



Chapter Three

ECOWAS: A new vehicle for human rights realisation in West Africa?

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3.1 Introduction

From the discussion in the previous chapter, it can safely be concluded that international organisations founded for economic purposes have legal and theoretical bases for engaging in non-economic activities such as the realisation of human rights in pursuit of their original objectives. This can occur at any stage of the organisation's existence but needs to be expressly or impliedly authorised by the member states through the instrumentality of residual treaty making powers or the decision and lawmaking processes of the organisation's organs and institutions. Thus, this chapter explores whether the necessary legal foundation exists in ECOWAS to sustain a contention that human rights can be validly realised under the framework of the organisation. In order to achieve this, the chapter undertakes an analysis of the treaties, instruments, documents and mandates of ECOWAS institutions to illustrate how human rights work has seeped into the agenda of the organisation.

Showing that there is an ECOWAS human rights regime that results from the considered policy decisions of the member states and is built on the regular legal framework of the organisation, this chapter aims to prove that the regime is legitimate and within the purview of organisational objectives. The chapter will also consider the impact of the Community's human rights regime on the legal relationship between ECOWAS and its member states on the one hand, and ECOWAS and the AU on the other hand. Linked to this latter aim, an attempt is made to determine the place of the emerging regime in the existing human rights architecture in the West African region.

There are eight sections in this chapter. After the introduction, a brief history of ECOWAS is given, followed by a section defining how human rights in ECOWAS is to be understood in the context of this study. The legal framework of the organisation is then analysed to show the sources from which human rights are derived in the regime and to determine how these impact on the international obligations of member states. The main institutions of the organisation are also analysed in order to extract the human rights content in their mandates. This is followed by a section that considers whether ECOWAS qualifies as an international human rights institution. The interim conclusion of the chapter is preceded by an evaluation of the place of an ECOWAS human rights regime in the existing African human rights architecture.

3.2 Towards integration in West African

It is generally agreed that integration efforts in West Africa date back to the 19th century when the idea of West African nationalism was prevalent and it was believed in some quarters that the creation of a unified West African state was vital for the emancipation of the African continent.³⁴⁴ However, when concrete attempts at integration began to take shape, it was on the basis of economic objectives rather than political unification. It is evident in the literature that first concrete attempts at subregional integration in West Africa related to a customs union in 1959 following the formation of a '*Union Douanière de L'Afrique de l'Ouest*' (UDAO) by seven former French colonies.³⁴⁵ After several failed attempts on the part of Francophone West African states as well as unsuccessful wider efforts supported by the United Nations Economic Commission for Africa (ECA), in the 1970s consolidation of subregional cooperation began to take root across linguistic barriers.³⁴⁶

In 1975, when the original Treaty founding ECOWAS was signed, the issues of convergence were essentially economic. Meeting in Lagos, Nigeria in May 1975, 15 West African heads of state and government adopted the 1975 ECOWAS Treaty with the aim of promoting cooperation and development in all fields of economic activity for the purpose of raising the standard of living of West African peoples, increase and maintain economic stability, foster closer relations among member states and contribute to the progress and development of the African continent.³⁴⁷ Decades after the adoption of the original ECOWAS Treaty and after the conclusion of several protocols aimed at actualising the lofty goals of integration, it is recorded in the literature that the objectives of ECOWAS did not appear any closer.³⁴⁸ Faced with the challenge of pursuing economic integration in the midst of political instability in the region, often involving armed conflicts, ECOWAS was compelled to veer into the

³⁴⁴ Early political actors like JA Beale Horton, Edward Blyden and Casely Hayford are identified as prime movers of the project of West African unification. See generally, Langley (1973); Asante (1986) and EM Edi (2007) *Globalization and Politics in the Economic Community of West African States*.

³⁴⁵ Edi (2007) 27.

³⁴⁶ Edi (2007) 28 records that President Eyadema of Togo (Francophone) and General Y Gowon of Nigeria (Anglophone) were instrumental to the successful emergence of ECOWAS.

³⁴⁷ Art 2(1) of the 1975 ECOWAS Treaty. The founding members of ECOWAS are Benin, Burkina Faso, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Sierra Leone and Togo. Cape Verde subsequently acceded to the ECOWAS Treaty of 1975 bringing membership to 16. In 2000, Mauritania withdrew its membership, bringing membership of the organisation to 15 once again.

³⁴⁸ Eg see generally Robert (2005).

unpredictable field of politics and security.³⁴⁹ These and other events led to the setting up of a committee to re-examine the foundations of ECOWAS.³⁵⁰ The result of the various activities that took place in the late 1980s and the early 1990s was the drafting and subsequent adoption of a revised ECOWAS Treaty in 1993.³⁵¹

Some of the high points of the 1993 Treaty revision included the expansion of the fundamental principles upon which integration was hinged and the structuring of institutional framework, all with a view to enhance integration, bring integration closer to West African peoples and to meet the demands of a changing international environment.³⁵² Theoretically, it can be argued that the 1993 treaty revision consolidated spill-over in the ECOWAS Community, resulting in more involvement in political issues. This in turn, it can be argued further, opened space for ECOWAS to pay greater attention to the question of human rights. This latter point is important considering that economic integration and greater political activities had brought ECOWAS into the field of human rights as a human rights actor. In reaction to its appearance in the field of human rights as an actor, ECOWAS seemed to have also gradually emerged as an arena for human rights realisation, subtly empowering some of its institutions in this regard. However, much of these were done in a haphazard and unplanned manner.

3.3 The idea of human rights in ECOWAS

Human rights as a term is dynamic. Finding the context in which human rights is understood in a given setting enhances an understanding of its significance in the overall scheme of things.³⁵³ No deeply philosophical enquiry into the meaning of human rights is intended to be engaged here, but it is necessary to identify how ‘human rights’ is to be understood when it is discussed in the context of ECOWAS, as

³⁴⁹ The intervention of the ECOWAS Monitoring Group (ECOMOG) in Liberia and Sierra Leone in the late 1980s and the early 1990s illustrates this trend. See generally F Olonsakin and EK Aning, ‘humanitarian intervention and human rights: The contradictions in ECOWAS’ (1999) 3 *The International Journal of Human Rights* 17

³⁵⁰ In 1992, a Committee of Eminent Persons was appointed to review the 1975 ECOWAS Treaty. The report of the Committee is available at the ECOWAS Commission Abuja (and on file with this writer).

³⁵¹ The ECOWAS Revised Treaty was signed in Cotonou, Benin on 24 July 1993 and entered into force on 23 August 1995.

³⁵² See the final report of the ECOWAS Committee of Eminent Persons (1992).

³⁵³ JJ Shestack, ‘The Philosophic foundations of human rights’ (1998) 20 *Human Rights Quarterly* 201

this will facilitate the task of locating and analysing provisions that touch on human rights in the mass of documents that make up the ECOWAS statutory framework.

3.3.1 Traditional human rights

The first possible understanding of human rights under the ECOWAS legal framework is in terms of the traditional conception of human rights as rights that accrue to human beings on the basis of humanity. In this sense, despite recent efforts to reinforce the interrelatedness and indivisibility of human rights, it is common to classify human rights in three broad categories of first, second and third generation rights.³⁵⁴ Further to this generational classification, it is possible to observe some dichotomy in the recognition of rights in different regional human rights system.³⁵⁵ However, considering that ECOWAS does not have a catalogue of human rights, the understanding of human rights under its legal framework is based on an interdependent and indivisible conception of rights on the basis of the human rights instruments adopted by reference. These references appear in the constitutive instruments and other documents of the Community.³⁵⁶ In this regard, the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and Peoples' Rights which are central in the ECOWAS definition of rights are significant in their guarantee of human rights across generational divides.³⁵⁷ Thus, human rights under ECOWAS would be understood as comprising of all generations of rights directly recognised or by reference in Community instruments and documents. The right to development occupies a special place in the context of ECOWAS to the extent that the right is a conglomerate of all socio-economic rights that are connected with the Community's objective to improve the standard of living of its peoples.

3.3.2 Democracy and good governance

It has to be conceded that ordinarily democracy and good governance do not appear as 'human rights' in international human rights instruments. In analysing the connection

³⁵⁴ K Vasak is credited for this generational classification of rights.

³⁵⁵ It is common to credit the African regional human rights system with innovative protection of the three generations of rights in a single binding instrument while different generations of rights enjoy varying degree of force in the European and Inter-American systems respectively.

³⁵⁶ See eg the preamble to the 1993 revised ECOWAS Treaty.

³⁵⁷ Nearly all the cases already decided by the ECOWAS Court were brought on the basis of either the African Charter or the UDHR.

between democracy and human rights, Tomuschat notes that despite the inclusion of attributes of democratic participation in the UDHR and the CCPR, the word ‘democracy’ itself is conspicuously avoided.³⁵⁸ However, even at the universal level, the link between democratic governance and human rights has gained recognition to the extent that the defunct Human Rights Commission stressed in 1999, that ‘democracy fosters the full realisation of all human rights and vice versa’.³⁵⁹ The link between good governance and human rights is even less direct. However, starting with the attention given to the concept of good governance by the World Bank in 1989, the concept has acquired an increasing significance in the field of human rights.³⁶⁰ With the clarification of the good governance by the defunct Human Rights Commission,³⁶¹ good governance and human rights have been described as mutually reinforcing.³⁶² On the basis of these links between democracy, good governance and human rights, it becomes easy to situate an ECOWAS understanding of human rights that envelopes these concepts. In this context, certain protocols of the ECOWAS Community promote a definition of human rights that encompasses these concepts. Perhaps the best example of this link can be found in the abundance of reference to human rights contained in the ECOWAS protocol relating to democracy and governance and interwoven use of aspects of democracy, governance and human rights in the same document.³⁶³ Such a comprehensive perception that incorporates democracy and governance thus represents the second understanding of the concept of human rights under the ECOWAS legal framework.

3.3.3 Peace, security and humanitarian law

Peace, security and humanitarian law are other concepts that do not fall within the common definition or understanding of human rights. Whereas peace and security fall within the realm of conflict studies, humanitarian law concerns the protection of vulnerable people and property in the midst of armed conflict. Thus, while human rights provide guarantees and safeguards at all times, humanitarian law apply

³⁵⁸ C Tomuschat (2003) *Human Rights: Between idealism and realism* 52 – 53.

³⁵⁹ See the observations of the Human Rights Commission, Spring 1999 meeting.

³⁶⁰ World Bank, *Sub-Saharan Africa: from crisis to sustainable growth*, Washington DC, World Bank 1999, cited by J Hatchard *et al*, (2004) *Comparative Constitutionalism and Good Governance in the Commonwealth 2*.

³⁶¹ Resolution 2006/64.

³⁶² Good governance and human rights (available at <http://www2.ohchr.org/english/issues/development/governance/index.htm>).

³⁶³ Protocol A/SPI/12/01 on Democracy and Good Governance.

essentially in the outbreak of armed conflict.³⁶⁴ Peace and security on their part connect to human rights to the extent that violent conflicts are often preceded by violations of human rights and conflict provides a fertile ground for massive violation of rights. Further, protection of rights constitutes a fundamental aspect of peace-building after armed conflicts. In fact, it has been suggested that the cross-cutting effect of conflict on human rights illustrates the indivisibility and interdependence of human rights.³⁶⁵ Thus, the 1993 World Conference on Human Rights, for example, affirms that there is a ‘crucial connection between international peace and security and the rule of law and human rights’ all within the context of democratisation and development.³⁶⁶

In view of the different conditions in which they operate, combining peace, security and humanitarian law on the one hand and human rights on the other hand ensures that rights are protected in every situation that a state finds itself. In the context of West Africa with its notorious armed conflicts,³⁶⁷ a broad understanding of human rights that encourages complementary application of aspects of humanitarian law as well as guarantees of peace and security appears suitable for the purpose of creating a proper environment for integration. In this regard, the ECOWAS Protocol relating to conflict prevention, for example, expresses a preambular connection between rights, good governance and conflicts,³⁶⁸ and recognises the ‘protection of fundamental human rights and freedoms and the rules of international humanitarian laws’ as principles for the realisation of the objectives of the protocol.³⁶⁹ Hence, these constitute the third understanding of human rights within the legal framework of the ECOWAS Community.

3.4 The sources of rights in the ECOWAS framework

As with other branches of law, the source of human rights law can have several meanings. It can generally refer to the formal source of rights, in this sense, meaning

³⁶⁴ See generally, FF Martin *et al* (2006) *International Human Rights and Humanitarian Law*.

³⁶⁵ ‘Human Rights and Conflicts’- United Nation policy document available at <http://www.un.org/rights/HRToday/hrcnfl.htm> (accessed 19 November 2008).

³⁶⁶ As above.

³⁶⁷ Apart from the Liberian and Sierra Leonean wars, there have been other conflicts in Cote d’Ivoire and internal conflicts in other African states like Nigeria.

³⁶⁸ Paras 8, 11 and 13 of the Protocol relating to the Mechanism for Conflict Prevention.

³⁶⁹ Art 2 of the Conflict Prevention Protocol.

the source of validity or force of human rights rules in the ECOWAS framework. It can also mean the material source of human rights, in which sense it would relate to tangible source from which the matter of rules can be derived.³⁷⁰ In terms of formal source, on the basis of the principles governing international law of institutions, it is arguable that the sovereignty of converging states as exercised by the ECOWAS Authority of Heads of State and Government is the source of force and validity of human rights in ECOWAS Community law. However, the material sources of human rights in ECOWAS are as dispersed as there are sources of general law in the ECOWAS Community.

Writing in 2001, Ajulo divided the sources of law in ECOWAS into two main categories of primary and secondary sources. He identified the ECOWAS Treaties, the protocols and conventions, treaties with third countries, legislative products of the ECOWAS parliament and other sources mentioned by the ECOWAS Treaty as primary sources of law in ECOWAS. He further classified subordinate legislations of ECOWAS Community organs, customary international law, general principles of law, judicial decisions and ‘ECOWAS internal law’ as secondary principles of ECOWAS law.³⁷¹

Ajulo’s enumeration of the sources of ECOWAS law generally tallies with the body of laws that the ECOWAS Community Court of Justice (ECCJ) is empowered to apply.³⁷² The ECCJ itself has taken the position that the material sources of law relevant for the determination of rights under ECOWAS law are ‘the Revised Treaty, the Protocols, Conventions and subsidiary legal instruments adopted by the highest authorities of ECOWAS’.³⁷³ Thus, it is in these documents of the ECOWAS Community that the applicable rules protecting human rights in the Community framework would be found.

³⁷⁰ GW Paton (1972) *Jurisprudence* (4th ed) 188 – 189 cited by SB Ajulo, ‘Sources of law in ECOWAS’ (2001) 45 *Journal of African Law* 77.

³⁷¹ Ajulo (2001) 86.

³⁷² Art 19(1) of Protocol A/P.1/7/91 On the Community Court of Justice (1991 ECOWAS Protocol) empowers the ECCJ to examine disputes in accordance with the Treaty, the Court’s rules of procedure and by application of the body of laws contained in Art 38 of the Statute of the International Court of Justice.

³⁷³ See *Keita v Mali*, Unreported Suit No. ECW/CCJ/APP/05/06 (Judgment No. ECW/CCJ/APP/03/07 on 22 March 2007) para 27.

3.4.1 The 1993 revised ECOWAS Treaty

The 1993 revised Treaty of ECOWAS can be referred to as the *Constitution* of the Community and to some extent, its provisions carry some weight that determines the power of the organs and institutions of the ECOWAS Community. The first express mention of human rights is contained in the preamble to the revised Treaty where the converging states alluded to the African Charter on Human and Peoples' Rights and the Declaration of Political Principles of ECOWAS as some of the background materials considered in the drafting of the revised Treaty.³⁷⁴ It is arguable that the allusion to these documents containing human rights by itself does not confer any particular rights on any body. However, read together with other provisions of the Treaty, it is possible to find some significance in the preambular mention.

Despite the acknowledgement of instruments protecting human rights in the preamble, the revised Treaty does not list the protection and promotion of human rights as part of the aims and objectives of the ECOWAS Community. However, in setting out the means for implementation of Community objectives, the revised Treaty sets out economic freedoms such as free movement of persons, goods, service and capital and the right of residence and establishment.³⁷⁵ The provisions on economic freedoms in article 3 are not couched in clear rights language and the guarantee of these freedoms may be as a result of their obvious instrumental value for the achievement of a common market. Yet it cannot also be denied that the freedoms have unambiguous links with traditional human rights such as the right to freedom of movement. This appreciation of Treaty economic freedoms from a human rights perspective is supported by further Treaty provisions reinforcing the freedoms, this time in the form of rights of ECOWAS Community citizens. Thus, article 59 of the revised Treaty guarantees the 'right of entry, residence and establishment' of 'citizens of the Community' and an undertaking by ECOWAS member states to recognise 'these rights of Community citizens'. There is therefore evidence of an intention to grant rights, albeit couched as economic freedoms.

³⁷⁴ Para 4 of the Preamble. The significance in mentioning the Declaration of Political Principles is that the Declaration itself makes ample reference to human rights protection.

³⁷⁵ Art 3(2)(d)(iii) of the 1993 revised ECOWAS Treaty.

Certain other significant human rights provisions in the revised Treaty are contained in the fundamental principles of ECOWAS expressed in article 4 of the Treaty. In article 4, the ECOWAS member states affirmed and declared adherence to principles such as the maintenance of regional peace, stability and security,³⁷⁶ accountability, economic and social justice and popular participation in development,³⁷⁷ and promotion and consolidation of a democratic system of governance in member states.³⁷⁸ Considering the opinion already expressed that the understanding of human rights in the context of ECOWAS includes democracy and good governance, as well as peace, security and humanitarian law, these provisions are vital in demonstrating the significance of human rights in the constitutional framework of the Community. The more direct statement of the place of human rights in these provisions is however contained in the expression that ‘recognition, protection and promotion of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’ constitutes a fundamental principle of the ECOWAS Community.

The significance of these provisions can best be appreciated by comprehending principles as ‘belief of fact, causation and rectitude’³⁷⁹ that are ‘modalities to which an organisation must adjust when attaining its purpose’.³⁸⁰ From this point of view, even though it has been contended that principles do not impose positive obligations on an international organisation since they are not ends in themselves,³⁸¹ such statement of principles could take on a special significance where they are vital for the realisation of organisational objectives. To that extent, the provisions of article 4 of the revised Treaty should amount to something and therefore should serve as an important foundation for the recognition, promotion and protection of human rights under the ECOWAS legal framework. This position apparently has judicial support since the ECCJ relied on it (read together with article 19 of the 1991 ECOWAS Court

³⁷⁶ Art 4(e) of the revised Treaty.

³⁷⁷ Art 4(h) of the revised Treaty.

³⁷⁸ Art 4(j) of the revised Treaty.

³⁷⁹ SD Krasner, ‘Structural causes and regime consequences as intervening variables’ (1982) 36 *International Organisations* No. 2, 185, 186.

³⁸⁰ M Rama-Montaldo, ‘International legal personality and implied powers of international organisations’ (1970) 44 *British Yearbook of International Law* 111, 123.

³⁸¹ Rama-Montaldo (1970) 154.

Protocol) as a basis for the application of African Charter guaranteed rights in cases brought before the Court.³⁸²

In addition to the provisions already discussed, the revised Treaty records an agreement by ECOWAS member states who are signatories to the Declaration of Political Principles and the African Charter, to cooperate for the purpose of realising the objectives of those instruments.³⁸³ This provision takes on a special significance because all member states of ECOWAS have ratified the African Charter and are signatories to the Declaration on Political Principles. In other words, all member states agree to cooperate under the auspices of ECOWAS to work towards the promotion and protection of human rights. Further, albeit with lesser force, the revised Treaty also contains an undertaking by ECOWAS member states to maintain freedom of access to information and to ensure respect for the rights of journalists.³⁸⁴ It cannot be contested that the 1993 revised ECOWAS Treaty is neither a fountain of human rights nor a catalogue of human rights. It may not also measure up as a human rights instrument in comparison to certain other more popular instruments. However, it contains adequate reference to human rights in ways similar to the constitutive instruments of other international organisation such as the United Nations Charter (UN Charter), the Charter of the defunct OAU and the Constitutive Act of the AU.

If legal foundation for the allocation of rights and obligations in the field of human rights could successfully be placed on the constitutive documents of these enumerated international organisations, it is submitted that the provisions identified in the revised ECOWAS Treaty would sufficiently sustain claims for, and institutional competence in human rights under the ECOWAS Community legal framework. Perhaps, more importantly, these provisions indicate that human rights realisation is not forbidden by the member states in the Treaty. Instead, the fact that most of the human rights provisions were added in the course of treaty amendment suggests that there is recognition by member states that economic objectives can be better achieved in an environment of respect for human rights.

³⁸² *Ugokwe v Nigeria*, Unreported Suit No ECW/CCJ/APP/02/05, para 29.

³⁸³ Art 56(2) of the revised ECOWAS Treaty.

³⁸⁴ Art 66 (2)(a)(b) of the revised Treaty.

3.4.2 Conventions and Protocols of the Community

Prior to the introduction of a new legislative regime in the ECOWAS Community, law-making was mostly by way of conventions and protocols.³⁸⁵ Whereas conventions were made as autonomous agreements between the member states, protocols were essentially employed to supplement, amend or extend the scope of the main constitutive treaty of the organisation. Consequently, the most elaborate provisions relating to human rights within the ECOWAS legal framework are contained in the protocols and supplementary protocols adopted for the purpose of extending the scope of the Community. The conventions on their part have generally been used by member states to agree on issues directly related to economic integration.³⁸⁶ In other words, protocols have been the medium for spill-over from purely economic issues into areas such as human rights.

The first traces of deference to human rights in ECOWAS can be found in protocols made pursuant to the 1975 Treaty even though the Treaty itself lacked any clear reference to human rights. However, these were basically in the realm of economic freedoms. Two categories of rights are evident in the body of protocols initially adopted by the ECOWAS Community. First, there are the economic freedoms which were couched in rights language and these were usually the subject matter of the protocols themselves.³⁸⁷ Subsequently, the protocols added traditional human rights guarantees to either supplement or regulate the enjoyment of the economic freedoms granted in these protocols. In this regard, the protocols provide that citizens are entitled to respect of their ‘fundamental human rights’ including property rights in situations where member states derogate from guaranteed economic freedoms.³⁸⁸ Fundamental human rights are defined in these protocols either as rights recognised in the UDHR,³⁸⁹ or as ‘the rights granted to any migrant worker by ...the Conventions of

³⁸⁵ Between 2006 and 2007, a new legal regime was introduced in ECOWAS to replace the regime that required treaty making for institutional governance.

³⁸⁶ See eg the 1982 Convention Regulating Interstate road Transportation between ECOWAS Member states.

³⁸⁷ Art 2 of Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment for instance provides for a right of ECOWAS Community citizens to enter, reside and establish in any member state. These rights are arguably for economic purposes.

³⁸⁸ In art 3 of the Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Rights of Residence and Establishment (Protocol A/SP.1/7/85), the term fundamental human rights appear at least five times. The art protects the rights of community citizens facing expulsion for illegal or clandestine immigration.

³⁸⁹ Art 1 of Protocol A/SP.1/7/85.

the International Labour Organisation ...on the protection of migrant workers'.³⁹⁰ The rights contained in this first set of protocols can generally be perceived as instrumental rights in the sense that they accrue to citizens actively engaged in economic activities (legal or illegal) in line with the goal of a common market.

The second set of protocols that emerge as sources of substantive rights in the ECOWAS framework are those adopted in furtherance of non-economic activities after spill-over into the political arena occurred in the ECOWAS Community. The two most important protocols in this category are the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (Conflict Management Protocol),³⁹¹ and the Protocol A/SP/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Democracy Protocol).³⁹² Both of these protocols allude to democratic governance and respect for human rights in the African Charter and the UDHR as principles fundamental to the implementation of set objectives and thus provide added impetus for the use of these instruments in the ECOWAS Community law.³⁹³ In addition, the Conflict Management Protocol creates rights and duties around the areas of peace, security and humanitarian law as linked to human rights. Also addressed are issues of ECOWAS competence on refugees, internally displaced persons and the question of child soldiers.³⁹⁴ The Democracy Protocol basically creates rights and duties from the angle of democracy and good governance but provides guarantees of women's rights,³⁹⁵ the rights of children,³⁹⁶ and rights protecting dignity of the person.³⁹⁷ The Democracy Protocol also contains provisions that oblige the

³⁹⁰ See art 1 of the Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (Protocol A/SP.1/7/86) and art 1 of the Supplementary Protocol A/SP.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment (Protocol A/SP.2/5/90).

³⁹¹ Adopted on 10 December 1999 and temporarily entered into force on the same day.

³⁹² Adopted on 21 December 2001 and entered into force in 2005.

³⁹³ Art 2 of the Conflict Management Protocol and art 1(h) of the Democracy Protocol.

³⁹⁴ See arts 25, 30, 31, 40, 42, 44 and 45 of the Conflict Management Protocol.

³⁹⁵ Arts 30(5) and 40 of the Democracy Protocol.

³⁹⁶ Art 41 of the Democracy Protocol.

³⁹⁷ Art 22 of the Democracy Protocol.

establishment of national and Community institutions for the protection of human rights.³⁹⁸

Clearly, these protocols do not have any direct link to economic integration or the establishment of a common market for ECOWAS. However, it cannot be denied that the maintenance of political stability and the avoidance of conflict are essential for the pursuit of integration. The provisions in the protocols would therefore represent an acknowledgment by member states that respect for human rights was essential for building a conducive environment for integration. Whatever the motivation may have been, these protocols are sources of rights in the ECOWAS Community. It may be added that certain provisions of the Supplementary Protocol on the ECCJ also constitute a source of rights to the extent that it provides access to the Court for individuals who have need to seek judicial protection of their rights.³⁹⁹ An important point to take into account is that the adoption of protocols and conventions is an exercise of the sovereign right to make treaties. Thus, the human rights content in these instruments could be read as an agreement by member states to cede some part of their sovereignty in favour of human rights scrutiny under the ECOWAS platform.

3.4.3 Subsidiary legislation, declarations and other ‘soft law instruments’

A third source of human rights law in the ECOWAS legal framework is the collection of laws and other legal materials that can liberally be grouped under the class of ECOWAS subsidiary legislation. Under this omnibus title, it would be necessary to separate documents into binding and non-binding subheadings. This is necessitated by the fact that while they can all generally be classified as subsidiary legislations of the ECOWAS Community and therefore have the common quality of being direct products of the Community’s own legislative process, the legal effect or consequences attached to some documents are higher than others.

³⁹⁸ See eg, art 35 of the Democracy Protocol requires states to establish ‘independent national institutions to promote and protect human rights’ and seems to establish a human rights reporting system within the ECOWAS framework. Art 39 of the Protocol on its part prepared the ground for the expansion of the jurisdiction of the ECCJ to the area of human rights.

³⁹⁹ See *Ukor v Laleye*, Unreported Suit No. ECW/CCJ/APP/01/04, para 20 where the ECCJ took the view that to the extent that it provides the right of access to the ECCJ to individuals, the 2005 Supplementary Protocol is substantive law.

In 2006, the revised ECOWAS Treaty was amended by protocol to install a new legal regime for the Community.⁴⁰⁰ Under the new legal regime, legislative instruments of the ECOWAS Authority of Heads of State and Government are to be known as Supplementary Acts and shall be annexed to the Treaty. The ECOWAS Council of Ministers is also empowered by the amendment to enact regulations and issue Directives and Decisions.⁴⁰¹ Supplementary Acts, Regulations, Directives and Decisions of ECOWAS therefore replace protocols and conventions as legislative instruments for the pursuit of integration in the Community. Accordingly, Supplementary Acts are binding on ECOWAS Community institutions and member states while Regulations are binding and directly applicable in member states. Directives are binding on member states in terms of the objectives intended but member states are given the freedom to decide on the best strategies for the realisation of objectives laid out in the Directives. Decisions are binding on all those designated in the instrument.⁴⁰² The ECOWAS Commission is also empowered to adopt Rules for the purpose of executing the Acts of the Council and these Rules have the same legal quality as the instrument to be executed.⁴⁰³ In this regard, the ECOWAS Commission also has some legislative powers.

All categories of ECOWAS instruments would generally be applied for the purpose of implementing the economic integration objectives of the ECOWAS Community. However, where they contain human rights guarantees, such guarantees are effective and applicable against the duty bearers identified in the instrument. Thus, for example, in article 21 of the Supplementary Protocol Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS,⁴⁰⁴ member states are obligated to ‘provide for high levels of labour and human rights protection approximate to regional and international treaties’. Insofar as they are intended by member states to be binding and directly applicable in national territories, human rights provisions in these legislations should carry the same force that economic legislations carry. Thus, it is submitted that they signify an agreement by member states to also cede aspects of their sovereignty in favour of the Community in relation

⁴⁰⁰ Supplementary Protocol A/SP.1/06/06 Amending the Revised Treaty (Supplementary Protocol A/SP.1/06/06).

⁴⁰¹ See the new art 9 introduced by art 2 of Supplementary Protocol A/SP.1/06/06.

⁴⁰² As above.

⁴⁰³ New art 9(2) introduced in art 2 of the Supplementary Protocol A/SP.1/06/06.

⁴⁰⁴ A/SA.3/12/08 enacted by the ECOWAS Authority on 19 December 2008 at Abuja, Nigeria.

to subject matters of the legislations. As this regime was adopted to avoid the constitutional obstacles associated with treaty making, there is the promise of a better and easier mode of standard-setting and implementation.

Apart from the binding legislative powers outlined above, the new legal regime of the ECOWAS Community empowers the ECOWAS Council of Ministers and the ECOWAS Commission respectively, to ‘formulate’ non-binding Recommendations and Opinions.⁴⁰⁵ In a similar context, the ECOWAS Community Parliament is empowered to adopt non-binding ‘Resolutions of Parliament’ in conformity with the Treaty and other legal texts of general application to institutions of the ECOWAS Community. These resolutions of the Parliament would be forwarded to decision-making bodies of the ECOWAS Community for appropriate and further action.⁴⁰⁶ Together with Declarations of the Community, Recommendations, Opinions and Resolutions form the category of non.-binding sources of law in the ECOWAS legal framework. Considering that they ordinarily do not impose binding legal obligations even though they may appear to confer rights, these instruments can be generally seen as ‘soft-law’ in the ECOWAS Community framework.⁴⁰⁷

As soft law or in some cases as ‘non-binding treaties’,⁴⁰⁸ these latter subsidiary instruments of the ECOWAS Community often contain rules of conduct that regulate member state conduct without the rigidity of treaties or other binding subsidiary legislation. Consequently, the statements of conduct contained in them may create state obligations of a voluntary nature in the field of human rights without attracting the usual international law sanctions or reactions in the event of a breach.⁴⁰⁹ Thus, the value of instruments of this nature lies in the possibility of their usage either as

⁴⁰⁵ As above.

⁴⁰⁶ New art 16(3) of the Protocol of the ECOWAS Parliament introduced by art 3 of Supplementary Protocol A/SP.3/06/06 Amending Protocol A/P.2/8/94 Relating to the Community Parliament (Supplementary Protocol A/SP.3/06/06). It has to be noted however that by art 4 of Supplementary Protocol A/SP.3/06/06, the powers of the ECOWAS Parliament would be progressively enhanced to co-decision making in yet-to-be defined areas.

⁴⁰⁷ I have used the term ‘soft-law’ here with full consciousness of the controversies around its acceptance as a ‘source of international law’. See CM Chinkin, ‘The challenge of soft law: development and change in international law’ (1989) 38 *International and Comparative Law Quarterly* 850, J Klabbers, ‘The redundancy of soft law’ (1996) 65 *Nordic Journal of International Law* 167 and H Hillgenberg ‘A fresh look at soft law’ (1999) 3 *European Journal of International Law* 499. All of these commentators seem to doubt the relevance of soft law as a source of international law.

⁴⁰⁸ Hillgenberg (1999) 500.

⁴⁰⁹ As argued in a general context by Hillgenberg (1999) 515.

interpretative guides⁴¹⁰ or as tools of information and education ‘suited to non-judicial means of dispute settlement’.⁴¹¹ In the very best of situations, soft law documents could even transform into ‘hard law’ by legislative enactment.⁴¹² The ECOWAS Declaration on Political Principles,⁴¹³ the Accra Declaration on War-Affected Children in West Africa (Accra Declaration),⁴¹⁴ and the Code of Conduct for Armed Forces and Security Services of West Africa⁴¹⁵ are examples of such soft law instruments containing state obligations in the area of human rights.

The Declaration on Political Principles it would be observed, contains the initial commitment by ECOWAS member states to ‘respect human rights and fundamental freedoms in all their plenitude’.⁴¹⁶ The Declaration was subsequently referred to in the Protocol on Conflict Prevention. The Accra Declaration also contains provisions expressing commitment to protection of the rights of children in conflict situations while the Armed Forces Code of Conduct contains guide for military conduct ‘in accordance with the relevant provisions of international humanitarian law’ and ‘respect for human rights’. While these may not avail individuals opportunities for judicial implementation of human rights, they remain useful for non-judicial demand and implementation of rights. In the absence of human rights catalogues and against the background of a dearth in binding instruments with adequate human rights content in the ECOWAS legal framework, these soft law instruments should carry greater significance for the protection of human rights in the Community. As non-binding instruments, their potential for conflict with existing mechanisms should be lower.

⁴¹⁰ Klabbers (1996) 177.

⁴¹¹ Chinkin (1989) 862.

⁴¹² Chinkin (1989) 858.

⁴¹³ Declaration A/DCL.1/7/91 of Political Principles of the Economic Community of West African States. The view has been expressed that ‘integration’ of this Declaration in the revised ECOWAS Treaty has made the Declaration binding. See Justice T el Mansour ‘The Relationship Between the ECOWAS Court of Justice and the Future African Court of Human and Peoples’ Rights’ undated paper presented by the former Vice President of the ECOWAS Court at a forum organized by the African Court Coalition (available at http://africancourtcoalition.org/content_files/files (accessed 10 November 2008)).

⁴¹⁴ Reproduced in (2001) 45 *Journal of African Law* 136 (efforts made in 2008 to locate this document at the ECOWAS Commission were unsuccessful).

⁴¹⁵ See ‘Defence Chiefs Endorse Code of Conduct for Armed Forces, Security Services of West Africa’ online bulletin of the ECOWAS Commission available at <http://news.ecowas.int/pressshow.php?nb=108> (accessed 27/11/1008).

⁴¹⁶ Art 4 of Declaration A/DCL.1/7/91.

A common feature of the sources discussed above is that they are all instruments and documents that result from the actual exercise of law making powers by organs and institutions of ECOWAS. They do not necessarily fall under classification as primary and secondary sources of human rights in the ECOWAS Community. Distinct from the sources already examined are other sources which are not products of direct law making by ECOWAS but are adopted by reference in ECOWAS through the exercise of legitimate law making powers. Some of the sources in this category are universal and regional instruments the making of which ECOWAS member states may have participated in their individual capacities as member states of the legislating organisations. Others are either generally accepted principles to which ECOWAS member states have previously subscribed or instruments which ECOWAS states have independently acceded to. It is in this later category that multilateral human rights instruments that ECOWAS member states had previously committed to in agreement with other non-ECOWAS member states can become applicable.

3.4.4 General principles of law

The entry point for general principles of law as a source of human rights in the ECOWAS legal framework can be found in article 19(1) of the 1991 Protocol of the ECCJ. That provision empowers the ECCJ to apply, in addition to the provisions of the Treaty and the court's Rules of Procedure, 'as necessary, the body of laws as contained in Article 38 of the Statute of the International Court of Justice'. Although it is evident that article 19(1) of the 1991 Protocol was formulated at a time when human rights litigation by individuals was not envisaged, the provisions are applicable even under the current legal regime.

As a source of international law, the term 'general principles of law' has been trailed by controversies especially when taken together with the qualification 'recognised by civilised nations'. Commentators have consistently failed to agree on the exact meaning and content of the term.⁴¹⁷ There are at least two clear interpretations given on the nature of legal principles which may be included under the title of general principles of law. The one view is that they mean principles that 'can be derived from

⁴¹⁷ VD Degan, (1997) *Sources of International Law* 14; I Brownlie, *Principles of public international law* (2003) (6th ed) 16, traces the controversy surrounding general principles of law back to the drafting history of the of the ICJ Statute.

a comparison of the various legal systems of municipal law and the extraction of such principles as appear to be shared by all or a majority of them'.⁴¹⁸ The other view is that in addition to the legal principles shared by municipal legal systems, general principles of law 'applicable directly to international legal relations ...' would also be accommodated.⁴¹⁹ As a result of all the confusion, even the International Court of Justice (ICJ) has not been known to have enthusiastically applied the term in its determination of cases.⁴²⁰ It is against this prevailing confusion that the term 'general principles of law' has been imported into the ECOWAS legal framework.

Notwithstanding the imprecise nature of general principles of law, the ECCJ has referred to it now and again in determining cases relating to alleged violations of human rights under the ECOWAS legal regime. In the case of *Ugokwe v Nigeria*,⁴²¹ the ECCJ relied on general principles of law to sustain the position that ECOWAS was a community based on the rule of law, which in turn allowed for the measurement of member states' actions for compliance with the Community Treaty. The ECCJ also applied general principles of law to base its power to 'protect the rights of an individual in the interim'.⁴²² The ECCJ also resorted to general principles of law in *Lijadu-Oyemade v Executive Secretary of ECOWAS* to state that it has a duty to 'protect the rights of citizens that have been infringed upon or examine the allegation of infringement of such rights'.⁴²³ In *Executive Secretary v Lijadu-Oyemade*, the ECCJ again referred to general principles of law as the source of its power to 'import what entails in member states courts and regional courts in considering and deciding the legal principles that have been accepted and of international repute'.⁴²⁴ On this basis, the ECCJ took the view that in any case before it, the Court 'will look at the substance and not the form by jettisoning the strict adherence to technicality and

⁴¹⁸ H Thirlway, 'The sources of international law' in MD Evans (2003) *International law* 131. This approach seemed to have been followed by the European Court of Justice at the initial stage of the evolution of its human rights jurisdiction.

⁴¹⁹ As above.

⁴²⁰ Brownlie (2003) 17; Thirlway (2003) 131.

⁴²¹ *Ugokwe* case (n 382 above).para 31.

⁴²² AS above. The ECCJ relied on the ICJ case of *Aegean Sea Continental Shelf (Greece v Turkey)* ICJ Reports 1976 in this regard.

⁴²³ Unreported Suit No. ECW/CCJ/APP/01/05, judgment of 10 October 2005, para 79. The Court had earlier in the same case at para 49, taken the position that the grant of provisional measures was a general principle of law. In both situations, it relied on the *Aegean Sea Continental Shelf* case.

⁴²⁴ Unreported Suit No. ECW/CCJ/APP/01/05, judgment of 24 May 2006, para 3.03

doing justice’.⁴²⁵ It would be observed that the ECCJ has not made any attempt to source for rights commonly guaranteed in the national constitutions of member states. Thus, the argument could be made that the understanding of ‘general principles of law’ within the judicial context of ECOWAS (at least) is of principles of law derived from international relations and legal practice.

While the ECCJ may not have relied on general principles of law to base individual rights in favour of applicants, it has used the principles as supporting pillars to strengthen the enjoyment of rights. This is consistent with the way general principles of law have been applied in other judicial or legal systems. Thus, it has been noted that the former Permanent Court of International Justice in its Advisory Opinion of 21 November 1925 concerning the *Mosul* case, invoked the ‘well-known rule that no one can be judge in his own suit’.⁴²⁶ Such general principles can therefore be legitimately applied to sustain demands for human rights in the ECOWAS legal framework, albeit, mostly in a juridical context. To the extent that general principles of law bind states generally without necessarily hinging on express acceptance by the states in question, human rights standards derived from general principles should ordinarily not affect the member states relations with the Community.

3.4.5 The African Charter on Human and Peoples’ Rights

Despite the fact that it is not an exclusive instrument of the ECOWAS Community, the African Charter occupies a distinguished place as a source of rights within the ECOWAS legal framework. As a multilateral treaty, the African Charter equates with the protocols and conventions of ECOWAS in terms of its legal force. It is treated differently here because by its origin, the African Charter falls in Ajulo’s category of ECOWAS member states ‘Treaties with third countries’.⁴²⁷ As an instrument universally ratified by all member states of ECOWAS,⁴²⁸ the African Charter represents what Viljoen has termed ‘the basis of a common regional human rights standard’.⁴²⁹ Although its first appearance by way of reference in the instruments and documents of the ECOWAS Community was only as recently as 1991, the African

⁴²⁵ As above.

⁴²⁶ PCIJ Series B, No. 12, p 32 (cited by Degan (1997) 54.

⁴²⁷ Ajulo (2001) 84.

⁴²⁸ As at December 2008, all member states of ECOWAS were state parties to the African Charter.

⁴²⁹ Viljoen (2007) 500.

Charter has consistently been referred to in the major legislative documents of the ECOWAS Community since then.⁴³⁰ The most important references to the African Charter are however to be found in the 1993 revised ECOWAS Treaty.

As already indicated above, the revised ECOWAS Treaty refers to the African Charter in its preamble, in the statement of fundamental principles,⁴³¹ and in the undertaking to cooperate on political matters.⁴³² In this latter provision, the agreement to ‘cooperate for the purpose of realising the objectives’ of the African Charter holds a special significance since all member states of ECOWAS are parties to the African Charter. In that regard therefore, it is possible to stretch the undertaking by member states of ECOWAS to ‘honour ...obligations under this Treaty’ to cover the objectives of the African Charter.⁴³³ Since ECOWAS member states have previously undertaken obligations under the African Charter, the reference in the ECOWAS Treaty does not impose any new substantive obligation on the states. Apart from the Treaty provisions, reference to the African Charter based rights can be found in the Conflict Management Protocol⁴³⁴ and the Democracy Protocol.⁴³⁵ A consequence of the ample reference to the African Charter in the Treaty and other legislative documents of ECOWAS should be that the pursuit of economic integration and the exercise of peripheral powers by organs and institutions of the ECOWAS Community have to be done, taking into account the rights guaranteed in the African Charter. It would be noticed that the formulation in article 4 of the ECOWAS Treaty gives room for suggesting that the obligation to respect African Charter based rights is incumbent on member states but not on ECOWAS as an organisation or on its organs and institutions.

In spite of the constant reference to the African Charter in the ECOWAS Community legal framework, the 2005 Supplementary Protocol of the ECCJ does not mention the African Charter as the source of the rights to be applied by the Court in the determination of cases alleging violation of human rights. However, the practice and

⁴³⁰ The reference to the African Charter in Declaration A/DCL.1/7/91 is probably the first time the African Charter formally appears in the ECOWAS Community legal framework.

⁴³¹ Art 4 (g) of the revised ECOWAS Treaty.

⁴³² Art 56 (2) of the revised ECOWAS Treaty.

⁴³³ Art 5 (3) of the revised ECOWAS Treaty.

⁴³⁴ Art 2 of the Conflict Management Protocol.

⁴³⁵ Art 4 of the Democracy Protocol.

jurisprudence of the Court demonstrates that the African Charter is perceived by judges and by lawyers appearing before the Court as one of the two main human rights catalogues governing the enjoyment of rights in the ECOWAS framework. In fact, it is the jurisprudence of the ECCJ that lends credence to the observation that the African Charter occupies a distinguished place as a source of rights in the ECOWAS legal framework. The ECCJ has consistently maintained the position that the ‘inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court ... to bring in the application of those rights catalogued in the African Charter’.⁴³⁶ Thus, the African Charter has both legislative and judicial relevance as a source of rights in the ECOWAS Community framework.

To the extent that it stands as a source of rights and obligations in the field of human rights, there are two possible ways of interpreting the African Charter obligations in the ECOWAS framework. The first, as already demonstrated above, is the obligation incumbent on the individual member states of the Community. The other is the obligation on ECOWAS as an institution, especially in situations where its operations independent of the individual states positions the organisation as a human rights actor. It is probably in this latter genre that the significance of universal ratification of the African Charter becomes more relevant. In other words, since all member states of ECOWAS have ratified the African Charter, and there is consistent reference to respect for rights contained in the African Charter as a principle for the pursuit of integration objectives, both the organisation and the member states should remain under Charter obligations as a part of ECOWAS Community obligation. Reference to, and use of the African Charter also reinforces the Community’s place as a building block of the AU/AEC. It is on these foundations that the African Charter stands out as a source of human rights in ECOWAS.

3.4.6 Other relevant instruments of the OAU/AU

Apart from the African Charter, several other human rights instruments or instruments with obvious human rights flavour exist within the framework of the defunct OAU and the AU. These include the OAU Convention Governing the Specific Aspects of

⁴³⁶ For instance, the *Ugokwe* case (n 382 above) at para 29. It has to be noted that the ECCJ has referred to the African Charter in every single case decided by the Court as at November 2008. This has been done without distinction as to the so-called different generations of rights contained in the African Charter.

Refugee Problems in Africa,⁴³⁷ the African Charter on the Rights and Welfare of the Child,⁴³⁸ the OAU Convention on the Prevention and Combating of Terrorism,⁴³⁹ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,⁴⁴⁰ the African Convention on Preventing and Combating Corruption⁴⁴¹ and the African Charter on Democracy, Elections and Governance.⁴⁴² While none of these instruments enjoy the sort of express reference that is given to the African Charter within the ECOWAS legal framework, these instruments would fall in Ajulo's category of 'Treaties with third parties' particularly if any of such instruments have received universal ratification by ECOWAS member states. It is possible to suggest that even in the absence of universal ratification by ECOWAS member states, any African human rights instrument ratified by a state can be applied judicially or otherwise against the given state but the challenge would be that it would be difficult to sustain an argument that the obligations contained in such an instrument is owed to all other member states as well. However, where continent wide instruments have been universally ratified by all ECOWAS member states, the obligations in those instruments are owed by each member state to the other, in addition to all other third states to which treaty obligations are owed. The other part of the argument is that it could be a consequence of non-universal ratification by ECOWAS states that an AU instrument would then not be binding on ECOWAS as an institution separate from the treaty obligation of individual states.

In the context of the position taken above, the human rights obligations contained in the AU Constitutive Act represent a good example of a continental document universally ratified by ECOWAS member states, which instrument should impose

⁴³⁷ Adopted in September 1969 and entered into force in 1974. Ratified by all ECOWAS member states.

⁴³⁸ Adopted in July 1990 and entered into force in 1999. This instrument has been ratified by all ECOWAS member states except Guinea Bissau.

⁴³⁹ Adopted in July 1999 and entered into force in 2002. Ten out of 15 member states of ECOWAS have ratified this instrument.

⁴⁴⁰ Adopted in July 2003 and entered into force in 2005. This instrument has also been ratified by ten member states of ECOWAS.

⁴⁴¹ Adopted in July 2003 and entered into force in 2006. Only eight member states of ECOWAS have ratified this instrument.

⁴⁴² Adopted in 2007 and is yet to entered into force. No state has ratified the Charter as at November 2008.

some sort of human rights obligations on ECOWAS member states.⁴⁴³ There is some reference to the African Charter on the Rights and Welfare of the Child (African Child Charter) in at least one document of ECOWAS.⁴⁴⁴ However, this is not sufficient to push an argument that the African Child Charter is an applicable source of rights only by reason of that mention. Further, it would be observed that in the jurisprudence of the ECCJ, African human rights instruments have not been relied upon by lawyers or applied by the Court itself. For example in the *Koraou v Niger* case,⁴⁴⁵ the claim that the applicant was discriminated against on the basis of her gender or sex was hinged on the Convention on the Elimination of All Forms of Discrimination Against Women.⁴⁴⁶

Considering the continent-specific nature of the human rights instruments of the OAU/AU and in view of the fact that ECOWAS member states often take active part in the formulation of the continental human rights standards, it would make sense to rely more on the rights guaranteed in these instruments. On the basis of the argument above on the possible effect of universal ratification of African human rights instrument, it is possible to pursue a course by which, instruments are applicable against member states of ECOWAS to the extent that such member states have ratified those instruments, but no obligation from such instruments accrue against ECOWAS as an organisation since there is no universal ratification by the member states. The important point is, however, that such African human rights instruments are likely sources of rights in the ECOWAS legal framework. To the extent that application on the platform of ECOWAS does not hoist additional obligations above treaty obligations already incurred by member states by reason of their being parties to these continental instruments, the chances of upsetting intra-organisational relations should be slim. However, the possibility of conflict with the jurisdiction with treaty bodies and continental institutions appears stronger in this regard.

⁴⁴³ The principles contained in the OAU Charter (and thus by implication, the AU Constitutive Act) is referred to in the Conflict Management Protocol as some of the principles upon which the protocol is hinged. See art 2 of the Conflict Management Protocol.

⁴⁴⁴ Accra Declaration (n 412 above).

⁴⁴⁵ *Koraou v Niger* (n 71 above).

⁴⁴⁶ The difficulty faced by the lawyers in this case is understandable considering that Niger is not a party to the Protocol on the Rights of Women in Africa.

3.4.7 The United Nations Charter, the Universal Declaration on Human Rights and other relevant global human rights instruments

Another category of sources of human rights in the ECOWAS Community is the global human rights instruments and documents with human rights content, adopted within the framework of the UN. These also fall within the class of ‘Treaties with third parties’. Similar to the AU Constitutive Act, the UN Charter, while not a human rights instrument and consequently not a catalogue of rights, contains certain obligations to respect the rights of individuals.⁴⁴⁷ As noted by some commentators, the UN Charter contains general provisions which have ‘the force of positive international law and create basic duties’ in the field of human rights.⁴⁴⁸ To the extent that all ECOWAS member states are members of the UN and have acceded to the UN Charter, the positive obligation to respect human rights that is found in the UN Charter binds the ECOWAS member states. Along the lines of the argument previously pursued, universal ratification of the UN Charter similarly places a binding obligation on ECOWAS as an international organisation, especially from the perspective of article 103 of the UN Charter. At the very minimum, there is a duty on ECOWAS and its member states to join in cooperation under the UN platform to promote and encourage respect for human rights ‘without distinction as to race, sex, language and religion’.⁴⁴⁹ This effectively guarantees a right against discrimination. The obligation is further expanded to include a duty not to legislate or conclude any treaty whose spirit and contents constitute a gross violation of human rights.⁴⁵⁰ In this limited regard, the UN Charter constitutes a source of human rights in the ECOWAS legal framework.

The UDHR has also become very important as a source of human rights in the ECOWAS Community law system. Although it was adopted by the UN General Assembly as a declaration without a binding legal ‘duty of immediate implementation’,⁴⁵¹ the UDHR was expressed as a ‘common standard of achievement for all peoples and all nations’.⁴⁵² The UDHR has been transformed over the years into various forms of ‘hard law’ either by inclusion in binding instruments or by

⁴⁴⁷ LB Sohn, ‘The human rights law of the Charter’ (1977) 12 *Texas International Law Journal* 129.

⁴⁴⁸ Sohn (1977) 131.

⁴⁴⁹ Art 1 of the UN Charter.

⁴⁵⁰ See Sohn (1977) 132.

⁴⁵¹ Sohn (1977) 132.

⁴⁵² See the preamble to the UDHR, G.A. Res.217A, U.N. Doc. A/810.

application in judicial and other fora as a source of human rights law.⁴⁵³ Consequently, it is common to find writers who hold the opinion that the UDHR now constitutes customary international law and thus binds all states.⁴⁵⁴ Notwithstanding the dispute on the customary law character of the UDHR, it has to be acknowledged that the UDHR or any of its contents can be transformed into binding law by positive enactment. It is apparently in this latter regard that the UDHR has come to have a central position as a source of rights in the ECOWAS Community.

In relation to ECOWAS, the status of the UDHR as a major source of rights and obligations in the field of human rights dates back to the constitutional epoch of the 1975 original ECOWAS Treaty. While the Treaty did not mention the UDHR, most of the protocols made pursuant to (and annexed to) the 1975 ECOWAS Treaty define human rights in terms of the UDHR.⁴⁵⁵ Despite its frequent mention in the protocols adopted under the 1975 Treaty epoch, the UDHR does not feature in the 1993 revised Treaty as one of the instruments on the basis of which respect for human rights could be hinged under the ECOWAS framework. However, the Conflict Management Protocol and the Democracy Protocol (both of which were adopted after 1993) make clear references to human rights in terms of the UDHR.⁴⁵⁶ In addition to these legislative mentions, a survey of the jurisprudence of the ECCJ indicates that the UDHR has featured significantly in the decisions of the Court.⁴⁵⁷ It is therefore arguable that legislative mention either in the preamble or in the interpretative sections of ECOWAS documents has led to judicial attitude that sees the UDHR as

⁴⁵³ Klabbers (1996) 175, observes that in the US case of *Filartiga v. Pena-Irala*, ‘the US Court of Appeals for the Second Circuit relied heavily on the Universal Declaration of Human Rights’.

⁴⁵⁴ See eg, LC Chen, ‘Restatement: protection of persons (1989) 14 *Yale Journal of International Law* 542, 546 – 547; KMG Nayar, ‘Human Rights: The UN and US foreign policy’ (1978) 19 *Harvard International Law Journal* 813, 816 -817. However, there are other equally prestigious commentators who, by challenging what they perceive as attempt by scholars to modernise the formation of customary international law, dispute the fact that the UDHR now constitutes Customary International Law. They suggest that the UDHR and other soft law built upon it can at best be seen as authoritative interpretation of the obligation contained in arts 55 and 56 of the UN Charter. See B Simma and P Alston, ‘The sources of human rights: Custom, Jus Cogens and General Principles’ (1988 -1989) 12 *Australian Yearbook of International Law* 82 – 108.

⁴⁵⁵ See eg arts 1, 3 and 7 of the Supplementary Protocol A/SP.1/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment available at <http://www.sec.ecowas.int> (accessed 18 August 2008).

⁴⁵⁶ Art 2 of the Conflict Management Protocol and the preamble of the Democracy Protocol are instructive in this regard.

⁴⁵⁷ The UDHR was referred to in such cases as the *Ugokwe* case (n 380 above); *Keita v Mali* (n 373 above); *Essien v The Gambia*, Unreported Suit No ECW/CCJ/APP/05/05, Judgment No ECW/CCJ/APP/05/07 and the *Koraou* case (n 71 above).

enacted into ECOWAS law in a binding format. A combination of this argument, the fact that there is no requirement for ratification of the UDHR, and the growing influence of the UDHR as an ‘authoritative interpretation of the obligations contained in Articles 55 and 56 of the UN Charter’, is sufficient to sustain the perception of the UDHR as a source of human rights in the ECOWAS Community. On the presumption that the UDHR or at least some of its provisions now constitute customary international law, application of the UDHR as a source of rights in the ECOWAS framework ought not to impose additional obligations on member states.⁴⁵⁸

Certain protocols annexed to the 1975 ECOWAS Treaty also define human rights in terms of ILO Conventions.⁴⁵⁹ However, these ILO Conventions have not featured prominently in claims for right within ECOWAS. These ILO Conventions and other global human rights instruments adopted under the framework of the UN or any of its specialised institutions are other sources of human rights in the ECOWAS Community framework. Although there are at least eight core human rights instruments under the aegis of the UN, only the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) seems to have been expressly mentioned in any binding ECOWAS Instrument.⁴⁶⁰ It would be recalled that CEDAW was applied by the ECCJ in at least one of its decisions.⁴⁶¹ The International Covenant on Economic, Social and Cultural Rights (CESCR) has also been taken into consideration by the ECCJ in at least one of its judgments.⁴⁶² As previously argued, universal ratification by ECOWAS member states is essential for ECOWAS as an organisation to be bound by any of the global instruments. However, it is difficult to determine if universal ratification is necessary for a claim to be based on these instruments. This is because both global instruments applied by the ECCJ already enjoy universal ratification by ECOWAS member states.

⁴⁵⁸ See R Lillich, ‘Civil rights’ in T Meron (ed) (1984) *Human rights in international law: Legal and Policy Issues* vol 115, 133, who contends that certain provisions of the UDHR qualify as principles of customary international law.

⁴⁵⁹ For instance, see art 1 of A/SP.1/7/86 Supplementary Protocol on The Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, The Right of Residence and Establishment.

⁴⁶⁰ Para 7 of the Preamble to the Democracy Protocol.

⁴⁶¹ *Koraou* case (n 71 above).

⁴⁶² *Essien* case (n 457 above).

It is not intended to present the list of sources presented above as exhaustive of human rights sources applicable in the ECOWAS Community framework. Rights and obligations in the area of human rights can emerge from any source recognised by the law making organs of the Community. The sources or groups of sources treated above are thus merely representative and demonstrate the wide range of sources applicable in the absence of an ECOWAS human rights catalogue. However, the sources considered in this study all have the common feature of merely restating or adapting human rights obligations already incumbent on ECOWAS member states through their participation in treaty making. Accordingly, the legality of the obligations should withstand scrutiny since the Community has not been used as a platform to create new norms or new instruments. What needs to be investigated further is whether the implementation or monitoring of the restated or adapted human rights obligations fit in the traditional framework for human rights realisation. The argument being made here is that the risk of upsetting intra-and inter-organisational relations would be lower if the ECOWAS mechanism is able to fit properly within the existing human rights architecture.

3.5 Human rights in the mandates of the main institutions and organs of ECOWAS

The uncoordinated distribution of human rights norms applicable in the ECOWAS Community framework as laid out in the previous section creates a situation wherein it is difficult to get a prima facie indication of the institutions saddled with obligations to promote and protect human rights in the Community. An evident danger of such a situation is the potential for failure of relevant institutions to live up to their human rights obligations under ECOWAS Community law. There is also the potential for confusion on the part of prospective beneficiaries of protected rights to identify and demand for the realisation of rights. Even more crucial is the difficulty of coordination with member states and continental human rights bodies as a result of dispersal of implementation and monitoring effort in the ECOWAS framework. Thus, it is essential to investigate the mandates of the organs and institutions of ECOWAS for the purpose of identifying their human rights obligations. In this regard, the traditional functionalist but holistic approach rather than a focus on judicial mechanisms is adopted. A detailed analysis of the human rights mandates and obligations will follow in the next chapter of this work.

3.5.1 The Authority of Heads of State and Government

Article 7(1) of the revised ECOWAS Treaty establishes the Authority of Heads of State and Government (the Authority) as the ‘supreme institution of the Community’.⁴⁶³ The Authority is composed of Heads of State and (in some cases) Heads of Government of the ECOWAS member states. As a political institution and the highest decision-making body in the ECOWAS Community, the Authority is ‘responsible for the general direction and control of the Community’.⁴⁶⁴ In order to exercise its powers and functions, the authority has concluded treaties, issued declarations and decisions. The ECOWAS instruments do not give an express mandate to the Authority in the field of human rights. However, to the extent that it has the responsibility to determine the general policy direction of ECOWAS, the Authority has a general human rights obligation in the sense that it has to ensure that treaties, declarations, decisions and other law making documents of ECOWAS do not negate the Community’s human rights obligations arising from the UN Charter.⁴⁶⁵ In practice, even though ECOWAS does not have an original human rights objective, the Authority has aided the growth of a human rights culture by the adoption of documents with clear or implied human rights consequences. It can therefore be argued that the most important role of the Authority with respect to human rights is in the area of law making and overall policy coordination in the ECOWAS Community. These functions naturally would have to be carried out with due respect to national constitutional law requirements and respect for existing treaty obligations.

In addition to the general human rights obligations of the Authority, it is possible to identify other specific, albeit limited obligations and powers of the Authority in the documents of the Community. The first of such specific roles is the duty to ensure implementation of decisions with human rights implications through monitoring of member states compliance with Community obligations. This duty also includes ensuring that ECOWAS institutions act within the limits of their authority.⁴⁶⁶ On the basis of the duty arising from the UN Charter, the Authority may very well have responsibility to ensure that ECOWAS institutions act with respect for human rights. There are two aspects to the Authority’s implementation obligations. The one is the

⁴⁶³ See also art 6 of the revised ECOWAS Treaty which lists the institutions of ECOWAS.

⁴⁶⁴ Art 7(2) of the revised ECOWAS Treaty.

⁴⁶⁵ Art 103 of the UN Charter.

⁴⁶⁶ Art 7(3)(b) and (g) of the revised ECOWAS Treaty.

power to refer allegations of non-compliance to the ECCJ.⁴⁶⁷ The other aspect is the power of the Authority to impose sanctions for member states' failure to fulfil obligations arising from the ECOWAS Community framework.⁴⁶⁸ Competence to impose sanctions on member states for failure to comply with ECOWAS related human rights obligation is also conferred on the Authority in the Democracy Protocol.⁴⁶⁹ These, it is submitted, creates an expectation that human rights obligations under the community framework would have a stronger potential for implementation.

Another role for the Authority in the field of human rights is in the functions that the Authority takes on in the Conflict Management Protocol. By article 6 of that Protocol, the Authority has 'powers to act on all matters concerning conflict prevention, management and resolution, peace-keeping, security, humanitarian support, peace-building ...as well as other matters'. The Authority accordingly has a role to play in taking decision to initiate application of the mechanism established under the Conflict Management Protocol.⁴⁷⁰ Some remote human rights obligation of the Authority also exists in the realm of Community guaranteed economic freedoms in the sense that the Authority (through its Chairman) has a responsibility to act in the event of 'systematic or serious violations of the provisions of the Protocols on Free Movement of Persons, the Right of Residence and Establishment'.⁴⁷¹

3.5.2 The Council of Ministers

The Council of Ministers of ECOWAS (the Council) is established by article 10 of the revised Treaty.⁴⁷² It comprises of two Ministers from each member state (including the Minister in Charge of ECOWAS Affairs where such exists). There is no clear mandate and no express human rights obligations placed on the Council in the ECOWAS Community framework but it is possible to find links between the functioning of the Council and the human rights agenda of ECOWAS. This is

⁴⁶⁷ Art 7(3)(g) of the revised ECOWAS Treaty

⁴⁶⁸ Art 77 of the revised ECOWAS Treaty lays out the powers of the Authority to sanction erring member states.

⁴⁶⁹ See art 45 (2) of the Democracy Protocol.

⁴⁷⁰ Art 26 of the Conflict Management Protocol.

⁴⁷¹ Amended art 7 (in art 2) of the Supplementary Protocol A/SP.1/6/89 Amending and Complementing the Provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment.

⁴⁷² See also art 6 of the revised ECOWAS Treaty.

essentially as a result of the fact that there is room for the Council to impact on the human rights direction of the ECOWAS Community. According to the revised Treaty, the main function of the Council of Ministers is to bear responsibility for the ‘functioning and development of the Community.’⁴⁷³ The Council supports the Authority by making relevant recommendations on which the Authority acts to move the Community forward. Considering that the input of the Council plays a significant role in the exercise of law making powers by the Authority, the human rights disposition of the Council is vital in determining the policy trend of ECOWAS. In addition to this advisory role, the Council’s exercise of other functions enumerated in the Treaty can also have consequences for human rights.

By article 10(3)(g) of the revised ECOWAS Treaty, the Council has the responsibility to ‘approve the work programmes and budgets of the Community and its institutions’. In this provision also, there is potential for the Council to exert its influence on the human rights work of the ECOWAS Community. The Council can refuse to grant approval for programmes that weigh too much in favour of human rights realisation. It could also reject the budget of Community institutions aimed at expanding the human rights agenda of ECOWAS. While there is no reference to human rights in these provisions, the operation of article 4(g) of the revised Treaty on the processes and operations of ECOWAS institutions should place an obligation on the Council to, at the minimum, take human rights into account in the exercise of its powers. In these areas therefore, while human rights is not an express part of the mandate of the Council, the link between the duties and functioning of the Council on the one hand and the human rights agenda on the other hand cannot be denied. The Council further has powers to request for advisory opinion from the ECCJ on any legal question. Arguably, this creates space for the Council to bring questions of compliance of Community policies, programmes and budget with the principle of respect, promotion and protection of human rights.

3.5.3 The Community Parliament

One of the few institutions with express human rights mandate within the ECOWAS Community is the ECOWAS Community Parliament (the ECOWAS Parliament).

⁴⁷³ Art 10(3) of the revised ECOWAS Treaty.

Currently established by article 13 of the revised Treaty, the ECOWAS Parliament was formally constituted by Protocol A/P2/8/94.⁴⁷⁴ By article 6 of Protocol A/P2/8/94, the ECOWAS Parliament is empowered to consider issues ‘relating to human rights and fundamental freedoms and make recommendations to the institutions and organs of the Community’. Similarly, the ECOWAS Parliament ‘may be consulted for its opinion’ in areas including ‘Community citizenship’ and ‘respect for human rights and fundamental freedoms in all their plenitude’.⁴⁷⁵ Clearly, human rights in the mandate of the ECOWAS Parliament go beyond the general obligation imposed by article 4(g) of the revised Treaty. It should require that the ECOWAS Parliament gives prime attention to human rights as an issue area within the framework of the ECOWAS Community.

Against the backdrop that the ECOWAS Parliament was established as a ‘forum for dialogue, consultation and consensus for representatives of the peoples of West Africa’, there are at least two angles to the human rights mandate. The first is the aspect requiring the ECOWAS Parliament to open dialogue and discuss human rights issues affecting the ECOWAS Community and its citizens. The other angle is to raise these issues with the relevant Community institutions and organs either on the Parliament’s own initiative or upon request by the relevant authority.

3.5.4 The Economic and Social Council

The revised ECOWAS Treaty lists an Economic and Social Council as one of the institutions of the ECOWAS Community.⁴⁷⁶ The composition, functions and organisation of the Economic and Social Council was left to be defined in Protocol to be adopted by the ECOWAS Authority. As at July 2009, no protocol had been adopted for the constitution of the Economic and Social Council. There is therefore no statement of its competence and as at yet no means of determining human rights content in the mandate of the Economic and Social Council.

⁴⁷⁴ Also see art 6 of the revised ECOWAS Treaty. Protocol A/P2/8/94 which gave life to the ECOWAS Parliament was adopted in August 1994 and entered into force in March 2000. Although it was formally inaugurated in November 2000, it held its maiden plenary session in January 2001.

⁴⁷⁵ Art 6(2)(k) and (m) of Protocol A/P2/8/94.

⁴⁷⁶ Art 6 (1)(d) of the revised Treaty.

3.5.5 The ECOWAS Community Court of Justice

Originally conceived as a ‘Tribunal of the Community’ under the 1975 Treaty of ECOWAS,⁴⁷⁷ details relating to the composition, structure and competence of the ECCJ were left to be determined by the ECOWAS Authority.⁴⁷⁸ In 1991 the ECOWAS Authority concluded a protocol to constitute what became known as the Community Court of Justice.⁴⁷⁹ Under the present Treaty regime, the ECCJ is established by articles 6 and 15 of the 1993 revised Treaty of ECOWAS as one of the institutions of ECOWAS. The 1991 Court Protocol has since been amended by Supplementary Protocol A/SP.1/01/05 Amending the Protocol (A/P.1/7/91) relating to the Community Court of Justice (2005 Supplementary Protocol) and Supplementary Protocol A/SP.2/06/06 Amending Article 3 Paragraphs 1, 2 and 4, Article 4 Paragraphs 1, 3 and 7 and Article 7 Paragraph 3 of the Protocol on the Community Court of Justice (2006 Supplementary Protocol).⁴⁸⁰ The competence and mandate of the ECCJ can be found in a combined reading of the revised Treaty, the 1991 Protocol of the ECCJ and the 2005 Supplementary Protocol of the ECCJ.

By article 9 of the 1991 Protocol of the ECCJ, the Court was empowered to ‘ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty’. This it had to exercise in disputes between member states or member states and Community institutions.⁴⁸¹ The intervention of the 2005 Supplementary Protocol of the ECCJ substitutes the original article 9 of the 1991 Protocol of the ECCJ with a new and expanded article 9.⁴⁸² Under the new article 9, the ECCJ has been given competence on disputes relating to the interpretation and application of the Treaty, Conventions and Protocols of ECOWAS⁴⁸³ and of the regulations, directives, decisions and other subsidiary instruments of ECOWAS.⁴⁸⁴ The ECCJ also has competence to determine the legality of ECOWAS Community legislation, the failure by ECOWAS member states to

⁴⁷⁷ See arts. 4(1)(d) and 11 of the Treaty of the Economic Community of West African States, signed in May 1975 and entered into force in June 1975. Reprinted in 14 *International Legal Materials* (1975) 1200.

⁴⁷⁸ Arts. 4 and 11 of the 1975 ECOWAS Treaty.

⁴⁷⁹ Protocol A/P.1/7/91, which was adopted and entered into force provisionally in July 1991. Reproduced in the official Journal of ECOWAS of July 1991.

⁴⁸⁰ Printed in Vol. 49, (2006) *Official Journal of the Economic Community of West African States*.

⁴⁸¹ Art 9(2) of the 1991 Protocol of the ECCJ.

⁴⁸² See art 3 of the 2005 Supplementary Protocol of the ECCJ.

⁴⁸³ New art 9(1)(a) in art 3 of the 2005 Supplementary Protocol of the ECCJ.

⁴⁸⁴ New art 9(1)(b) in art 3 of the 2005 Supplementary Protocol of the ECCJ.

honour obligations under the Community legal framework, interpret the provisions of the Community legislations and entertain actions arising from the actions and omissions of Community officials.⁴⁸⁵ Significantly, the ECCJ is also empowered to determine cases of violation of human rights that occur in ECOWAS member states.⁴⁸⁶ The expanded competence of the ECCJ can be exercised in disputes between states, between states and ECOWAS Community institutions as well as in disputes involving individuals and corporate bodies.⁴⁸⁷ Thus, the ECCJ is currently the other ECOWAS institution with an express human rights mandate. The ECCJ's competence over human rights cases coincides with the jurisdiction of the national courts of member states, the African Commission and the African Human Rights Court (or its successor). Notwithstanding this fact, there appears to be no clear definition of the relationship with these other judicial and quasi-judicial fora.

Considering the expanded competence of the ECCJ, human rights in the Court's mandate can take any of several forms. First, on the basis of the requirement to take human rights into consideration as a fundamental principle of the ECOWAS Community, the ECCJ would have to ensure respect for human rights in its interpretation and application of ECOWAS Community legislation. The Court also has to test the legality of Community legislation against applicable human rights standard. The ECOWAS Community obligation of member states that the Court is competent to determine would also include obligations to respect, promote and protect human rights. In addition to all of these is the actual competence to receive and determine concrete complaints of the violation of human rights from individuals and corporate bodies. It is thus arguable that human rights in the mandate of the ECCJ is both express and implied.

3.5.6 The ECOWAS Commission

What is now known as the ECOWAS Commission was established in the revised Treaty as the Executive Secretariat of ECOWAS.⁴⁸⁸ As a secretariat, this institution had no human rights mandate and there was little room for its functions to impact on the human rights agenda of the ECOWAS Community. However, even in that mould,

⁴⁸⁵ See generally the new art 9 (1) of the 2005 Supplementary Protocol of the ECCJ.

⁴⁸⁶ Art 9(4) in art 3 of the 2005 Supplementary Protocol of the ECCJ.

⁴⁸⁷ New art 10 in art 4 of the 2005 Supplementary Protocol of the ECCJ.

⁴⁸⁸ Arts 6 and 17 of the revised ECOWAS Treaty.

there were certain aspects of the ECOWAS Secretariat's mandate that had apparent human rights implications. The Secretariat was to act as the legal representative of the ECOWAS Community in all situations and this included in cases of alleged human rights violations. The Secretariat was also responsible for the execution of all decisions of the ECOWAS Authority and the regulations of the Council. In carrying out these duties, the Secretariat could affect the human rights of ECOWAS citizens. It was the transformation of the Secretariat into a Commission that has however expanded the scope for greater impact on the Community's human rights agenda.

With a decision taken in January 2005, the Authority decided to transform the Executive Secretariat of ECOWAS into a Commission in order to 'enable ECOWAS focus better on the discharge of its core function'.⁴⁸⁹ The ECOWAS Commission is now established by a new article 17 of the revised Treaty.⁴⁹⁰ Under the new arrangement which took off in 2006, the ECOWAS Commission was endowed with enhanced powers distributed among Commissioners within clearly defined sectors.⁴⁹¹ The functions of the ECOWAS Commission have now been expanded to include coordination of the activities of the ECOWAS Community as well as strategic planning and policy analysis of regional integration activities.⁴⁹² In carrying out these functions, the ECOWAS Commission is empowered to submit recommendations to the Authority and the Council on matters it deems necessary for the promotion and development of ECOWAS. The ECOWAS Commission also has the role of formulating proposals to enable the Authority and the Council to take important decisions on the main orientation policies of the member states and the Community.⁴⁹³ The ECOWAS Commission also has powers to make rules for the purpose of implementing other legislative documents of the Community.

While it is obvious that human rights does not appear expressly in the enumeration of the functions and competences of the ECOWAS Commission, as with several of the

⁴⁸⁹ 'Summit Approves Conversion of ECOWAS Secretariat into Commission', ECOWAS bulletin available at <http://news.ecowas.int/pressshow.php?nb=5&lang=en&annee=2006> (accessed 3 November 2008).

⁴⁹⁰ See art 2 of Supplementary Protocol A/SP.1/06/06.

⁴⁹¹ 'ECOWAS Commission at a Glance' available at http://www.comm.ecowas.int/dept/stand.php?id=a_about&lang=en (accessed 3 November 2008)

⁴⁹² New art 19 of the revised Treaty as inserted by art 2 of Supplementary Protocol A/SP.1/06/06

⁴⁹³ As above.

other institutions, it is arguable that the general human rights obligations of the ECOWAS Community apply to the ECOWAS Commission. In the analysis of Community policies, in the formulation of proposal and in the making of rules, the ECOWAS Commission should be guided by the principles of respect, promotion and protection of human rights. Over and above this, in its actual functioning, ECOWAS Commission has delineated clear sectors involving human rights mandates for its Commissioners. In this regard, there are roles in human rights areas such as gender, youth and children affairs, humanitarian and social matters and political matters including good governance, human rights and democracy. There are also roles in the area of security, peace building and peace keeping. In all of these, the ECOWAS Commission impacts on human rights either as actor or as arena for the promotion and protection of right.

It has to be admitted that on the face of it, the human rights aspects in the mandates of the ECOWAS institutions are not obvious. In some cases, they may even appear to have been adopted without direct and clear legal foundation. Considering that the Treaty requires the ECOWAS institutions to act within the limits of conferred powers, it is essential to question whether ECOWAS as an organisation allows for the exercise of these human rights mandate. The following section of the work would therefore consider whether human rights now falls within the purview of ECOWAS and its institutions.

3.6 ECOWAS as a post-national human rights institution

The idea that RECs like ECOWAS could be involved in the realisation of human rights within the region in which they are set up presupposes that such organisations can add some value to the existing framework for human rights realisation. Generally, it should mean that there is a prospect that such mechanisms, as international institutions, would complement and fortify existing national mechanisms. In this regard, Besson pictures such institutions as ‘post-national human rights institutions’ and argues that they cannot be understood in the same light as national agencies for human rights realisation.⁴⁹⁴ Thus, Besson suggests that a post-national human rights institution should be ‘any collective institutional structure that purports to intervene in

⁴⁹⁴ Besson (2006) 323.

human rights matters regardless of jurisdiction and which, itself, regards human rights as its key principle of governance'.⁴⁹⁵ Besson's criteria for 'a good post-national human rights institutions' are institutional structure (which may mirror the tripartite governmental structure of a state), core competence in human rights that allows human rights to be placed at the core of internal and external governance, global know-how, publicity, transparency and democracy.⁴⁹⁶ From the perspective of international institutional law, perhaps the criterion of competence would be the most important consideration.

The competence of ECOWAS in the field of human rights represents the foundation upon which the exercise of jurisdiction by ECOWAS organs and institutions in that issue area is built. In fact, the question of organisational competence could be described as a 'central issue of principle' and it is unwise to 'take it for granted that the necessary legal principle and constitutional competence exists' in this area of activity.⁴⁹⁷ The significance of this inquiry is in the fact that international organisations, unlike states that create the organisations, do not have the freedom to engage in just any field of activity they desire. In the same vein, an international organisation can neither endow its organs and institutions with powers the organisation itself does not have, nor can it empower such organs and institutions to exercise powers the parent organisation does not have.⁴⁹⁸ Thus, some have argued that where an international organisation or any of its institutions acts beyond its specific powers, member states of the organisation should 'possess the right' to argue that the organisation has exceeded its purposes and functions. In this regard, an aggrieved member state should be able to 'refuse to collaborate finally or otherwise in implementing the obligation that comes with such action. Such a member state should be 'entitled to do so on the simple ground of legality' because the limitation of sovereignty can only be applied in the line of activities that they have subscribed to in signing the constitutional document of the organisation.⁴⁹⁹ This right, it is argued further, should avail an aggrieved state without the need for such a state to withdraw

⁴⁹⁵ Besson (2006) 338.

⁴⁹⁶ Besson (2006) 341.

⁴⁹⁷ P Alston and JHH Weiler, 'An 'ever closer Union' in need of human rights policy' (1998) 9 *European Journal of International Law* 660.

⁴⁹⁸ See generally the *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion of 11 April 1949) ('*Reparation Case*') (1949) ICJ Reports, p. 174.

⁴⁹⁹ Rama-Montaldo (1970) 123.

from the organisation.⁵⁰⁰ In relation to ECOWAS, if member states regard the human rights activities as either unlawful or excessive, they should have a right to resist that line of activity. It is against this background that the foundation ECOWAS offers for the exercise of human rights competence by its institutions and organs will be assessed.

As already observed the 1975 ECOWAS Treaty did not make any mention of human rights and completely avoided any use of human rights language. Consistent with this posture, even the economic freedoms which could be seen as vehicles for economic integration were carefully couched to avoid any link with rights. Hence, while Article 2(1)(d) of the 1975 Treaty recognised the abolition of obstacles to free movement of persons, services and capitals between member states as a means to achieve the aims of ECOWAS, these were not drafted as rights of the citizens of the states concerned. By Article 27 of the 1975 ECOWAS Treaty, there was an undertaking by member states to abolish obstacles to freedom of movement and residence of those regarded as ‘Community citizens’, but this was not stated as a right of those citizens. However, as has been shown earlier, the protocols adopted on the platform of the 1975 Treaty contain some rights language and limited reference to specific human right instruments. From 1985, more frequent use of rights language and reference to human rights instruments became evident in the ECOWAS. By 1991, while still operating under the 1975 Treaty, ECOWAS adopted the declaration on political principles in which the Community fully alluded to human rights under ‘universally recognised international instruments on human rights and in the African Charter on Human and Peoples’ Rights’ without necessarily linking the rights to economic freedoms.⁵⁰¹ These represent the place of human rights in ECOWAS under the 1975 founding Treaty.

In contrast to the picture painted above, the 1993 revised ECOWAS Treaty arguably, has revolutionised the perception and reception of human rights in the constitutional framework of ECOWAS. Considering the wide differences in the form in which human rights finds expression in the constitutional epochs of ECOWAS (the 1975 and

⁵⁰⁰ Rama-Montado (1970) 143.

⁵⁰¹ Declaration A/DCL.1/7/91 of Political Principles of the Economic Community of West African States.

the 1993 constitutional epochs), it becomes interesting to engage the question whether ECOWAS had transformed from an economic integration initiative into a political integration scheme. In this sense, it becomes necessary to ask whether the objectives and purpose of the Community have changed or expanded to embrace Community competence in the field of human rights. In view of the fact that the law of international institution and indeed, the practice of international organisations indicate that a principle of limited powers prevails in that sphere, are the human rights provisions contained in the 1993 revised Treaty of ECOWAS sufficient to confer human rights competence on ECOWAS and to result in legally acceptable transfer of human rights competence to the organs and institutions of ECOWAS? Assuming the Treaty provisions are insufficient to base the presence of such competence, would the provisions in the protocols suffice to sustain an argument that ECOWAS does have a human rights competence? In answering these questions, it has to be noted that both the constitutional document of the given organisation and general international law may operate to confer competence on an international organisation.⁵⁰²

Generally, the treaty of an international organisation which is the constitutional document of the organisation is the most important source of the authority that the organisation has. The Treaty lays out the objectives, functions and powers of the organisation. Hence it has been argued that by the operation of the doctrine of delegated powers in the field of the law of international institutions, only powers ‘expressly enumerated’ in the treaty of an organisation can be exercised. The exception being that the theory of ‘implied powers’ could intervene to allow for the exercise of powers and functions, which though not expressly granted by enumeration in the treaty, can be deemed conferred by reason of being essential for the performance of enumerated powers and functions.⁵⁰³ Practical expression of the theory of implied powers comes in the form of an omnibus provision that allows international organisations to undertake ‘any other activity’ necessary for achieving set objectives.⁵⁰⁴

⁵⁰² T Ahmed and I de Jesus Butler, ‘The European Union and Human Rights: An International Perspective’ (2006) 4 *European Journal of International Law* 771, 776.

⁵⁰³ Rama-Montaldo (1970) 114.

⁵⁰⁴ See art 3(2)(o) of the 1993 revised ECOWAS Treaty and art 308 of the Treaty of the European Union.

Notwithstanding the operation of the theory of implied powers, Rama-Montaldo advises that caution has to be applied in order to avoid giving room for the enlargement of competence ‘by considering as a means for the fulfilment of its original purposes, tasks for which it was not created and are clearly outside the natural interpretation of its constitution and which are opposed by a minority’.⁵⁰⁵ Pushing his argument forward, Rama-Montaldo makes the point that there may just be a thin line between assuming a new competence and performing a task not authorised by the constitution but termed a ‘means’ to fulfil an enumerated competence.⁵⁰⁶ From this perspective, both treaties of ECOWAS do not enumerate the promotion and protection of human rights as a purpose or function of the organisation. Both treaties aim at promoting action to ‘raise the living standards’ of ECOWAS citizens. Further, both treaties do not expressly list the promotion and protection of human rights as means to achieve the goal of ‘raising the living standards of ECOWAS citizens. However, the revised Treaty and several other instruments of the organisation make frequent allusion to human rights protection, possibly as a means of creating conditions necessary to raise the living standards of citizens. In addressing the question whether failure to enumerate human rights protection as a purpose of ECOWAS is fatal to an ECOWAS claim to human rights competence, a basic challenge lies in delineating what should be included in defining constitutional authorisation, especially since treaties need to be interpreted in context, which context includes the preamble and annexes to the treaty.⁵⁰⁷

Looking beyond the enumerated aims in the treaties in order to contextualise interpretation, it is possible to identify clear differences in the two constitutional epochs of ECOWAS. Both in its preamble and in the statement of fundamental principles, the 1993 revised Treaty gives some status to human rights promotion and protection in the ECOWAS agenda. However, there is no *prima facie* basis to suggest that human rights realisation is suddenly one of the goals of ECOWAS as the purposes of an organisation can only be found in the constitutional instrument of the

⁵⁰⁵ Rama-Montaldo (1970) 115.

⁵⁰⁶ Rama-Montaldo (1970) 117.

⁵⁰⁷ Art 31(2) Vienna Convention on the Law of Treaties (1969) 8 *ILM* 679 (1969). Also see D Shelton, ‘The boundaries of human rights jurisdiction in Europe’ (2003) Duke 13 *Journal of Comparative and International Law* 95, 125.

organisation and cannot be implied.⁵⁰⁸ Nevertheless, it is difficult to dismiss an argument suggesting that human rights realisation constitutes a means for achieving the objectives of ECOWAS. It may even be necessary to undertake a further enquiry as to whether the economic goals of ECOWAS can be achieved without necessarily addressing the state of human rights in the Community and in the member states. The revised Treaty does not engage the link between human rights realisation and the goal of raising living standards through economic integration. However, the record of ECOWAS under the 1975 Treaty demonstrates the difficulties that the organisation faced in implementing its economic goals without attending to the political issues linked with domestic human rights situations. The effects of domestic conflicts directly or indirectly related to denial of, and demand for human rights protection prevented ECOWAS from achieving set goals and resulted in moving the organisation towards security ends. Thus, while the effect of donor pressure and the change that occurred in the international environment cannot be ignored, it is arguable that the significance of addressing the human rights question in the Community as a condition for achieving set goals was recognised within the era of the 1975 Treaty.

In the face of the link between human rights realisation and the goal of raising living standards through economic integration, recognition of the former as a fundamental principle of ECOWAS becomes even more relevant. Going by Krasner's definition of principles as 'belief of fact, causation and rectitude',⁵⁰⁹ it is possible to locate an ECOWAS understanding of an interface between rights realisation and goal attainment. This interface can even be stretched to base an argument that realising human rights is an essential means to pursue organisational goals. Such an understanding also fits with Rama-Montaldo's perception of principles as 'modalities to which an organisation must adjust when attaining its purpose'. Thus, despite the argument that principles do not impose positive obligations for the organisation since they are not ends in themselves,⁵¹⁰ principles could take on special significance in different contexts. In the context of ECOWAS, recognition of the promotion and protection of human rights as a fundamental principle of the organisation takes on the character of a means to the end of the organisation. The undertaking further expressed

⁵⁰⁸ Rama-Montaldo (1970) 154.

⁵⁰⁹ Krasner (1982) 186.

⁵¹⁰ Rama-Montaldo (1970) 154

by member states to cooperate to guarantee rights in the African Charter thus serves to amplify the significance of the principles.

Notwithstanding the line of argument pursued above, the position that principles in themselves do not impose obligations on member states cannot be taken lightly. As Seyersted observed, the exercise of authority by an organisation, to make decisions that are binding on member states or to claim and exercise direct or indirect jurisdiction over the territory, nationals or institutions of member states can only be sustained by a 'special legal basis'.⁵¹¹ However, the legal basis for this genre of authority need not be located in the constitutional instrument alone. It could be traced to any other legally acceptable lawmaking instrument recognised by the member states of the given organisation.⁵¹² This position has to be even weightier where the power of lawmaking resides in the usual representatives of the member states, acting in intergovernmental capacity. In such a capacity, the member states would be deemed to be exercising unlimited competence to enter into agreements of any sort that is not expressly illegal in international law. Seen from this perspective, the search for the human rights competence of ECOWAS cannot be restricted to aims enumerated in the constitutional instrument of the organisation but extends to the entire Treaty and all other validly adopted lawmaking instruments of the organisation. To that extent, there is evidence of human rights competence in ECOWAS under the 1993 constitutional epoch.

Having come to a conclusion that even though human rights realisation is not one of the goals of ECOWAS, the organisation can claim some competence in that area, it is necessary to explore whether there is sufficient coordinated activity in this area to suggest the presence of a human rights regime. The wisdom in taking a regime approach is that it becomes possible to see a clearer picture through a comprehensive visualisation of the collective that isolated and individualised assessment of provisions and instruments would not sustain.⁵¹³ The term 'regime' may take any of several meanings. Seen from the 'eyes' of Krasner, it may refer to 'principles, norms,

⁵¹¹ F Seyersted, 'Objective international personality of intergovernmental organizations: do their capacities really depend on the conventions establishing them?' (1964) 34 *Nordisk Tidsskrift for International Ret.* 29

⁵¹² Seyersted (1964) 29 - 30.

⁵¹³ See eg, M Brosig, 'Human Rights in Europe: An Introduction' in Brosig (ed.) (2006) *Human Rights in Europe: A fragmented regime?* 9.

rules and decision-making procedures around which actor expectations converge in a given issue-area'.⁵¹⁴ Regime may also be recognised as 'an international regulatory system promoting and enacting normative rules'.⁵¹⁵ A regime may further be understood as 'as norms and decision-making procedures accepted by international actors to regulate an issue-area'.⁵¹⁶ While there are minor differences in these definitions, they all agree to the extent that a regime requires the presence of rules and means of applying those rules. What is not clear is whether the rules that form part of a given regime need to be created exclusively within the regime set-up or such rules or a part thereof, could be 'borrowed' from another regime framework.

In the absence of a strict requirement, a liberal approach to the question of the source of regime rules may be adopted to sustain an argument that a regime could exist even if the applicable rules are a 'mixture' of original and borrowed norms. The critical determination being whether the rules are recognised by the actors within the system and the means of applying the rules operate to bring order to the specific issue-area in relation to the given community it seeks to regulate. From this point of view, ECOWAS under the 1993 revised Treaty has created an emerging human rights regime that consists of constitutional instrument provisions conferring rights, fundamental principles and normative guarantees in other treaties and lawmaking instruments. Taking a stricter approach would lead to undesirable results since overlap in norms and rules appear in all systems of human rights protection. Applying Besson's criteria, it can be concluded that ECOWAS qualifies as a post-national organisation for human rights realisation in West Africa. This is because ECOWAS operates on a tripartite state structure, currently adopts human rights as a governing principle, applies human rights on the basis of international instruments and exhibits some level of transparency, publicity and democracy in its application of human rights.⁵¹⁷

⁵¹⁴ Krasner (1982) 185.

⁵¹⁵ Brosig (2006) 9.

⁵¹⁶ J Donnelly, 'International human rights: a regime analysis' (1986) 40 *International Organisations* 602.

⁵¹⁷ Besson views global know-how as a 'constellation of instruments of trans-national or post-national trendsetting'. See Besson (2006) 341.

3.7 A new pillar in an old building: relation with existing human rights systems

As demonstrated in the previous sections of this chapter, the introduction of human rights realisation in the agenda of ECOWAS is a relatively recent occurrence. Prior to this introduction, there were at least three levels of human rights realisation mechanisms applicable to the West African region. These are the domestic or national legal systems, the African regional human rights system and the global (UN) human rights system.⁵¹⁸ Shelton suggests that a human rights system is a legal system that consists of a catalogue of internationally guaranteed rights, permanent institutions to supervise the application of the rights and procedures for compliance.⁵¹⁹ From this perspective, while a liberal understanding of the African human rights system could envelop the national human rights as a sub-system of a complete African human rights system,⁵²⁰ it is arguable that each of these three levels for human rights realisation is a separate and complete rights realisation system.

It would generally be agreed that the national systems are at the lower rung of an imaginary human rights pyramid as they provide the first port of call in the event of human rights violations. At the international level, it becomes a little more complicated since there is no formal hierarchy between the regional and global human rights realisation systems. The regional and global systems are independent, autonomous and self-sufficient within their specific spheres of influence. The complication arises partly from the fact that in terms of Africa, the global and regional systems exercise authority over the same geographical territory, peoples and issues. Notwithstanding this complication, all tiers of human rights realisation systems have existed without any crisis. With the emergence of an ECOWAS system for human rights realisation in West Africa, questions on how it would fit into the existing human rights architecture are raised. These questions are significant for reasons of intra- and inter-institutional relations, overlap of judicial jurisdictions and consequent threats of fragmentation of international human rights law in the subregion; risk of

⁵¹⁸ Citing P Licker (1987) *Fundamentals of System 5*. D Shelton, 'The Promise of Regional Human Rights System' in BH Weston and SP Marks (eds) (1999) *The Future of International Human Rights*, 352 defines system as 'a set of elements that are related and that, through this set of relationships, aim to achieve goals.

⁵¹⁹ Shelton (1999) 352. Reference to permanent institutions and procedures for compliance as used here are not restricted to courts and other forms of the judicial and quasi-judicial process. They cover all institutions, actors and processes involved in the implementation and supervision of human rights realization.

⁵²⁰ Odinkalu (2001) 227.

forum shopping and abuse of processes; risk of watering-down of human rights standards and implementation mechanisms; and the ultimate risk of self-destruction, arising from a crowded regulatory environment. What is obvious is that the ECOWAS regime is not part of the national systems. It is a post-national system operating at the international plane. However, it is also neither a central part of the African continental human rights system nor a part of the global human rights system. It leaves open the question whether it is any part, albeit a peripheral part, of the African continental human rights system. It is against this background that existing and potential relationship between the ECOWAS regime for human rights realisation and the older systems will be addressed.

3.7.1 Relation with national systems for human rights realisation

Fifteen West African states currently are member states of ECOWAS and each of these states has its national systems for human rights realisation. These systems usually comprise of parliaments and parliamentary bodies, national human rights institutions, the courts, the ministries of justice and any other institutions directly or indirectly responsible for aspects of human rights realisation. Despite the expected direct applicability of certain ECOWAS instruments within the member states,⁵²¹ the ECOWAS system does not replace the national systems. Apparently, the ECOWAS system does not also exist as a supervisory system over national systems of member states. At best, the ECOWAS system operates side by side with national systems as a complementary and reinforcing mechanism. In terms of norms, since ECOWAS does not have its own catalogue of rights and it is not a party to any international human rights instrument, it relies on the human rights commonly guaranteed by its member states as general principles of law and on the international instruments ratified by ECOWAS member states.⁵²² ECOWAS does not therefore create new rights but merely applies those already recognised by the member states.

In terms of institutions, there is no evidence of any law regulating the relation between ECOWAS institutions with direct or implied human rights roles and the

⁵²¹ New art 9 of the revised ECOWAS Treaty (introduced by art 2 of Supplementary Protocol A/SP.1/06/06

⁵²² Out of the two ECOWAS institutions with express human rights mandate, none has the power of actual lawmaking. The ECOWAS Parliament is merely a consultative forum and is not likely to make laws in the foreseeable future. The ECCJ has a mandate without a clear statement of applicable human rights instruments. See also Justice el Mansour (n 413 above).

institutions of the member states. The Democracy Protocol rather demonstrates an intention that victims of alleged human rights violations should have access to national mechanisms.⁵²³ This, it is submitted, agrees with the principle of subsidiarity in international law and international relations. Hence, the Democracy Protocol encourages ECOWAS member states to ‘establish independent national institutions to promote and protect human rights’.⁵²⁴ It is then envisaged that the President of the ECOWAS Commission (formerly the Executive Secretary) would take measures to strengthen these national institutions by helping them to establish a regional network on the basis of which national institutions may submit reports of rights violations in the member states to the President of the Commission.⁵²⁵ Interestingly, the Protocol makes use of the term ‘shall’ which creates the impression that there is a duty of sorts on national human rights institutions to report to the ECOWAS Commission.⁵²⁶ However, it is doubtful if this intended to create a binding obligation as indeed there is no evidence that such reports have ever been submitted. Further, there is no indication that the ECOWAS Commission itself anticipates a role in this regard.⁵²⁷ Thus, the provision discussed above seems to be the only one showing a link between an ECOWAS institution and national institutions of a non-judicial nature in the field of human rights.

Even from a judicial perspective, it can be reasonably argued that the ECCJ does not seek to replace nor supervise national judicial protection of human rights. There are at least two main reasons to support this position. First, even though the 2005 Supplementary Protocol of the ECCJ does not make any reference to prior attempts to address allegations of human rights violation at the domestic level, it does not also state that the ECCJ’s jurisdiction replaces the national jurisdiction. Further, if the intention expressed in the Democracy Protocol is any thing to go by, the ECCJ’s power to hear cases of alleged violations of human rights ought to arise only when ‘all

⁵²³ Art 1(h) of the Democracy Protocol.

⁵²⁴ Art 35(1) of the Democracy Protocol.

⁵²⁵ A network of national human rights institutions currently exists in West Africa and although, ECOWAS officials are known to participate in meetings of the network, it is not clear whether the founding of the network was facilitated by ECOWAS as an organisation.

⁵²⁶ Art 35(2) of the Democracy Protocol.

⁵²⁷ The Political Affairs Department of the ECOWAS Commission describes itself as a department to promote good governance, human rights, democracy, peace and security through the implementation of relevant protocols. But enquires made by this author in November 2008 did not yield any results on the appreciation of this role.

attempts to resolve the matter at the national level have failed'.⁵²⁸ In any event, the practice all over the world is that the international judicial mechanisms for human rights protection only come into play after attempts at the national level have failed. Would this then mean that the ECCJ's jurisdiction in the field of human rights is supervisory over the national systems? The answer forms the second reason to support the position taken above. There is no requirement to exhaust local remedies before a case alleging human rights violation can be brought before the ECCJ.⁵²⁹ The ECCJ has also stressed that it is not a court of appeal over the decisions of the national courts of the ECOWAS member states.⁵³⁰ Consequently the ECCJ does not seek to supervise the human rights jurisdiction of member states.⁵³¹ Instead, the ECCJ visualises itself as being in an 'integrated' relationship with the national courts, especially since it would require the assistance of the national courts to implement its decisions.⁵³² It can therefore be concluded that the judicial protection of human rights under the ECOWAS regime is expected to exist side by side with the national legal systems. However, it is desirable that the national systems should have primacy in the determination of cases alleging human rights violation.

The new legal regime of the ECOWAS Community envisages the introduction of supranationality and the direct application of ECOWAS instruments in the national systems of member states. It is arguable however, that this applies essentially in the core field of economic integration. In terms of human rights realisation, the ECOWAS system is silent on the nature of relationship with national mechanisms. The practice of the ECOWAS institutions and a careful scrutiny of the applicable documents may thus be applied to support the position that the ECOWAS mechanisms exist to complement and reinforce the national mechanism.

⁵²⁸ Art 39 of the Democracy Protocol.

⁵²⁹ See the *Essien* case (n 457 above) and the *Koraou* case (n 71 above).

⁵³⁰ See the *Keita* case (n 373 above).

⁵³¹ It is even doubtful whether the ECCJ as presently constituted is suitable for such a supervisory role in the area of human rights.

⁵³² *Ugokwe* case (n 382 above).

3.7.2 Relation with the African (continental) human rights system⁵³³

It is commonly agreed that the African continental human rights system refers to the norms and institutions developed around the framework of the OAU/AU, the central document of which is the African Charter.⁵³⁴ Seen from a holistic perspective, the African continental human rights system extends beyond the African Charter and its supervisory bodies⁵³⁵ and encompasses all other institutions and norm creating instruments and implementing institutions directly or remotely concerned with the recognition, promotion and protection of human rights.⁵³⁶ A consideration of the relation between the emerging ECOWAS human rights regime and the continental human rights system therefore necessarily implicates the relation with all such AU institutions and organs. It further requires reopening the question whether the ECOWAS regime is in any way a part of the African human rights system as is currently known.

In view of the stipulation in the Abuja Treaty that RECs, including ECOWAS, are building blocks for the AU/AEC, it would be necessary to explore the overall relationship between the regional and continental organisations as aid in this analysis. The 1998 Protocol on Relations Between the African Economic Community and the Regional Economic Communities (AEC/REC Protocol)⁵³⁷ contains the most comprehensive statement of the expectations in that regard. Pursuant to article 6 of the Abuja Treaty, the AEC has responsibility to strengthen existing RECs and to establish RECs in regions where none exist, with a view to integrating the RECs into the proposed African Common Market. This is translated in the AEC/REC Protocol to impose an obligation on RECs to ‘provide and umbilical link’ to the AEC.⁵³⁸ The ultimate intention is envisaged as the ‘eventual absorption’ of the RECs into the African Common Market ‘as a prelude to the Community’.⁵³⁹ It can be deduced from these statements that the RECs are perceived as pillars of the AEC structure. As pillars, they cannot be outside of the overall framework. The call to provide an

⁵³³ I have used ‘continental’ here to indicate as previously argued, that the African regional human rights system extends beyond the OAU/AU mechanisms for human rights realisation.

⁵³⁴ See generally Shelton (1999) 353; OC Okafor (2007) *The African Human Rights* 65.

⁵³⁵ The African Commission and the African Court of Human and Peoples’ Rights.

⁵³⁶ See eg A Lloyd & R Murray (2004) 173; Heyns & Killander (2006)

⁵³⁷ OAU Doc. Annex III-4, signed in Addis Ababa in 1998.

⁵³⁸ Art 5(1) of the AEC/REC Protocol.

⁵³⁹ Art 5(1)(c) of the AEC/REC Protocol.

umbilical link had earlier been answered in article 2(1) of the 1993 revised ECOWAS Treaty which stipulates that ECOWAS was established ‘for the purpose of economic integration and the realisation of the objectives of the African Economic Community’. There is therefore common understanding that ECOWAS, like other African RECs, should be part of the continental economic integration system. Accordingly, the AEC/REC Protocol envisages coordination to avoid duplication of efforts and action that jeopardise AEC objectives,⁵⁴⁰ exchange of information and cross-participation at meetings.⁵⁴¹

However, the actual nature of the relationship is not very evident in the different instruments. While the language in the AEC/REC Protocol gives the impression that the RECs would dissolve upon realisation of the African Common Market, the manner in which article 2(1) of the 1993 revised ECOWAS Treaty is couched does not support such an impression. Further, the AEC/REC Protocol does not contain a termination date. Although it is conceded that treaties can terminate by implication,⁵⁴² the omission of a termination clause in such a treaty can at best, be translated as an indication that there is no certainty of intention to terminate it. If this interpretation is correct, it would mean that RECs should continue to operate even after the coming into being of the African Common Market. Thus, RECs, including ECOWAS could operate as regional offices of the AEC. However it is analysed, the conclusion that can be drawn is that, in terms of economic integration, the RECs are either currently or potential expected to be part of the overall African system.

From a human rights perspective, the documents of ECOWAS are silent on how ECOWAS institutions are to relate with continental institutions involved in the field of human rights. There is also little, if any practice to guide an understanding of the relationship between the ECOWAS regime and continental human rights system. On the side of the continental system, there are provisions in certain documents which provisions touch on relations between the system and subregional mechanisms involved in the field of human rights. As previously observed,⁵⁴³ the PSC Protocol for example recognises regional security mechanisms like the mechanism established

⁵⁴⁰ Art 4 of the AEC/REC Protocol.

⁵⁴¹ Art 17 of the AEC/REC Protocol.

⁵⁴² I Brownlie *Principles of public international law* (2008) 621.

⁵⁴³ Chapter 2 of this work.

under the ECOWAS Conflict Management Protocol as part of the ‘overall security architecture of the Union’.⁵⁴⁴ What these provisions fail to do is to outline the nature of operational relation between the continental system and the subregional mechanisms. From the judicial and quasi-judicial perspective, the African Charter, the Protocol to the African on the African Court on Human and Peoples’ Rights and the African Children Charter all make general provisions for competence of continental human rights supervisory bodies to receive requests from ‘African Organisations’ for advisory or interpretative opinions on the applicable human rights instruments.⁵⁴⁵ Further, in its rules of procedure, the African Committee of Experts on the Rights and Welfare of the Child has elaborated on the provisions of article 42 of the African Children Charter to create a right to ‘invite RECs’ to submit reports to the Committee on the implementation of the African Children Charter and to ‘give expert advice in areas falling within their scope of activities’.⁵⁴⁶ All the provisions on ‘African organisations’ and ‘RECs’ naturally include ECOWAS and its institutions.

It would be observed that none of the provisions considered expresses any hierarchical relation between the continental system and subregional regimes like the ECOWAS regimes. There is also no clear delineation of areas of competence or indications of what mechanisms alleged victims should approach first. What is clear however, is that the provisions envisage subregional involvement in the human rights issue area, and the communal usage of relevant continental human rights instruments. Notwithstanding these observations, there are a few reasons to support a view that the continental mechanisms stand in some sort of ‘superior’ position vis-à-vis the subregional regimes like ECOWAS. First, from the general point of view of integration, the revised ECOWAS Treaty recognises that its integration should ‘constitute an essential component of the African continent’.⁵⁴⁷ By implication, the activities of ECOWAS, including in issue areas like human rights should defer to wider continental initiatives. Secondly, especially in the judicial and quasi-judicial sector, the issue-specific nature of the mandate of the continental human rights

⁵⁴⁴ Art 16 of the PSC Protocol. See also the provisions for parliamentary cooperation as well as the NEPAD provisions discussed previously.

⁵⁴⁵ See art 45(3) of the African Charter, art 4 of the Protocol on the African Court of Human and Peoples’ Rights and art 42(c) of the African Children Charter.

⁵⁴⁶ Rule 69 of the Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child.

⁵⁴⁷ Art 78 of the revised ECOWAS Treaty.

supervisory bodies makes those bodies better placed to exercise hegemony in the area of human rights.⁵⁴⁸ In this regard, even the language of the documents of the continental system, which empower continental bodies to receive requests for advisory opinions from bodies like ECOWAS seem to envisage that the greater competence for interpretation lies with the continental bodies. It has to be noted however, that the instruments do not confer exclusive jurisdiction on continental bodies and they do not specify an appellate relationship. Thirdly, the ECOWAS system is ‘closer’ to West Africa⁵⁴⁹ and it is likely to be accessed first.

The deductions that can be made from the previous paragraph are that the ECOWAS system does not state the nature of the relation between ECOWAS institutions involved in the field of human rights and the institutions of the continental human rights system. However, continental instruments ‘recognise’ subregional regimes like the ECOWAS regime and envisages a supporting role for such regimes. Thus, the ECOWAS regime stands in a complementary relation with the continental institutions in a non-hierarchical position in the space between the national plane and international (continental) mechanisms for human rights realisation. At this point, it is relevant to revisit the question whether the ECOWAS system is a part, or has any specific link with the African human rights system.

Until recently, legal scholarship on the African human rights system has been conclusive on the position that the system revolved around the African Charter, the African Commission on Human Rights and (at that time), the emerging African Court on Human and Peoples’ Rights.⁵⁵⁰ On the strength of such traditional scholarship, the emerging ECOWAS human rights regime is not a part of the African human rights system as it does not have a direct link with the African Charter. To determine whether the ECOWAS regime is a part of the African human rights system, it would

⁵⁴⁸ See eg E Aukot, ‘The future of regional courts in redressing human rights violations: Is the establishment of the African Court on Human and Peoples’ Rights a Plus?’ in Wachira (ed) (2007). Aukot argues that the African Human Rights Court, as a specialised continental court for human rights issues should enjoy ‘supremacy’ vis-à-vis subregional courts like the ECCJ.

⁵⁴⁹ Although, not in all cases as the Secretariat of the African Commission is hosted in Banjul, The Gambia.

⁵⁵⁰ Recent works which have tended to adopt a more holistic approach include Viljoen (2007) and J Akpori and DS Zimble (eds) *Africa’s Human Rights Architecture* (2008). For a contrary view, see JD Boukongou, ‘The appeal of the African system for protecting human rights’ (2006) 6 *AHRLJ* 268, 269.

be necessary to further explore what the system is and how parts of the system can be identified. In this regard, a system has been defined as ‘a set of elements that are related and that, through this set of relationships, aims to accomplish goals’.⁵⁵¹ A system may also be seen as ‘a regularly interacting or interdependent groups of items forming a unified whole’.⁵⁵² LoPucki adds that ‘systems are composed of subsystems’.⁵⁵³ Working by these definitions, the African human rights would refer to all the norms, principles and institutions that interact for the purpose of promoting the realisation of the objectives human rights protection around the framework of the African Charter. For identification of parts of a system, LoPucki advises inquiry into relationships rather than on stated components.⁵⁵⁴ He advocates the use of an analysis tool that evaluates interaction and purpose in order to identify the existence of a system and its components.⁵⁵⁵

As noted already, current analysis of the African human rights system excludes the ECOWAS regime as part of the system. It is arguable that this conclusion is the result of overly focusing on the familiar ‘components’ of the system. This would mean that adopting a ‘systems analysis approach’ and expanding focus to relationships would present a different picture and allow for seemingly unrelated ‘components’ to be admitted as part of a more comprehensive system, even if only as a subsystem. Using LoPucki’s approach, there is some level of interaction of the ECOWAS system with other parts of the African human rights system. While this may not currently be very much in all areas, it is very strong with respect to the use of the African Charter as a common standard for human rights in West Africa.⁵⁵⁶ In terms of purpose, there is clear evidence that the ECOWAS regime also partly aims at ensuring realisation of the objectives of the African Charter.⁵⁵⁷ There is thus an indication of a common purpose of the ECOWAS regime and the continental system. From this perspective, the ECOWAS regime, while not being a central part of the system, operates as a

⁵⁵¹ P Licker, *Fundamentals of system analysis* (1987) cited by Shelton (1999) 352.

⁵⁵² LM LoPucki, ‘The systems approach to law’ (1996 -1997) 82 *Cornell Law Review* 482. LoPucki cites the Webster’s Ninth New Collegiate Dictionary.

⁵⁵³ LoPucki (1996 – 1997) 487.

⁵⁵⁴ As above.

⁵⁵⁵ LoPucki (1996 – 1997) 498.

⁵⁵⁶ It can be pointed out that law-making instruments of ECOWAS commonly refer to the African Charter. Judicial protection of rights under ECOWAS has also been largely based on the African Charter.

⁵⁵⁷ Art 56(2) of the revised ECOWAS Treaty is instructive in this regard.

somewhat independent, but connected part of the African human rights system. It can therefore be regarded as a subsystem of the African continental human rights system.

3.7.3 Relation with the global human rights system

In terms of human rights realisation, the ECOWAS regime does not also prescribe any formal institutional relation with the global (UN) human rights system. From the point of view of the global human rights structures, there is also no recognition of any relationship between subregional regimes like ECOWAS and the global system.⁵⁵⁸ This is no different from the relation between the global system and the three main subregional human rights systems. As Shelton notes, the regional systems draw ‘inspiration from the human rights provisions of the United Nations Charter and the Universal Declaration of Human Rights’.⁵⁵⁹ Yet, these regional systems are autonomous and independent of the global system. At best, some form of mutual respect exists between the global and regional human rights systems. The ECOWAS regime is yet to have any significant contact with global institutions for human rights realisation to assist analysis of the nature of the relation. However, as already demonstrated earlier in this chapter, the understanding of human rights under the ECOWAS regime makes ample references to the UDHR which stands as the central human rights standard of the global human rights system. Added to this, the human rights obligations in the UN Charter would also be relevant considerations to the extent that ECOWAS member states are all members of the UN.

Beyond the recognition accorded the UDHR in the documents of the ECOWAS regime,⁵⁶⁰ it can be argued that the ECOWAS regime operates at a level too remote to require formalisation of relations. However, from a judicial and quasi-judicial perspective, the provisions under the ECOWAS regime and in the various UN Treaties preventing dual submission of cases before international mechanisms for rights protection is evidence of some level of mutual respect. Nevertheless, it can be the principle of speciality of purpose operates in favour of the global mechanisms for human rights in the remote event of a conflict.

⁵⁵⁸ However, the Office of the UN High Commissioner for Human Rights states that it can partner with organisations for the protection of human rights. This, it is submitted is wide enough to accommodate formal relations with ECOWAS.

⁵⁵⁹ Shelton (1999) 353.

⁵⁶⁰ The UDHR has also been applied frequently in judicial protection of human rights under the ECOWAS system.

3.8 Interim conclusion

The purpose of this chapter was to investigate whether there is a legitimate subregional regime for human rights protection under the ECOWAS framework. After an evaluation of the integration history of the Community, analysis of the treaties and other sources of law as well as a brief consideration of institutional mandates, this chapter has shown that despite its origins as an initiative for subregional economic integration, ECOWAS has gradually developed a human rights regime. The boundaries of the regime are still unclear as the regime is still at its infancy. The discourse has also shown that the legal foundation for an ECOWAS human rights regime rests on a delicate yet evident constitutional basis as contained in provisions of the revised ECOWAS Treaty. Thus, there is a lawful human rights regime which falls within the purview of the Community's organisational objectives. The chapter has also demonstrated that human rights standard-setting under the ECOWAS framework depends largely on restatement or adaptation of obligations that member states had undertaken under other treaty arrangements and thus, does not create additional obligations or impact negatively on the relations between the Community and its member states.

It has also been shown that whereas the human rights aspects in the mandates of some ECOWAS institutions are express and obvious, in others, they are not so clear. The chapter has also demonstrated the unclear relation between the budding regime and other, far more established human rights systems. The point has also been made that lack of clarity of human rights mandate of ECOWAS institutions amplifies the risk of conflict between the Community's institutions and other players in the African human rights system. Notwithstanding the uncertainties, one can venture that the regime has come to stay. However, the survival of the system would depend largely on its ability to navigate through the haze of uncertainties. This can be simplified where ECOWAS institutions identify their roles in the new regime with a view to enhancing their performances. In this process of identification and clarification of roles, the ECOWAS institutions need to develop mechanisms to regulate intra- and inter-organisation relations with national and continental bodies that are involved in the field of human rights. This is especially since some of the treaties applied by the ECOWAS regime were adopted on the platform of the AU and in some cases have



their own treaty supervisory bodies. The next chapter of this work will therefore focus on the institutional responsibilities for human rights under the ECOWAS regime.