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Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice

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Abstract

A new opportunity for international human rights litigation in West Africa was presented in 2005 when the Economic Community of West African States adopted a protocol to empower its judicial organ, the ECOWAS Community Court of Justice, to determine cases of human rights violation that occur in ECOWAS member states. Since then, several human rights claims have been brought before the court. However, critical questions concerning the legality of the new mandate and the suitability of the court to exercise a human rights jurisdiction have lingered. Beginning with an inquiry into the foundation within ECOWAS for the exercise of a human rights jurisdiction, this article analyses the legitimacy of the human rights mandate of the ECOWAS court and interrogates crucial issues relevant to the effectiveness of the mandate. The article suggests ways to enhance execution of the mandate and concludes with a call for careful judicial navigation in the exercise of the court's expanded jurisdiction.

INTRODUCTION

Some 14 years after the Economic Community of West African States (ECOWAS) adopted the protocol establishing the ECOWAS Community Court of Justice (ECCJ),[1] the ECCJ's mandate was radically altered by the introduction of a human rights competence. Acting on an intention expressed in an earlier protocol,[2] the heads of state and government of ECOWAS member states adopted a supplementary protocol in 2005 (the Supplementary Court

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1 The ECCJ was established by Protocol A/P1/7/91 which was adopted and entered into force provisionally in 1991. The court was constituted in December 2000 and became functional in January 2001 with the appointment of judges.

2 See art 39 of Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

Protocol)[3] to amend the 1991 protocol that established the ECCJ. The Supplementary Court Protocol significantly amended the original conception of the ECCJ by expanding the court's jurisdiction and increasing access to it by granting access to actors who were not contemplated under the original protocol. However, what has turned out to be by far the most revolutionary aspect of the Supplementary Court Protocol is the grant of a mandate to determine cases of human rights violation that occur in ECOWAS member states.

The new and wider article 9 in the Supplementary Court Protocol conferred jurisdiction on the ECCJ to determine cases of human rights violation.[4] Concomitantly, a new article 10 created the legal possibility for individuals to access the ECCJ to seek relief for violations of their human rights.[5] The revolutionary effect of these new provisions is demonstrated by the fact that the ECCJ has become increasingly busier since the entry into force of the Supplementary Court Protocol.[6]

Although lawyers and citizens of ECOWAS states have taken advantage of the court's expanded jurisdiction and the ECCJ has warmed up to its new mandate, uncertainty still trails the functioning of the court in relation to its human rights mandate. To start with, the foundation for the exercise of human rights within the ECOWAS legal framework remains open for debate. On the basis of such an uncertain foundation, sceptics would challenge the legality and legitimacy of the transfer of a human rights mandate by ECOWAS to any of its organs. Beyond foundational issues, the court's law, rules, practice and procedure to date have raised critical issues that have the potential to determine the future direction of the court's new mandate. Taking a critical but optimistic approach, this article analyses the human rights mandate of the ECCJ by examining the instruments and case law of the court. Particular attention is paid to an analysis of the legitimacy of the ECCJ's human rights mandate, the consequences of the lack of a catalogue of human rights within ECOWAS and the indeterminate nature of the instrument conferring human rights competence on the ECCJ.

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3 Supplementary Protocol A/SP.1/01/05 Amending the Protocol (A/P1/7/91) Relating to the Community Court of Justice was signed and entered into force in January 2005. Further amendments to the structure of the ECCJ were introduced by Supplementary Protocol A/SP.2/06/06 of 14 June 2006 (2006 Supplementary Protocol) and Supplementary Regulation C/REG.2/06/06 of 13 June 2006.

4 See the new art 9(4) in art 3 of the Supplementary Court Protocol.

5 Art 10(d) in art 4 of the Supplementary Court Protocol.

6 From 2001 to 2004, only one case, *Olajide Afolabi v Nigeria* suit no ECW/CCJ/APP/01/03, came before the court. Since then and as at May 2008, the court had delivered about 15 judgments, three cases were awaiting judgment while another 13 cases were pending. see T Anene-Maidoh "Remarkable progress in the judicial activity of the ECOWAS court" (2008) 1 *Court Bulletin* (Quarterly publication of the ECCJ) 15.

HUMAN RIGHTS IN THE COMMUNITY: IN SEARCH OF A FOUNDATION

Unlike some human rights supervisory bodies, the ECCJ does not have an independent existence as it is established as ECOWAS's principal legal organ. Thus, the competence of ECOWAS in the field of human rights represents the foundation upon which the exercise of jurisdiction by the ECCJ in the area of human rights is built. Accordingly, in analysing the human rights mandate of a body such as the ECCJ, the question of organizational 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"[7] in this area of activity. Unlike the states that create international organizations, the organizations themselves do not have the freedom to engage in just any field of activity they desire. In the same vein, international organizations can neither endow their organs with powers the organizations themselves do not have, nor can they empower such organs to exercise powers the parent organizations do not have.[8]

Against this position, some argue that, where an international organization or any of its institutions acts beyond its specific powers, member states should "possess the right" to argue that the organization has exceeded its purposes and functions. In this regard, an aggrieved member state should be able to "refuse to collaborate finally or otherwise in its carrying out decisions". 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 to which they have subscribed in signing the organization's constitutional document.[9] An aggrieved state should be able to avail itself of this right, it is argued further, without the need for the state to withdraw from the organization.[10] It is against this background that the foundation ECOWAS offers for the exercise of human rights jurisdiction by the ECCJ will be assessed.

A feature of the 1975 ECOWAS Treaty (1975 Treaty) is that it does not mention human rights and completely avoids any use of human rights language. Even economic freedoms usually seen as vehicles for economic integration were carefully couched to avoid any link with rights. For example, while article 2(1)(d) of the 1975 Treaty recognized the abolition of obstacles to the free movement of persons, services and capital between member states as a means to achieve the aims of ECOWAS, it was not drafted in terms of the rights of citizens. However, protocols adopted on the platform of the 1975 Treaty

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7 P Alston and JH Weiler "An 'ever closer union' in need of human rights policy" (1998) 9 *European Journal of International Law* 658 at 660.

8 See generally *Reparation for Injuries Suffered in the Service of the United Nations* (advisory opinion of 11 April 1949) (*Reparation Case*) (1949) *ICJ Reports* 174.

9 M Rama-Montaldo "International legal personality and implied powers of international organisations" (1970) 44 *British Yearbook of International Law* 111 at 123.

10 Id at 143.

contain some rights language and limited reference to specific human right instruments. For instance, the 1979 protocol relating to free movement, residence and establishment provides for "rights to enter, reside and establish".[11] From 1985, more frequent use of rights language and reference to human rights instruments became evident within ECOWAS.[12] By 1991, while still under the 1975 Treaty, ECOWAS adopted the declaration on political principles in which it 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.[13] These represent the place of human rights in ECOWAS under the founding 1975 Treaty.

In contrast, the 1993 revised ECOWAS Treaty (Revised Treaty) could be said to have revolutionalized the perception and reception of human rights in the ECOWAS constitutional framework. The Revised Treaty makes specific reference to human rights right in its preamble,[14] and recognizes the "promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights" (African Charter) as one of the fundamental principles to which ECOWAS members states will adhere in the pursuit of ECOWAS objectives.[15] The Revised Treaty also contains a commitment that ECOWAS member states which are also "signatory states … to the African Charter" agree to "cooperate for the purpose of realising the objects" of that instrument.[16] The Revised Treaty further provides citizens with "the right of entry, residence and establishment" and records an undertaking by member states "to recognize these rights of Community citizens".[17] Consistent with the new approach, protocols adopted by ECOWAS in the post-1993 era make clear references to human rights instruments and use relatively unambiguous rights language.[18]

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11 Art 2 of ECOWAS Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment.

12 See 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, which defines fundamental human rights in terms of the Universal Declaration on Human Rights. Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of the Persons, the Right of Residence and Establishment defines human rights in terms of migrant workers and the Conventions of the International Labour Organization (ILO).

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

14 Para 4 of the preamble to the Revised Treaty.

15 See id, art 4(g).

16 Id, art 56(2). It is significant to note that all ECOWAS member states have signed and ratified the African Charter.

17 Id, art 59. See also id, art 66(2)(c) on the right of journalists.

18 Art 2 of the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security is instructive in this regard. Also see paras 7, 8 and 11, as well as arts 4(h), 22 and 35 of Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for

Considering the differences in expression of human rights in the constitutional epochs of ECOWAS (the 1975 and the 1993 constitutional epochs), it has to be questioned whether ECOWAS has transformed from an economic integration initiative into a political integration scheme. The question also arises whether the objectives of integration have changed or expanded to embrace community competence in human rights. These questions are valid in view of the prevailing principle of limited powers in the law and practice of international institutions. In answering these questions, it has to be noted that both the constitutional document of the given organization and general international law may operate to confer competence on an international organization.[19] However, the focus will be on the internal documents that confer competence.

Generally, the treaty of an international organization is its constitutional document so that, by the operation of the doctrine of delegated powers, only powers "expressly enumerated" in the treaty of an organization can be exercised. The exception is the theory of "implied powers", which could intervene to permit the exercise of powers and functions that can be deemed to be conferred by reason of being essential for the performance of enumerated powers and functions.[20] Practical expression of the theory of implied powers comes in the form of an omnibus provision that allows international organizations to undertake "any other activity" necessary for achieving set objectives.[21]

Notwithstanding the theory of implied powers, Rama-Montaldo advises that caution is required to avoid the enlargement of competence "by considering as a means for the fulfilment of [the organization's] 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".[22] Rama-Montaldo further makes the point that there may be just a thin line between assuming a new competence and performing a task not authorized by a treaty but termed a "means" to fulfil an enumerated competence.[23] From this perspective, neither ECOWAS treaty enumerates the promotion and protection of human rights as a purpose or function of the organization. Both treaties aim at promoting action to "raise the living standards" of ECOWAS citizens. However, neither treaty lists the promotion and protection of human rights as means to achieve that aim. Nevertheless, the Revised Treaty and several other ECOWAS instruments frequently allude to human rights protection,

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Conflict Prevention, Management, Resolution, Peacekeeping and Security. Ample references to human rights instruments appear in these provisions.

19 T Ahmed and I de Jesus Butler "The European Union and human rights: An international perspective" (2006) 4 *European Journal of International Law* 771 at 776.

20 Rama-Montaldo "International legal personality", above at note 9 at 114.

21 See art 3(2)(o) of the Revised Treaty and art 308 of the Treaty of the European Union.

22 Rama-Montaldo "International legal personality", above at note 9 at 115.

23 Id at 117.

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 a claim to human rights competence, one has to delineate what should be included in a definition of constitutional authorization, since treaties need to be interpreted in context, which includes their preamble and annexes.[24]

Beyond enumerated aims, it is obvious that, in its preamble and in the statement of fundamental principles, the Revised Treaty gives status to human rights promotion and protection. This does not make human rights realisation one of the goals of ECOWAS but it throws open the question whether human rights realisation is relevant for the pursuit of organizational objectives. Can the economic goals of ECOWAS 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, ECOWAS's record under the 1975 Treaty demonstrates the difficulties that arise in implementing economic goals without attending to the political issues linked to domestic human rights situations. 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 ECOWAS community as a condition for achieving set goals was recognized within the era of the 1975 Treaty. In this context, despite the argument that principles do not impose positive obligations for the organization since they are not ends in themselves,[25] the principles expressed in the Revised Treaty could assume special significance as reinforced by other commitments to human rights realisation in ECOWAS's legal framework.[26]

Notwithstanding this line of argument, the position that principles in themselves do not impose obligations on member states cannot be taken lightly. For, as Seyersted observed, the exercise of authority by an organization 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 on a "special legal basis".[27] 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 recognized by the member states of the given organization.[28] This position has to be even stronger where the lawmaking power

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24 Art 31(2) of the Vienna Convention on the Law of Treaties (1969) 8 *International Legal Materials* 679 at 692.

25 Rama-Montaldo "International legal personality", above at note 9 at 154.

26 Examples of such subsequent commitments can be in the form of other ECOWAS legislating acts or implementing action by community organs and institutions.

27 F Seyersted "Objective personality of intergovernmental organisations" (1964) 34 *Nordisk Tidsskrift for International Ret* 3 at 29.

28 Id at 29–30.

resides in the usual representatives of the member states, acting in an 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 are not expressly illegal in international law. From this perspective, the search for the human rights competence of ECOWAS cannot be restricted to aims enumerated in the treaty, but extends to all other validly adopted law-making instruments of the organization. To that extent, there is evidence of some human rights competence in ECOWAS under the 1993 constitutional epoch. It is therefore submitted that ECOWAS can validly confer competence on any of its organs or institutions in the field of human rights, especially in the exercise of the sovereign will of the member states. Considering that the introduction of human rights in the European Union (EU) can be traced to judicial activism, deliberate legislative action to clothe the ECCJ with competence in human rights should withstand theoretical attacks on its legitimacy.[29]

THE EXPANDED MANDATE OF THE ECOWAS COURT: NEW WINE IN OLD SKIN

At inception, in relation to its contentious jurisdiction,[30] the ECCJ was empowered to "ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty".[31] The ECCJ could only exercise competence in cases between ECOWAS member states or between member states and ECOWAS institutions. Where the interests of nationals of member states were involved, a member state was authorized to bring an action on behalf of its national, after failing to reach an amicable settlement.[32] The ECCJ was designed for resolving disputes between subjects of international law relating to regional economic integration. This was the old wine which the wineskin was made to accommodate.

The relevance of the ECCJ was challenged by its very first case, which involved an individual complaint not contemplated by the court's protocol. Interestingly, this first case, *Afolabi Olajide v Federal Republic of Nigeria* (*Olajide*),[33] raised issues around the question of individual access to the court. The question of individual access related to human rights and fundamental freedoms partly founded on the recognition accorded to the African Charter in the Revised Treaty.[34] While the ECCJ declined jurisdiction in

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29 See generally G Quinn "The European Union and the Council of Europe on the issue of human rights: Twins separated at birth?" (2001) 46 *McGill Law Journal* 849 at 858. Also see Alston and Weiler "An 'ever closer union'", above note 7 at 660.

30 The ECCJ is clothed with an advisory jurisdiction by art 10 (now art 11) of the 1991 Protocol on the Court of Justice.

31 Art 9(1) of the 1991 Protocol on the Court of Justice.

32 Id, art 9(2)(3).

33 Above at note 6.

34 In *Olajide*, violations were alleged of the right to free movement in art 3(iii) of the Revised

Olajide, the fallout of the case, linked to the new visibility of human rights in the ECOWAS community agenda, prompted the amendment of the 1991 Protocol on the Community Court of Justice. At the time *Olajide* was heard, there was sufficient human rights content in the ECOWAS framework to sustain the exercise of human rights competence by ECOWAS institutions. The case might have been an opportunity for the ECCJ to take a more dynamic role in providing judicial protection of human rights under the ECOWAS community framework similar to the approach of the European Court of Justice (ECJ).[35] However, the ECCJ shied away from such judicial activism and gave room for legislative endowment of competence in the field of human rights. The ECCJ's restraint resulted in the clear empowerment of the court by the community's lawmaking organ. Thus, the human rights mandate of the ECCJ is "a legislature-driven" mandate.

The jurisdictional change introduced by the Supplementary Court Protocol is expansive in the sense that it affects the material, personal, temporal and territorial aspects of the court's jurisdiction with respect to human rights.[36] As noted above, in addition to conferring human rights jurisdiction on the ECCJ, the Supplementary Court Protocol grants access to the court to individuals and corporations with respect to different cases of human rights violation.[37] This new jurisdiction is additional to the ECCJ's original jurisdiction. Consequently, the "new wine" is an increased jurisdiction that comprises competence in disputes involving member states and community institutions, to interpret and apply the ECOWAS treaties from a regional integration perspective, and competence in complaints of human rights violation involving member states, community institutions, corporations and nationals of member states. With respect to the credibility of the ECCJ, the critical question then is whether the court's original design is able to sustain this additional mandate without amendment to the court's structure, composition and procedures.

Structure

The ECCJ remains largely fit for the original concept of a judicial forum for settling disputes arising from economic integration rather than human rights. The ECCJ is the single court in the ECOWAS legal system and its

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Treaty and the right to freedom of movement under the African Charter based on the provisions of art 4(g) of the Revised Treaty. Reliance was placed on the Nigerian domesticated statute of the African Charter.

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

36 S Ebobrah "A rights-protection goldmine or a waiting volcanic eruption: Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice" (2007) 2 *African Human Rights Law Journal* 307 at 312–21.

37 Art 10(d) in art 4 of the Supplementary Court Protocol.

decision on a matter is final and immediately enforceable.[38] The ECCJ has no direct relationship with the courts of member states and does not consider itself a court of appeal or a court of cassation over decisions of national courts.[39] This is notwithstanding the fact that provisions in the Supplementary Court Protocol allow national courts to refer domestic cases involving issues of the interpretation of the ECOWAS treaties, protocols and regulations to the ECCJ.[40] This court structure, when combined with the interpretation that the ECCJ cannot sit in appeal over decisions of national courts, has a negative impact on the court's human rights jurisdiction.

The position taken by the ECCJ in at least two cases gives the impression that, where a case had previously been heard and decided by a national court, the court would hesitate to hear the case or, if it did hear it, hesitate to make a finding, as it does not wish to overrule decisions of national courts.[41] If this is indeed the intention of the court, then the first effect is that a right of appeal is extinguished in cases heard by the court, as such a case would not have previously been heard by a national court from which there would be a right of appeal. In other words, once a litigant decides to bring his case before the ECCJ, the litigant abandons his right of appeal as no other court would have previously heard the case and there is no appeal from the decision of the ECCJ. Secondly, the operation of the principle of subsidiarity, in the form of requirements to exhaust local remedies before bringing a human rights complaint before international courts, does not apply in the ECCJ.[42] This has a double barrel effect. One effect is that the ECCJ is forced to become a court of first instance. The court thereby opens the gate for every single case of injustice from the 15 member states. The other related effect is that the majority of cases alleging a human rights violation first go to national courts, thereby barring those cases from reaching the ECCJ. Thus, by

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38 Art 19(2) of the 1991 Protocol of the Court. In the case of *Ugokwe v Nigeria*, suit no ECW/CCJ/APP/02/05 (unreported) (*Ugokwe*), the ECCJ proclaimed (at para 32 of the judgment) that it is the first and last court in community law.

39 *Ugokwe*, ibid.

40 New art 10(f) in art 4 of the 2005 Supplementary Protocol.

41 See *Ugokwe*, above at note 38, and the case of *Kéïta v Mali*, suit no ECW/CCJ/APP/05/06 (unreported) (*Kéïta*), at para 31. In *Ugokwe*, the ECCJ stressed that hearing appeals against decisions of national courts does not form part of its powers and it cannot overturn the decision of a national court. This position was emphasized in *Kéïta*. On the other hand, the court does not seem to have had difficulty hearing cases not previously heard by national courts or, at least, in which the issue in contention had not been addressed by a national court. This latter caveat is necessitated by the fact that, in the recent case of *Koraou v Niger*, suit no ECW/CCJ/APP/08/08 (unreported) (*Koraou*), the court entertained the case even though aspects of the fact had previously been tried in a national court.

42 See Ebobrah "A rights-protection goldmine", above at note 36, on the inapplicability of the exhaustion of local remedies. Interviews with ECCJ judges and officials indicate that the court sees the non-inclusion of that requirement as a renunciation of the rule by ECOWAS. See "Absence of exhaustion of local remedies before an international court: Omission or renunciation?" (2008) 1/1 *ECOWAS Court Bulletin* 22 for one such interview.

emphasizing that it is not an appellate court, the ECCJ, for example, potentially avoids all cases alleging a violation of the right to fair trial. Either way, the ECCJ's credibility as an international court is thrown open to challenge as a result of the adaptation of the original structure to cover the new jurisdiction.

Composition

By article 3 of the 1991 Protocol on the Community Court of Justice, the qualification for appointment as a judge of the ECCJ is "high moral character and … the qualification required in their respective countries for appointment to the highest judicial offices" or by being a "jurisconsult of recognised competence in international law". This provision was amended by the 2006 Supplementary Protocol, but the only addition in terms of qualification for the office of a judge of the ECCJ is that "jurisconsults of recognised competence in international law" should be versed "particularly in areas of Community law or Regional Integration".[43] Experience or qualification in human rights is not a consideration for appointment as a judge of the ECCJ. It can be argued that judges in national courts do not need any special human rights qualification to be appointed, yet are expected to provide the first layer of protection in the event of an alleged human rights violation.

However, as Besson notes, an entity claiming the status of a post-national human rights institution needs some "global know-how" in the field of human rights.[44] The practicality of this requirement lies in the need for international courts to provide leadership and guidance for national courts in the application of human rights instruments. Such leadership becomes even more relevant for the legitimacy of the system, considering the gap between international judges and direct domestic mandates. It is the "global know-how" that would prompt the sort of in-depth analysis of human rights issues that international courts need if their decisions are to be taken seriously. In this respect, the original composition of the ECCJ poses challenges for the credible exercise of its human rights mandate in terms of not requiring any specific human rights qualification for appointment.

Procedure

The ECCJ adopted its rules of procedure in 2003 on the basis of the authority granted in article 32 of the 1991 Protocol of the Community Court of Justice. In 2003 the ECCJ did not have jurisdiction over human rights and was not competent to receive cases from individuals. However, the rules of procedure are generally adequate even for the purpose of a human rights competence.

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43 New art 3 in art 2 of Supplementary Protocol A/PS.2/06/06 amending art 3 paras 1,2 and 4, art 4 paras 1,2 and 7, and art 7 para 3 of the Protocol of the Community Court of Justice.

44 S Besson "The European Union and human rights: Towards a post-national human rights institution?" (2006) 6 *Human Rights Law Review* 328 at 341.

The only apparent concern is in the fact that there is no provision for legal assistance to indigent litigants. Considering that some of the people most commonly at the receiving end of human rights violations are those at the lower end of the economic spectrum, omitting to create room for legal assistance may easily result in disempowering people with genuine cases.[45]

The current structure, composition and procedure of the ECCJ represent the old wineskin. Putting new wine in old wineskin does not always result in the disaster of a burst skin, but disaster looms until the old wineskin shows its durability and value by stretching to accommodate the new wine. To date, the ECCJ has done fairly well in adapting to its growing role as an economic integration/human rights court. But the quality of protection it offers could improve significantly if the concerns which have been identified are addressed. This article offers some advice below. Having demonstrated that the ECCJ has a clear human rights mandate, the next section examines the nature of that mandate.

UNRESOLVED ISSUES IN THE EVOLVING MANDATE

An intriguing aspect of the evolving human rights jurisdiction of the ECCJ is the fluidity that surrounds the mandate and its exercise. The complexities that result from the vagueness and consequent fluidity of the jurisdiction can be both constructive and destructive. There are at least five such issues that can be identified. In considering these issues, it has to be borne in mind that the credibility of the system depends, to a large extent, on the ECCJ's ability to act within the bounds of the powers conferred on it. This requires a balance between meeting the expectations of the citizenry, touching on the effectiveness of the court, and respecting the legal and legitimate bounds set by member states.

Unlimited scope of the power of judicial review

The exercise of supranational legislative powers by international organizations is confined to pre-determined issue areas, voluntarily ceded by the states that converge in such international organizations.[46] Consequently, the powers of judicial review by the relevant organs of such organizations are also usually restricted to the areas over which the organization has been granted legislative competence. This rule may not apply with exactly the same level of rigidity in organizations which are essentially inter-governmental, as the legislating powers in such inter-governmental arrangements effectively remain with the heads of state and government of the converging states. The level of resistance to the ceding of sovereign powers is even higher among African states, for reasons beyond the scope of this article. However, under the platform of ECOWAS, West African heads of state and government have made moves to create a supranational organization with powers to exercise direct jurisdiction

45 Compare with art 31 of the Interim Rules of the African Court on Human and Peoples' Rights (on file with the author).

46 See the *Reparation Case*, above at note 8.

(legislative and judicial) over the territories, nationals and institutions of the integrating states.[47]

Notwithstanding the rhetoric on the transformation of ECOWAS into a supranational organization, the authority of heads of state and government remains the supreme organ of ECOWAS and, thus, control and the highest legislative competence reside in the heads of state and government. Another vital observation is that, even in the field of economic integration, ECOWAS does not seem to have clearly delineated the subjects that fall within the competence of its community and those that remain with the states. In this regard, it is easy to point out the clear distribution of competence within the EU. The relevance of this distinction to the present discourse is that, whereas the ECJ's exercise of human rights jurisdiction revolves around the areas of EU competence, it is not possible to identify clearly the boundaries of the ECCJ's human rights mandate.

It is evident from the literature on the ECJ's human rights practice that there are clear boundaries beyond which the ECJ will not seek to apply judicial competence. As the EU is "multi-layered", comprising community institutions and member state institutions, the ECJ's powers cover internal EU acts and legislation, as well as acts and legislation of member state institutions.[48] In terms of EU legislation and conduct, the ECJ's human rights enquiries do not seem to apply to primary EU legislation, although they would apply to secondary legislation.[49] However, the ECJ monitors compliance with human rights when the EU acts on its own competence through community institutions.[50] In terms of the legislation and actions of member states, there are layers of jurisdictional issues. As a general rule, the ECJ's human rights jurisdiction is "essentially limited to matters within the fields of EU law …"[51] so that "if member states were bound by EU fundamental rights, it was not in their own fields of competence and the EU had no business telling them how best to protect human rights in their national sphere of competence".[52]

Even within the competence of the EU, ECJ scrutiny of member states human rights compliance was initially restricted to situations where the member state in question acted in the execution of EU legislation, that is, in cases where the state acted as an agent of the EU.[53] Subsequently, ECJ scrutiny

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47 Under ECOWAS's new legal regime introduced in 2006–07, ECOWAS legislative instruments should apply directly in member states without the need for protocols and treaties.

48 Besson "The European Union and human rights", above at note 44 at 353.

49 T Stever "Protecting human rights in the European Union: An argument for treaty reform" (1996–97) 20 *Fordham International Law Journal* 919 at 941–42.

50 Ahmed and de Jesus Butler "The European Union and human rights", above at note 19 at 773.

51 C Lyons "Human rights case law of the European Court of Justice, January 2003 to October 2003" (2003) 3 *Human Rights Law Review* 323 at 344.

52 Besson "The European Union and human rights", above at note 44 at 344.

53 J Kingston "Human rights and the European Union - An evolving system" in MC Lucey and C Keville (eds) *Irish Perspectives on EC Law* (2003, Round Hall) 271 at 275.

extended to cases arising from situations where member states derogate from the application of community law.[54] Thus, insofar as member states are concerned, ECJ scrutiny of human rights compliance with legislation and action effectively arises where states act as agents of the EU in enacting implementing legislation in an area of EU competence, where state institutions execute EU legislation as agents of the EU, or where states legislate or act in derogation of EU law and in permissible exceptions from EU legislation.

On the part of the ECCJ, it is not possible to identify the boundaries of the court's human rights jurisdiction. There are no clear demarcations between community competence and state competence. The ECOWAS treaties basically refer to the co-operation of member states in specified fields. However, from a human rights perspective, it is possible to identify what can liberally be described as "community treaty rules" in the area of immigration, touching on the rights of free movement, residence and establishment.[55] It is around these economic freedoms that ECOWAS has made the most elaborate "collective legislation" having binding effect on member states. The treaty provisions in these areas have been strengthened by protocols drafted in similar rights language. A survey of the cases already decided by the ECCJ, however, demonstrates that the ECCJ does not restrict its scrutiny of human rights compliance to economic freedoms, whether from the perspective of community institutions or member state institutions.[56] Indeed, the provisions of new articles 9(4) and 10 of the 2005 Supplementary Protocol do not set any boundaries for the court in terms of competence partitioning. Thus, the ECCJ can and does exercise jurisdiction to scrutinize the human rights situation of member states insofar as there is an alleged violation.

From the view-point of a human rights lawyer, the human rights jurisdiction of the ECCJ should be cause for celebration, especially as most domestic courts have not lived up to the high expectations of human rights lawyers and activists alike. The supervisory institutions of the continent-wide African human rights system have themselves left so much to be desired. In fact, the ECCJ has in a way even begun to justify the confidence and hopes of its admirers, with recent decisions finding that the detention without trial of a Gambian journalist[57] and the failure of a state to prevent the practice of slavery[58] violated human rights. However, these positive aspects need not

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54 Ibid. See also J Holmes "Human rights protection in European Community law: The problem of standards" in J Ferrer Beltran and M Narvaez Mora (eds) *Law, Politics and Morality: European Perspectives II* (2006, Duncker & Humblot) 157 at 160.

55 Art 59 of the Revised Treaty. The article is drafted in rights language, as against most other provisions which comprise statements that states agree to co-operate for set purposes.

56 See for example *Ugokwe*, where the alleged violation concerned fair hearing relating to national elections. In *Kéïta*, the alleged violation was based on an alleged refusal by the state party to compensate for damage to art work.

57 *Manneh v The Gambia*, suit no ECW/CCJ/APP/04/07 (unreported).

58 *Koraou*, above at note 41.

cloud the constructive assessment of the possible consequences of the fluid jurisdiction of the ECCJ. First, there is the likelihood of conflict between the national courts of member states and the ECCJ on the one hand, and between the ECCJ and continent-wide supervisory institutions on the other. Considering that the ECCJ can exercise jurisdiction in the same areas of competence as national courts, forum shopping is a present danger. With respect to the continent-wide institutions, the ECCJ now shares jurisdiction with the African Commission and the African Court over the same instrument (the African Charter), territories, peoples and institutions, albeit in a given part of the African continent. With the potential of conflicting decisions, fragmentation of African international human rights is a risk that is unavoidable. Further, the realities of the manner in which African states jealously guard national sovereignty show the danger of future state resistance to the unrestricted jurisdiction of the ECCJ to scrutinize their human rights conducts on issues perceived as purely domestic concerns. These are some of the possible challenges that need to be addressed at some stage in the court's evolution.

Relationship between the ECCJ and national systems: The ostrich approach

There are two possible dimensions from which the relationship between the ECCJ and the domestic courts of ECOWAS member states can be examined. First, linked to the discourse on the demarcation of competence, is the question relating to which system should have the first opportunity to scrutinize alleged human rights violations that occur in member states. Secondly, there is the question of hierarchy and status of the one system in the "eyes" of the judges of the other system. These questions are essential against the background that ECCJ decisions (including in the field of human rights) have to be judicially enforced by the domestic courts in member states.[59]

Generally, international judicial practices that involve exercising jurisdiction directly over the territories, nationals and institutions of sovereign states require some form of coordinated relation between the international judicial system and the domestic legal system. Hence, it has been suggested that the European human rights convention system is "based upon a partnership between the national courts and the Strasbourg Court".[60] Similarly, the development of the human rights jurisdiction of the ECJ under the European Community/EU system has been attributed partly to the ECJ's reaction to national courts' challenge to the ECJ doctrine of supremacy of community

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

60 R White "The Strasbourg perspective and its effect on the Court of Justice: Is mutual respect enough?" in A Arnull, P Eeckhout and T Tridimas (eds) *Continuity and Change in EU Law* (2008, Oxford University Press) 139 at 155.

law.[61] In the case of the ECCJ, despite the provisions that require the involvement of national courts, there are no treaty or other ECOWAS legislative provisions that "speak to" the relations between the legal systems. In practice, the ECCJ seems to have adopted an ostrich approach of avoiding the question. At least two cases illustrate this point. In *Ugokwe*, the ECCJ stressed that the "relationship existing between the Community Court and these national courts of Member states are [sic] not of a vertical nature … but demands an integrated Community legal order".[62] This was subsequent to stating that the ECCJ could not receive appeals against decisions of national courts of member states.[63] If "integrated" is understood to mean "included" or "incorporated" or is understood to mean "parts that work together" or even "bringing dissimilar parts to work together", what rules would apply to determine where a prospective litigant should go first? Subsequently, in *Kéïta*, the ECCJ reaffirmed that it is not a court of appeal.[64] It stated, however, that within the context of article 10 of the court's protocol it "can only intervene when … courts or parties in litigation expressly so request it within the strict context of the interpretation of the positive law of the Community".[65]

This discussion shows that the ECCJ seems to be avoiding conflicts with national courts of member states. In doing so, the ECCJ evades authority, instead of trying to assert it, if only in the field of ECOWAS community law. The result is confusion regarding whether a matter should come before the ECCJ or national courts. In fact, it has to be stressed that the provision in article 10(f) of the Supplementary Court Protocol on requests by national courts to the ECCJ relates to references for interpretation which the national courts are at liberty to decide whether or not they want. Thus, the ECCJ shares jurisdiction with the national courts insofar as a litigant decides to submit a case to the ECCJ without any prior reference to a national court. The practice of the ECCJ in this regard, it is submitted, is not legally wrong, considering that there is no requirement for local remedies to be exhausted before a case alleging human rights violation is brought before the ECCJ. The danger in this regime is that national courts, which are closest to the scene, may not be given the first opportunity to remedy the alleged wrongs. Such an overreaching practice could even ignite resistance by national courts, at least in the form of refusal to give domestic judicial backing to the decisions of the ECCJ. However, in a positive sense, the practice allows for easy access to the ECCJ without the complications of spending time and resources in pursuing domestic remedies.

The other uncertain aspect of the relation between the ECOWAS legal system and the national system with respect to human rights relates to the status

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61 A Tizzano "The role of the ECJ in the protection of fundamental rights" in Arnull, Eeckhout and Tridimas (eds) *Continuity and Change*, id 125 at 126.

62 *Ugokwe*, above at note 38 at para 32.

63 Ibid.

64 *Kéïta*, above at note 41 at para 31.

65 Id at para 27.

that the ECCJ has before national courts. As already observed, article 10(f) of the ECOWAS court protocol allows national courts to refer issues relating to the interpretation of ECOWAS treaty and legislative provisions to the ECCJ, where such issues arise in cases before national courts. However, the provision makes use of the term "may" which would imply that it is a permissive rather than an obligatory requirement. The mischief inherent in such a situation is that, if the ECCJ sticks to the practice of refusing to rule on cases already decided by national courts, most matters would never come before the ECCJ for determination. The other angle to the quandary relates to the perception of the ECCJ by national courts. Considering that the ECCJ holds itself out as an equal partner in an integrated community legal order, in the common law jurisdictions especially, national courts would not be bound by ECCJ decisions. At best, national courts can ignore ECCJ decisions and proceedings. At worst, national courts could give judgments that are parallel and conflict with decisions of the ECCJ. At the very extreme, national courts could even hear cases challenging the legality or constitutionality of judgments of an international court not recognized under national law.[66] In any of these scenarios, human rights protection by the ECCJ would be threatened. Thus, an approach which avoids dealing with these issues (the ostrich approach) is a danger in itself to the existence and growth of the system.

Indeterminacy in the mandate

Indeterminacy in the ECCJ's human rights jurisdiction has two aspects, one of which is specific to the ECCJ and the other being the general character of human rights instruments. The usual effect of indeterminacy in legal discourse is that it raises questions of judicial discretion and, hence, the remote challenge of judicial preparedness to exercise conferred or implied discretion. In the first place, the Supplementary Court Protocol does not specify what instruments are applicable in the determination of human rights cases by the ECCJ. This leaves open the question whether it is exclusively ECOWAS instruments that are applicable or whether the ECCJ may rely on any other human rights instrument. Fortunately, the increasing jurisprudence of the ECCJ provides some guidance in these areas, which will be referred to in the discourse.

By a combination of the vagueness of aspects of the Supplementary Court Protocol and the ECOWAS's economic origins, the provisions of article 9(4) of the Supplementary Court Protocol leave room for all kinds of interpretations.[67] It is possible to put forth the argument that, against the background of its original mandate, article 9(4) should be interpreted to mean that the ECCJ can only hear cases of violations of human rights provisions contained in the Revised

66 A 2009 decision of the High Court of Zimbabwe in *Etheredge v The Minister of State for National Security and Another* HC 3295/08 with respect to the Southern African Development Community (SADC) Tribunal illustrates this danger.

67 Art 9(4) provides that "the Court has jurisdiction to determine cases of violation of human rights that occur in any member state".

Treaty and in the conventions and protocols that form part of the treaty. If this were the case, the provisions in question would be the rights of free movement, residence and establishment contained in article 59 of the Revised Treaty. Should a more liberal interpretation be adopted, human rights provisions in the treaty would include the undertaking to respect the right of access to information and to respect the rights of journalists.[68] These enumerated rights, it can be argued further, have direct links to the realisation of ECOWAS's economic objectives and therefore can be loosely classified as economic freedoms. However, such an approach would spark some of the controversies that surrounded the ECJ's human rights practice when the ECJ was seen as protecting economic freedoms to the detriment of wider human rights concerns.[69] Such a situation would invariably restrict the enjoyment of rights protection under the regime to economic matters. However, a teleological approach would lead to an interpretation that statements in the treaty, regarding co-operation for the purpose of realising the objectives of the African Charter, imply that human rights in that instrument form part of the human rights provisions of the treaty.[70]

As certain ECOWAS conventions, protocols and supplementary protocols are deemed to form part of the treaty, it is also possible to interpret the new article 9(4) of the 2005 ECOWAS Court Protocol to include rights contained in those instruments. In this context, certain International Labour Organization conventions dealing with migrant workers (incorporated by definition in some ECOWAS protocols) could found actions before the ECCJ.[71] In fact, the ECCJ seems to have taken this sweeping understanding of treaty, conventions and protocols in its interpretation of the mandate granted by the Supplementary Court Protocol. Hence, in *Kéïta*, the ECCJ took the view that:

> "… as regards material competence, the applicable texts are those produced by the Community for the needs of its functioning towards economic integration: the Revised Treaty, the Protocols, Conventions and subsidiary legal instruments adopted by the highest authorities of ECOWAS. It is therefore the non-observance of these texts which justifies the legal proceedings before the Court."[72]

The dicta of the ECCJ in *Kéïta* can be read in several ways. It can be read to mean that only those rights relevant for the movement towards economic

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68 Art 66 of the Revised Treaty.

69 See generally M Poiares Maduro "Striking the elusive balance between economic freedom and social rights in the EU" in P Alston (ed) *The EU and Human Rights* (1999, Oxford University Press) 449.

70 Art 56 of the Revised Treaty.

71 The challenge here would be that not all ECOWAS member states have ratified all the relevant ILO conventions.

72 *Kéïta*, above at note 41 at para 27.

integration can base complaints of human rights violation. The dicta can also be read to mean that, insofar as a right or group of rights are present in any of these instruments adopted for functioning towards economic integration, they form part of ECOWAS legislation and can be applied. The latter understanding is better, as the former would be unduly restrictive.

It is also possible to interpret article 9(4) of the 2005 Court Protocol to mean that all human rights contained in any human rights instrument directly or indirectly referred to in ECOWAS legislative instruments can found an action for human rights before the ECCJ. From this perspective, references to human rights instruments in preambles and statements of fundamental principles of ECOWAS instruments would be sufficient to entrench such instruments as sources of human rights law in the ECOWAS context. Thus, in *Ugokwe*, the ECCJ interpreted article 4(g) of the Revised Treaty as requiring the application of the African Charter in the context of articles 9 and 10 of the 2006 Supplementary Protocol. The ECCJ stated:

> "In articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloguing of various human rights but by the provisions of article 4 paragraph (g) of the Treaty of the Community, the Member States of the Economic Community of West African States (ECOWAS) are enjoined to adhere to the principles including 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.
>
> Even though there is no cataloguing of the rights that the individuals or citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the Community behoves on the Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter."[73]

While it provides reasoning for its use of the African Charter, the court has not been so expressive of the reasons for its use of the Universal Declaration of Human Rights (UDHR). Yet, the UDHR has appeared frequently in proceedings before the ECCJ and the court has relied on the UDHR in at least three of its decisions.[74] What is clear is that both the African Charter and the UDHR appear in varying frequency in parts of ECOWAS legislative instruments; this strengthens the argument that article 9(4) of the Supplementary Court Protocol can be read to accommodate actions based on all such enumerated human rights instruments. This attitude to interpretation benefits litigants before the ECCJ.

Other human rights instruments upon which actions before the ECCJ have been founded, and which the court has referred to in judgments, include the

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73 *Ugokwe*, above at note 38 at para 29.

74 *Kéïta*, above at note 41; *Essien v The Gambia*, suit no ECW/CCJ/APP/05/05 (unreported) (*Essien*); and *Karaou*, above at note 41.

International Covenant on Economic, Social and Cultural Rights,[75] the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)[76] and the Slavery Conventions.[77] While CEDAW is mentioned in at least one ECOWAS legislative document,[78] the other two instruments are yet to be specifically mentioned or enumerated in ECOWAS documents. To a lesser extent, provisions of national constitutions of member states have also been relied on in actions before the ECCJ, although it is not clear whether the court sees national constitutions as part of its sources of law. The fact cannot be denied that the liberal interpretation that the ECCJ has given to articles 9 and 10 of the Supplementary Court Protocol encourages robust human rights litigation. However, as argued above, the ECCJ's credibility depends on the court's ability to achieve results while acting within the legal boundaries of its competence. This much is required by article 6(2) of the Revised Treaty that limits the functioning of ECOWAS institutions to the powers expressly conferred by the community's treaty and protocols. It will therefore be useful to assess whether the ECCJ has acted credibly in the exercise of the apparent discretion resulting from the indeterminacy of the provisions of the Supplementary Court Protocol.

It may appear contradictory to assert that indeterminacy grants a right to exercise judicial discretion, while trying to assess the legality and legitimacy of this discretion. However, it has to be borne in mind that judicial decisions do not exist in a vacuum since they have to relate as much as possible to existing positive law. As some would like to argue, the main duty of the judge is not to make law but to interpret law that has been made. Clearly, the Supplementary Court Protocol does not expressly confer power on the ECCJ to "determine" the human rights instruments that should be applicable in cases brought before the court. It is rather the indeterminacy of the protocol that has created room for the exercise of discretion by the ECCJ. Hence, it can be argued that the ECCJ does not have absolute discretion in the sense of giving itself a right to hear cases based on every single human rights instrument that exists. The legitimacy of the discretion would require that the human rights instruments applied should be those acknowledged by ECOWAS by way of reference in other community documents. In the eyes of the human rights practitioner, the ECCJ's liberal approach is more convenient but it runs the risk of undermining the legitimacy of the system. It also poses a risk of conflict with the supervisory organs established in some human rights instruments, should the ECCJ decide not to defer to the jurisprudence of such organs.

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75 *Essien*, ibid.

76 *Karaou*, above at note 41.

77 Ibid.

78 See the Supplementary Protocol on Democracy and Good Governance (Protocol A/SP12/01 of 2001).

Interpretation of state responsibility

It is now commonly accepted in international human rights circles that human rights instruments give rise to duties of respect, protection and fulfilment. They can also be classified as negative duties and positive duties. Generally, the duty to respect is a negative duty while the duties to protect and fulfil are positive duties. Both sets of duties can be found in all human rights in spite of the previous classification of rights in terms of generations of rights. With respect to the human rights mandate of the ECCJ, the question is whether the term "violation" (as used in the empowering provision) relates to both positive and negative duties of member states. Put differently, what is the nature of the failure of state obligation that can activate the ECCJ's human rights jurisdiction? This is a particularly interesting inquiry when it is considered that resistance to judicial enforcement of social, economic and cultural rights in national systems is a reflection of feelings that courts ought not to interfere in the allocation of resources by finding a violation of positive duties.

Clearly violations of negative duties fall within the ambit of the ECCJ's human rights mandate. The court itself seems to look out for such violations in the inquiries it makes in cases already decided.[79] The scrutiny of the violation of positive duties is however not so easy to justify. The difficulty would be linked to the possibility of arguing that the ECCJ lacks political legitimacy and technical competence to determine how member states apply scarce national resources. This difficulty is apparent in the depth of the position taken by the African Commission in seeking to identify the nature of the positive duty imposed on Nigeria by social and economic rights provisions in the African Charter.[80] The relative ease that national courts would have in this area is evident in the robust decisions of the South African Constitutional Court in actions imposing positive duties on government.[81] To the extent that it has found state violation for failure to protect rights from being violated by third parties, the ECCJ has effectively moved into the sphere of positive duties of member states.[82]

In the context of the ECJ it is argued that, if the EU perceived itself to be bound by international human rights obligations, it would conceive its human rights duties in the tripartite classification to respect, protect and fulfil.[83] The attraction of the tripartite conception is that it gives room for the ECCJ to ensure that ECOWAS member states protect rights from third party violation. Constant reference to international human rights instruments in

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79 See for example *Essien*, above at note 74, where the court focused on whether the state had failed to respect the right to equal pay for equal work.

80 *SERAC and Another v Nigeria* (2001) African Human Rights Law Reports (AHRLR) 60.

81 The South African Constitutional Court is famous for its decisions in cases such as *Grootbroom v South Africa* (2000) 11 BCLR 1169 in which economic, social and cultural rights were litigated.

82 *Koraou*, above at note 41.

83 Ahmed and Butler "The European Union and human rights", above at note 19 at 796.

ECOWAS documents suggests that the ECOWAS community sees itself as bound by international standards. It can safely be concluded in this regard that the ECCJ is on its way towards a combined approach to state duties and responsibilities in human rights cases.

Standard setter or just another court?

Connected to the question of the relationship between the ECCJ and the national courts of member states is the question of the objective of the ECCJ's human rights mandate. As the mandate is still evolving, it is necessary to delineate whether the ECCJ should only take on cases that position the court as a standard setter or whether it should embrace all cases. As presently couched, there is nothing to indicate that the ECCJ has this discretion, but determining this is useful for a number of reasons. In the first place, the nature of cases taken on by the court and the resulting jurisprudence could determine whether national courts would perceive some sort of regional judicial hegemony in the ECCJ. It would also prevent the clash of jurisdiction and jurisprudence, as the ECCJ would be providing judicial leadership in relatively new areas of human rights. Considering that the ECCJ only has seven judges and the court has to serve the entire West African region, there is the potential for the caseload to become burdensome. Here also, a careful choice of cases would prevent the situation of the ECCJ becoming a victim of its own success. However, care needs to be taken not unduly to exclude deserving cases. Finally on this point, a careful choice of cases brought before the court would ensure that the goal of the mandate would not be to provide justice in every conceivable case, thereby moving further from its original mandate and antagonising member states, but would enable the court build a democratic environment in the region. It is in this context of building and preserving a democratic environment with respect for human rights that the link between human rights, conflict prevention and the objective of economic integration can be found.

As currently practised, there is no clear guidance on the kind of human rights cases that should be brought before the ECCJ, so a variety of matters have been brought before the court. The court has received cases based on non-performance of a commercial contract,[84] dissatisfaction with elections in a member state,[85] dissatisfaction with remuneration for work done on the basis of a contract of employment[86] and failure of a state to compensate a citizen for damage to artefacts.[87] The court has also received cases alleging violation based on the inheritance of the estate of a deceased[88] and on slavery.[89] While all these cases have been couched in terms of human rights

84 *Ukor v Laleye*, suit no ECW/CCJ/APP/01/04 (unreported).
85 *Ugokwe*, above at note 38.
86 *Essien*, above at note 74.
87 *Kéïta*, above at note 41.
88 *Chukwudolue and Seven Others v Senegal*, suit no ECW/CCJ/APP/07/07 (unreported).
89 *Karaou*, above at note 41.

complaints, some have little to do with human rights and are matters that can be resolved in national courts. The cases also aim mostly at providing immediate and personal benefit for individual litigants. Although judgments have no use if they cannot benefit any-one, it is submitted that the aim of an international court should be to hear cases which have wide consequences for the greatest number of people. For example, the case relating to slavery may have had an immediate benefit for the victim, but it is significant to the extent that it addresses a societal malaise with wide consequences. While the ECCJ cannot select the cases submitted to it, it can set guidelines in decisions that are made in the cases already before the court.

The experiences of the European human rights system and of the European courts are relevant to demonstrate the point being canvassed. Relating to the ECHR, it is reported that, while drafting the instrument, the drafters understood that the concern is not with "every case of injustice which happens in a particular country, but with the question whether a county is ceasing to be democratic; Have those freedoms, give effect to those freedoms and you will ensure that each state remains democratic".[90] This approach sits nicely with the role of the ECCJ as an international court within the framework of economic integration, regulating human rights for the purpose of creating an environment suitable for the community's economic goals. Focusing on the cases that maintain the level of democratic governance and respect for human rights without necessarily entering the "national playing field" is vital for maintaining the court's credibility. Making the right choices and using its case law to establish itself as a standard setter rather than just another court is most important for the ECCJ to maintain a position of judicial superiority in the absence of a hierarchical structure.

CONSOLIDATING FOR THE FUTURE

Hoisting a human rights mandate on the judicial institution of a sub-regional economic integration initiative would definitely have consequences for the credibility, efficiency and effectiveness of such an institution. The reaction of various actors to the consequences of such an adopted competence would arguably determine the future of such a judicial institution. It is, however, the reaction of the institution in question that is likely to have the most effect on its own future. A proactive approach by the ECCJ is therefore necessary to shape the future of human rights litigation and protection in the ECOWAS legal system. While this article does not pretend to have addressed all conceivable consequences of the human rights mandate of the ECCJ, it has considered salient issues. These include: the challenges posed by the current composition, structure and procedure of the ECCJ for the exercise of a human rights mandate; the looming potential for conflict with national courts of member states and supervisory institutions created under human rights instruments

90 Quinn "The European Union and the Council of Europe", above at note 29 at 857.

applied by the ECCJ in carrying out an expanded mandate; the risk of fragmentation of human rights law in Africa; and the dangers in the indeterminate nature of the ECCJ's human rights mandate. It is indisputable that the protection of human rights in the ECCJ is a positive development in a region infamous for conflicts ignited by the abuse of human rights. It is therefore essential that effort is made to consolidate the gains of the system and safeguard the future of the ECCJ as a major player in the field of human rights in West Africa.

Although the ECCJ is not a human rights court, it is now commonly accepted by all players that human rights protection forms a significant part of the court's mandate.[91] Yet, the original intention behind its creation cannot be ignored. Consequently, it would be unrealistic to advocate for substituting the competence criteria of international law tilting towards regional integration, with a competence in human rights, as the qualification necessary for the office of an ECCJ judge. However, if the ECCJ has to consolidate its role in the field of human rights, it may be necessary to appoint judges with some demonstrable knowledge in human rights.[92] The selection of research and other judicial staff of the ECCJ should also reflect the court's increasing human rights content. This can be strengthened with concerted capacity building for judges and staff of the court.[93] It would also be important for ECOWAS to fast-track the establishment of the proposed appellate division in the ECOWAS legal system to address concerns touching on the absence of a right of appeal.[94] Further, the ECCJ would do well to strengthen co-operation aimed at providing legal aid to indigent litigants.

With respect to the relationship with national and other international judicial and quasi-judicial institutions, there is no short cut towards avoiding potential conflict. Despite opinion to the contrary and the position of the ECCJ itself, it may be necessary to reconsider the question of the exhaustion of local remedies before human rights cases come before the ECCJ. This is not to argue that it is unlawful or illegal not to require the exhaustion of local remedies. It also does not seek to wish away the benefits of easy access to the court. However, it would be beneficial in the long run to defer to some extent to the principle of subsidiarity by giving national courts the first opportunity to remedy human rights violations, subject to the availability

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91 The ECCJ recognizes this, as indicated by the responses of the ECCJ bureau to questions posed by the author at a meeting facilitated by the Danish Institute for Human Rights in November 2008 at Abuja, Nigeria.

92 This position was also advocated by the vice president of the ECOWAS court during the November 2008 meeting. For him, the human rights competence of prospective appointees should be taken into consideration, but not be expressly stated as a criterion for appointment.

93 Judges and staff of sub-regional courts seem to agree on the need for capacity building programmes. This arose both in the meeting with the bureau and staff of the ECOWAS court and at a programme facilitated by Interights at Abuja in November 2008.

94 A proposed appellate division of the ECCJ is still awaited. An interview with the ECCJ in November 2008 indicated that a consultant was working on modalities for the appellate division.

and efficacy of local remedies.[95] One possible consequence of such reconsideration is that any appearance of a struggle for primary jurisdiction would be avoided. However, it would also allow the ECCJ to act as some form of "appellate jurisdiction" and thereby position itself as a judicial hegemony in the sub-region. Even though the ECCJ seems to want to avoid such a role, the reality of human rights litigation is that a court sitting in the international arena necessarily has to review national decisions from time to time. The only way this can be avoided is if the cases only come by way of reference from national courts for the opinion of the ECCJ. This, it must be submitted, would not be a desirable option considering the gains already made by the court. The ECCJ would in the future also need to select its cases in a manner that gives preference to cases with new issues or cross-cutting consequences. This would also mean that the ECCJ should build jurisprudence that has a binding (or, at least, very persuasive) effect in the region. If the court's jurisprudence acquires the expected level of superiority, national courts would refer to decisions of the court in situations of violations that have previously been addressed by the court.

With respect to potential conflict with other international bodies, the main approach would be to aim at developing co-operation agreements with other relevant institutions. This should be supported by other informal approaches, including the exchange of visits, joint participation in colloquia and other capacity building programmes, and the creation of mutual respect between judges of the various institutions. Further, in order to avoid fragmentation arising from conflicting decisions, the ECCJ needs to take previous decisions of the African Commission into consideration in its judgments. This is essential as the African Charter forms the major source of the human rights law applied by the ECCJ. An attractive option may be that ECOWAS adopts its own catalogue of human rights,[96] but the risk of fragmentation of African international human rights law would be greater if sub-regions were to adopt their own human rights instruments. It would thus be better to work towards enthroning the African Charter as the regional human rights standard.[97] Similarly, the ECCJ needs to consider the interpretation given by bodies created in other relevant instruments which the court applies.

So far as the indeterminacy of the ECCJ's human rights mandate is concerned, one cannot rule out the possibility of exhausting the goodwill of states and the emergence of resistance and compliance fatigue if states perceive the court to be too activist and to exceed appropriate legal boundaries. It would be necessary, therefore, for the court to stick to the application of instruments envisaged by the ECOWAS community, either by express or implied reference

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95 The jurisprudence of the African Commission is clear on this point. See for example *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 at para 50.

96 This could be similar to the European Charter of Fundamental Rights. There have been moves in East Africa to adopt a sub-regional human rights instrument while SADC already boasts a human rights instrument of sorts.

97 Viljoen *International Human Rights Law in Africa*, above at note 35 at 500.

in ECOWAS community law. It would also mean that only instruments universally ratified by ECOWAS member states should be applicable before the court as sources of law. This would, however, not exclude seeking inspiration from other relevant human rights instruments. Further, in order to maintain the confidence of litigants and sustain the proper environment for economic integration, the ECCJ needs to maintain its approach of recognizing the indivisibility and interrelatedness of human rights.

CONCLUDING REMARKS

The movement into the area of politics has brought ECOWAS into the realm of human rights with its attendant political volatility. It has positioned ECOWAS both as an actor and as an arena in the field of human rights. Increasingly, the ECCJ has also emerged as the arrow-head of the ECOWAS intervention in the arena of human rights. Not unexpectedly, the involvement of the ECCJ in human rights also raises questions and creates potential for resistance by ECOWAS member states, as well as potential for conflict with national and international institutions.

It appears that the more ECOWAS progresses towards acquiring the character of a human rights institution, the more it opens space for contradictions between its original goals and its emerging character. Thus, the ECCJ has to navigate its way delicately through the web of uncertainty and indeterminacy created by the system. The absence of clear areas or subjects of ECOWAS community competence further complicates the task of delineating the extent of the human rights mandate that the ECCJ should validly exercise. Yet, in this indeterminacy lies the temptation of pushing the ECCJ to transform itself completely into a human rights court. If it does so without regard to applicable principles of international law and the law of international institutions, it risks committing judicial suicide by exhausting the goodwill that it currently enjoys among ECOWAS member states. On the other hand, if the court defers too much to respect for the sovereignty of states, it will lose the confidence of ECOWAS citizens. The task faced by the court is by no means easy, but it is at this stage of infancy that the future of the court can be shaped. Proactively engaging challenges identified in its work is one certain way that the ECCJ can consolidate and strengthen itself as a sub-regional protector of rights and a guarantor of the environment necessary for the region's much desired economic integration.