EHRR, the ECtHR acknowledged that the EU system for the protection of rights is equivalent to the regime under the ECHR. In the 1999 case of *Pellegrin v France* (1996) 22 EHRR 123 the ECtHR resorted to the case law of the ECJ. Similarly, in *Goodwin v United Kingdom* (1996) 22 EHRR 123 the ECtHR is on record to have relied on ECJ case law (*P v S and Cornwall County Council*) to strengthen its decision on the matter before it.

¹⁰⁵⁵ Scheeck (2005) 873.

these courts has been described as ‘fruitful’.¹⁰⁵⁶ While it may not completely extinguish all threats of conflicting jurisprudence, these forms of cooperation have significantly improved the rapport between the two regimes. In relation to the ECCJ, there are traces judicial diplomacy targeted at the African Human Rights Court since judges of both courts have held joint meetings at least once.¹⁰⁵⁷ However, judicial dialogue between the ECCJ and the African Human Rights Court can only take place when the latter court begins to operate fully. The prevailing area of concern is therefore, the relationship between the ECCJ and the African Commission, which Commission has been largely ignored by the ECCJ even though it is a treaty supervisory body of the African Charter and has developed an expansive body of jurisprudence on the contents of the African Charter.

Cooperation and coordination also occur effectively in relation to standard-setting in the field of human rights. As is the case with judicial cooperation, there is evidence of involvement of both organisations in the efforts undertaken in this area. In the first place, a ‘well established practice’ is that ‘the CoE involves the EU whenever new conventions are being prepared’.¹⁰⁵⁸ In the arguments made in favour of EU accession to the ECHR, it is expected that this practice will be formalised as the EU would have a legal right to be represented in the formulation of standard-setting instruments. From the perspective of the EU, the process of drafting the CFR demonstrates how cooperation and coordination comes into play. The involvement of representatives of governments of member states, national parliaments and observers from the CoE ensured that resistance to the CFR was greatly reduced. Hence it is on record that the adoption of the CFR was ‘welcomed’ by the CoE.¹⁰⁵⁹

The opportunity provided for other stakeholders to participate in the development of the CFR enabled the ECtHR and the Committee of Ministers of the CoE to express their concerns with the emerging charter. Consequently, provisions were made in the CFR to address such concerns and ensure consistency between the systems.¹⁰⁶⁰ Thus, while article 52 of the CFR provides that rights in the CFR that correspond to ECHR

¹⁰⁵⁶ Juncker (2006) 6.

¹⁰⁵⁷ As evidenced by the 2006 meeting mentioned in chapter 4 of this study.

¹⁰⁵⁸ Juncker (2006) 7.

¹⁰⁵⁹ Polakiewicz (2001) 70 -73.

¹⁰⁶⁰ Polakiewicz (2001) 74 -75.

rights should be interpreted in accordance with the ECHR, article 53 insists that the CFR would not be interpreted in a manner that conflicts with existing standard-setting instruments such as national constitutions and international human rights treaties including the ECHR.¹⁰⁶¹ These provisions are consistent with the provisions of article 307 CT which preserve the status of earlier treaties that EU member states are party to. By linking the treaty provision and the practices of cooperation and coordination, the EU reduces the risk of conflicting standard-setting to a minimum.

Coordination is also noticeable in the creation of the FRA by the EU. In view of the prevailing perception of the CoE as the main institution for rights protection in Europe, the creation of the CFR was a ‘sensitive issue’ in the relations between the two organisations.¹⁰⁶² Thus, prior to taking the decision to establish the FRA, the European Commission launched public consultation to enable stakeholders express views on the development.¹⁰⁶³ As was the case with the process towards adoption of the CFR, this consultation process allowed the mechanisms of the CoE to present their concerns on the FRA. It also increased the legitimacy of the Agency as member states and their citizens could ‘own’ it. Very importantly, the process resulted in the decision to formalise initiatives to avoid conflict by the adoption of a Memorandum of Understanding (MoU) between the EU and the CoE in relation to the functioning of the FRA.¹⁰⁶⁴ Preparatory to the adoption of the MoU, the Committee of Ministers of the CoE (Committee) were also able to formulate and document the CoE’s expectations on the work of the FRA.

Pursuant to the various initiatives, the Committee produced a document expressing the worries that creation of the FRA had potential implications for the overall system of rights protection under the CoE. Thus, the Committee suggested the inclusion of certain obligations in the regulation establishing the Agency. These include an obligation to take the activities and findings of CoE mechanisms into account in the Agency’s work, coordinating activities with the CoE mechanisms and concluding a

¹⁰⁶¹ On this point generally, see Polakiewicz (2001) 75.

¹⁰⁶² Juncker (2006) 6.

¹⁰⁶³ Nuyens (2007) 67.

¹⁰⁶⁴ Nuyens (2007) 63.

bilateral cooperation agreement.¹⁰⁶⁵ Most of these conditions were also included in the MoU adopted by the EU and the CoE to regulate the work of the FRA. Thus, the MoU requires that regular contacts be established at appropriate levels between the FRA and the CoE. It also obligates the FRA to exchange information and data with the CoE mechanisms, subject to the rules of confidentiality. Other points agreed upon include the FRA's duty to take account of the judgments and decisions of the ECtHR and findings of other CoE monitoring bodies. The FRA is also expected to reconcile on-going and prospective activities with the CoE bodies.¹⁰⁶⁶

Thus, overall effect of coordination and cooperation between the EU and the CoE in the process leading to the establishment has guaranteed the continued functioning of the CoE as the primary source and interpreter of human rights standards in Europe while enabling the EU, through the FRA, to contribute to the protection of right.¹⁰⁶⁷ Although the provisions of article 307 CT contributes in some way to the coordination efforts of the EU, it is arguably the institutions themselves that have perfected the practice of cooperating and coordinating with the CoE. In essence, this approach puts the EU and its human rights work in a complementary rather than a confrontational role vis-à-vis the CoE and its mechanisms. Such a value adding role fortifies the protection of rights in Europe and avoids the conflict that would have resulted otherwise.

5.6 Similarities, dissimilarities and insights

As previously noted in this study, in their explanation of the concept of spillover, economic theorists posit that spillover can be motivated by reward generalisation, frustration or imitation.¹⁰⁶⁸ The development of a human rights regime under the ECOWAS framework cannot be attributed to a generalisation of reward because economic integration as pursued by the organisation has not been totally successful. Thus, spillover to an issue-area such as human rights realisation can best be explained as a consequence of frustration or imitation. It is from the perspective of spillover as a

¹⁰⁶⁵ European Council of Ministers' Document (EC Ministers Document) CM/AS (2007) Rec1744 final of 19 January 2007.

¹⁰⁶⁶ Co-operation between the Council of Europe and the Agency for Fundamental Rights of the European Union: Agreement between the CoE and the EU (1029 Meeting, 11 June 2008) available at <https://wcd.coe.int> (accessed 13 June 2009).

¹⁰⁶⁷ See the Chairperson of the EU Council as quoted by the EC Ministers Document.

¹⁰⁶⁸ See chapter 2 of this study.

result of imitation that the EU human rights regime is significant in a study of the ECOWAS regime. There are two possible angles to link the EU human rights regime to a study on the ECOWAS regime. On the one hand, it has to be considered whether there is sufficient similarity between the two regimes to justify a claim that the EU regime influenced the development of the ECOWAS human rights regime. Such a link is important for the purpose of demonstrating that state practice exists in the field of international organisations to justify the emergence of a human rights regime within the framework of an economic integration scheme. This would have by extension, partially contributed to addressing the question whether hoisting a human rights regime on an economic integration platform necessarily conflicts with the main objectives of an international organisation. On the other hand, proceeding on the basis that the ECOWAS regime emerged as an imitation of the EU regime, the comparison has provided a basis for determining whether imitation occurred in a manner that adapts or adopts the best practices such as creation of relevant mechanisms to create organisational balance.

The bases for integration in both the EU and ECOWAS were essentially economic and in both systems, no effort was made to include specific human rights objectives in the founding treaties. In spite of initial decisions (advertently or inadvertently) to exclude human rights from their integration agenda, both organisations incrementally developed human rights regimes, notwithstanding the fact that within their respective territorial spheres, relatively successful regional human rights systems are fully operational. In view of the experiences of both organisations (as representative of state practice) and available limited jurisprudence, it can cautiously be asserted that, on the basis that addressing human rights concerns creates a suitable environment for economic integration, international organisations established for economic integration can legitimately enter into the field of human rights without necessarily conflicting with their main founding objectives. The similarity in the practices of the EU and of ECOWAS is that in both organisations, there has been a demonstrated need for veering into the field of human rights. In the case of the EU, the need was to satisfy the demand by national courts, especially the German Constitutional Court, to guarantee at the collective level of integration, human rights protection equivalent to that which existed at the national level. In ECOWAS, the need for including human rights in the agenda has generally been to ensure the creation of a suitable and stable

environment for integration by providing alternative platform for promoting and protecting human rights in the face of limited protection at the national level.

Despite the differences in justification, there are grounds to argue that successful economic integration in each case depended or depends on the ability of the system to meet the human rights challenges that emerged. To the extent that spilling over to the field of human rights facilitates integration, the human rights regimes that have evolved can find legitimacy in the respective omnibus provisions in the founding treaties of these organisations. While there is commonality of legitimacy, the expression of source and the actual practices of the two regimes differ and to some extent, reflect the nature of the justification for adding human rights to organisational agenda. By resorting to general principles of law as a window to introduce human rights that was excluded from the original treaty framework, the ECJ dug into human rights as values that were common to member states of the EC. In other words, values present at the national level were transported to the collective, regional level and survived with the tacit support of member states and their institutions (especially the courts). Although there was basis to challenge the legality of judicial introduction of human rights in the absence of a treaty basis, subsequent acts of member states arguably provided complete legitimacy for the process. However, even such subsequent legitimating acts needed to be translated into the treaty framework. By expressing human rights as principle for integration and using that as a legal foundation for expansive human rights work, the EU set precedent for other organisations. In the expression of respect for human rights as a condition for accession to the EU Treaty, the drafters of successive EU treaties reflect the intention of the EU member states to ensure that the conditions prevailing at the national level, which has been extended to the level of integration are not diluted by admitting states with a lower level of respect for human rights.

While the evolution of human rights in the ECOWAS system was also the result of a gradual process, it was not prompted by the ECCJ. In view of the fact that it resulted from a conscious treaty amendment process, the ECOWAS human rights regime had no need to draw inspiration from general principles. In any event, the human rights culture at the national level of the ECOWAS member state may not have been sufficient to sustain a claim to respect for human rights as a general principle.

However, the idea of respect of human rights as a general principle of international law rather than a regional concept could very well have founded such a regime. Notwithstanding this, the statement of fundamental principles contained in the ECOWAS Treaty is akin to the corresponding statement in the EU treaties and should therefore enjoy a similar legal quality sufficient to sustain a human rights regime. However, in the absence of a human rights culture as strong as that identified in the EU, the focus of ECOWAS is justifiably to encourage the growth of such a culture rather than to maintain an existing value system. Consequently, whereas the EU regime favours a negative application of subsidiarity in the sense of deferring to national protection of rights, the ECOWAS approach has to be targeted at a positive application that allows for active regional involvement in human rights protection vis-à-vis member states.

A further consequence of the different approaches is that the risk of jurisdictional tension and conflict with national and specialised regional human rights system is greater in the ECOWAS regime than it is in the EU order. Despite that fact, the EU regime appears to have more mechanisms aimed at regulating organisational conflicts. Obviously, there is a significant difference in the fact that unlike the relation between ECOWAS and the AU/AEC, the EU is not envisaged to converge in the CoE or any other international organisation. This should have enhanced the development of better mechanisms in the ECOWAS regime to regulate intra- and inter-organisational relations. Yet, the workings of the EU human rights regime allows for better regulation. In spite of a lower level of active involvement in the field of human rights, the EU regime's respect for the principle of limited competence ensures that the organisation does not encroach on the competences of member states. The regime also successfully employs the principle of subsidiarity in a negative sense in judicial and non-judicial protection of rights so that regional intervention is only triggered in the failure of national mechanisms and therefore complements the national mechanisms. Although the justification for its involvement in the field apparently warrants a deeper involvement, it also should require that the ECOWAS regime employs both positive and negative approaches to the application of subsidiarity. The practice of cooperation and coordination that occurs in the EU regime vis-à-vis the CoE and other international bodies is another important aspect that is lacking in the ECOWAS regime. The uncertainty surrounding the ultimate relation between the AU/AEC and

ECOWAS makes it even more imperative for the ECOWAS regime to shape and grow mechanisms similar to those present in the EU regime.

5.7 Interim conclusion

The evolution of human rights in the framework of the EU can hardly be described as the product of a well thought-out and predetermined process. As the discourse in this chapter has shown, the chequered history of the system ensured that it was almost impossible to discard a challenge to the legality of the ECJ's introduction of rights protection through the process of treaty interpretation and application. However, it has also been shown that the doctrine of functional interpretation of treaties provides some room for interpretation that tilts towards treaty modification. Moreover, such treaty modifying interpretations could be given legitimacy by ratifying actions of member states of an international organisation. The chapter has also shown that the approach adopted by member states of the EU to mainstream human rights protection in the treaty framework of the Union was to include rights protection as a principle of integration rather than as an objective of the Union. However, inclusion as a principle of integration is still interpreted as imposing legal obligations that do not conflict with the central objectives. While the current approach may not have extinguished all forms of doubt as to the competence of the EU and its institutions to be involved in the protection of rights, it has certainly improved the standing in that regard and has enhanced legal certainty in this area.¹⁰⁶⁹ To this extent, the EU regime is similar to the ECOWAS human rights regime.

It has also been demonstrated in this chapter that the involvement of the EU and its institutions in the field of human rights has sparked off tension and the possibility of conflicts with the legal systems of member states, on the one hand, and other international human rights protection systems, particularly the CoE, on the other. In order to address these tensions and conflicts, the EU human rights regime has had to resort to the constitutional principles of limited competence and subsidiarity as well as cooperation and coordination. It is by resorting to these mechanisms that the EU human rights regime has succeeded in holding out itself as a complement to both national systems and other international systems. The presence of these mechanisms

¹⁰⁶⁹ See de Búrca (1993) 304; Besson (2006) 346.

is the factor that distinguishes the EU system from the ECOWAS regime for human rights protection. The treaty regime of the EU together with the mechanisms for maintaining intra and inter-organisational balance constitute the alternate model to the ECOWAS model for rights protection in an economic integration scheme. It has to be conceded that the EU has gone beyond exclusive economic integration. It cannot also be denied that the motivations for the spillover to rights protection in both models are different just as the degree of domestic rights protection that exists is unequal. Perhaps these are the factors that make a wholesale adoption of the EU model undesirable but there are definitely lessons that can be borrowed and adapted to improve the model of protection that ECOWAS presents. However, this chapter has demonstrated that it is possible to undertake human rights protection on the platform of economic integration without upsetting relations with member states and other international organisations with prior competence in the field.